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140	Dini v. Emperor	27 Cr. L. J. 572.
141	Gandoo v. Emperor	27 Cr. L. J. 573; A. I. R. 1926 Lah. 368
142	Ghasita v. Emperor	27 Cr. L. J. 574.
142	Saraj Din v. Khalil Shah	27 Cr. L. J. 674.
143	Daya Ram v. Emperor	27 Cr. L. J. 575; A. I. R. 1926 Lah. 366.
144	Emperor v. Mohna	27 Cr. L. J. 576; 7 L. 344.
145	Mubarak Ali Shah v. Secretary of State for India	6 L. 218; A. I. R. 1925 Lah 435.
146	B. N. Lang v. Jaswantlal Hathichand	28 Bom. L. R. 381; A. I. R. 1926 Bom. 271; 50 B. 439.
147	Barada Prosad Roy v. Tarak Nath Mandal	A. I. R. 1926 Cal. 844.
148	Shahab Din v. Umran	*Lahore High Court.
149	Nowroji Pudumji Sirdar v. Kanga & Sayani	28 Bom. L. R. 334; A. I. R. 1926 Bom. 272.
150	Indian Income Tax Act, *In the matter of*	A. I. R. 1926 Lah. 201; 7 L. 138.
151	Salar Bag Saheb v. Karumanchi Kottaya	23 L. W. 538; A. I. R. 1226 Mad. 654.
152	Mehl Singh v. Amar Nath	7 L. 212.
153	Anandrao Bhicaji Sabnis v. Napu Patramul	28 Bom. L. R. 386; A. I. R. 1926 Bom. 289.
156	Baij Nath v. Commissioner, Income Tax, Lahore	A. I. R 1926 Lah. 233.
156	Manicklal Dey Chaudhuri v. Kadambini Dassi	43 C. L. J. 272; A. I. R. 1926 Cal. 763.
157	Raj Bahadur v. Narayan Prasad	24 A. L. J. 546; A. I. R. 1926 All. 439.
158	Thakur Das v. Ghulam Mahommad	*Lahore High Court.
159	Registered, Jessore Loan Co., Ltd. v. Gopal Hari Ghose Choudhury	30 C. W. N. 366; A. I. R. 1926 Cal. 657.
162	Chandrika Datt Ram Pandey v. Shyam Lal	3 O. W. N. 397; A. I. R. 1926 Oudh 383.

163	Ram Gopal v. Firm Bhan Ram-Mangal Chand ...	*Lahore High Court.
164	Velluri Narasinha Rao v. Ryots of Pedamamidipalli	(1926) M. W. N. 131; 23 L. W. 320; A. I. R. 1926 Mad. 480; 49 M. 499.
168	Karim Bakhsh v. Mohamed Shafi ...	A. I. R. 1926 Lah. 354.
169	Jhabba Singh v. Chajjoo ...	24 A. L. J. 548; L. R. 7 A. 141 Rev.; A. I. R. 1926 All. 445.
170	Nandalal Ganguli v. Nrityakali Devi ...	A. I. R. 1926 Cal. 853.
171	Sohan Lal v. Makhan Lal ..	L. R. 7 A. 163 Rev.
172	Mul Raj v. Kishori Lal ...	*Lahore High Court.
172	Safitannessa Khatun v. Megh Lal Gope ...	43 C. L. J. 285; A. I. R. 1926 Cal. 735.
173	Jagan Nath-Baij Nath v. Secretary of State for India ...	*Lahore High Court.
175	Om Prakash v. Moti Ram ...	24 A. L. J. 417; A. I. R. 1926 All. 447.
177	Narendra Nath Das v. Haran Chandra Ghose ...	43 C. L. J. 292; A. I. R. 1926 Cal. 730.
179	Sarju v. Sheoraj ...	13 O. L. J. 124; A. I. R. 1926 Oudh 380.
180	Bohra Natha Mal v. Jhunai Lal ..	*Allahabad High Court.
181	Lakho v. Lachhman Das ...	A. I. R. 1926 Lah. 241.
182	Mitsui Bussan Kaisha, Ltd. v. Hogarth Shipping Co., Ltd. ...	43 C. L. J. 297; A. I. R. 1926 Cal. 722.
188	Pirtha Singh v. Raja Mohammad Ali Mohammad Khan	13 O. L. J. 126; A. I. R. 1926 Oudh 427.
190	Ramdeo v. Sheo Naik ..	L. R. 7 A. 214 Rev.
192	Nathu Ram v. Municipal Committee, Muktsar ...	8 L. L. J. 162
193	Mukta Prasad v. Emperor ..	13 O. L. J. 69; 27 Cr. L. J. 577.
204	Ram Chandra De v. Gajendra Nath Das ...	43 C. L. J. 287; 27 Cr. L. J. 588.
205	Emperor v. Daya Shankar ...	3 O. W. N. 382; 27 Cr. L. J. 589; A. I. R. 1926 Oudh 398.
209	Sadhu Saran Pandey v. Nand Kumar Singh ..	(1926) Pat. 97; A. I. R. 1926 Pat. 276.
210	Sital Prasad Singh v. Janki ...	*Allahabad High Court.
212	Hussain Bibi v. Nur Hussain Shah ...	*Lahore High Court.
212	Nagendra Nath Palit v. Robindra Narain Deb ..	30 C. W. N. 389; 53 C. 132; A. I. R. 1926 Cal. 490.
224	Khatun Bibi v. Rajjab ..	*Allahabad High Court.
226	Muchumarri Malliah v. Yerravulu Ganganna ...	*Madras High Court.
228	Khorshedennessa Khatoon v. Hakikannessa Banoo...	A. I. R. 1926 Cal. 845.
229	Fariduddin Ahmed v. Abdul Wahab ..	(1926) Pat. 103; A. I. R. 1926 Pat. 277.
231	Bhuban Mohan Basak v. Chairman, Municipal Commissioners, Dacca Municipality ..	30 C. W. N. 405; A. I. R. 1926 Cal. 607; 53 C. 453.
231	Roop Narain v. King King & Co. ..	A. I. R. 1926 Lah. 370
235	Ganga Prosad Chowdhury v. Kuladananda Roy ...	30 C. W. N. 415; A. I. R. 1926 Cal. 568.
243	Sham Sundar-Madan Gopal v. Fatteh Chand ...	*Lahore High Court.
244	Radhabinode Mandal v. Naba Kishore Mondal ...	30 C. W. N. 413; A. I. R. 1926 Cal. 578.
245	Orient Bank of India, Ltd. v. Secretary of State for India ...	*Lahore High Court.
246	Shiva Prasad v. Shambhu Prasad ...	24 A. L. J. 501; A. I. R. 1926 All. 450.
249	Deo Karan Das v. Secretary of State for India ..	7 L. 373.
250	Kedar Nath v. Shankar Dayal ...	*Oudh Chief Court.
251	Dulo v. Muhammad Nathu ...	*Lahore High Court.
253	Srikanta Mandal v. Jotirmoyi Devi ..	*Calcutta High Court.
253	Ragha Ram v. Dewa Singh ..	A. I. R. 1926 L. 300; 7 L. 306.
254	Secretary of State for India v. Sarvepalli Venkata Lakshmanayya	50 M. L. J. 279; 23 L. W. 602; (1926) M. W. N. 362; A. I. R. 1926 Mad. 565; 49 M. 567.
255	Majid Mia v. Munshi Mia ..	A. I. R. 1926 Cal. 860.
257	Emperor v. Sain Dass ...	8 L. L. J. 180; 27 Cr. L. J. 593; A.I.R. 1926 Lah. 375.
258	Bigna Kumhar v. Emperor ..	(1926) Pat. 167; 27 Cr. L. J. 594.
264	Munshi v. Emperor ...	27 Cr. L. J. 600.
266	Satya Charan Mitter v. Emperor ...	30 C. W. N. 427; A. I. R. 1926 Cal. 586; 27 Cr. L. J. 602.
269	Waryam Singh v. Emperor ...	27 Cr. L. J. 605.
270	Harun Rashid v. Emperor ...	30 C. W. N. 432; A. I. R. 1926 Cal. 581; 27 Cr. L. J. 606; 53 C. 466.
271	Municipal Committee, Simla v. Mukand Singh ..	27 Cr. L. J. 607; A. I. R. 1926 Lah. 365.
273	F. H. Manisty v. J. V. Jameson ..	5 Pat. 326; A. I. R. 1926 Pat. 330; 7 P. L. T. 557.
279	Dukh Bhanjan Ram v. Sarfraz Khan ...	*Lahore High Court.
279	Manmatha Nath Kar v. Probodh Chandra Ratari ...	43 C. L. J. 274.
282	Chhotelal v. Lakhmichand ...	*Nagpur Judicial Commissioner's Court.
284	Ramjhari Koer v. Kashi Nath Sahai ..	A. I. R. 1926 Pat. 337; 5 Pat. 513.

287	Gordhandas Kalidas v. Dowlatram Kanayalal	*Sind Judicial Commissioner's Court.
292	Sasadhar Choudhury v. Bishnu Narain Kunda	43 C. L. J. 279; A. I. R. 1926 Cal. 738.
294	Brij Raj Chandra v. Subhadra Kuar	3 O. W. N. 321; A. I. R. 1926 Oudh 324.
300	Ata-ur-Rahman v. Mashkur-un-nisa	*Lahore High Court.
302	Muthusami Iyer v. Dharma Raja	(1926) M. W. N. 209; A. I. R. 1926 Mad. 495.
304	Kanwar Bhan-Sukha Nand v. Ganpat Rai-Ram Jiwan	A. I. R. 1926 Lah. 318.
306	Umamkeshwara Mudaly v. Muniswami Mudaly	50 M. L. J. 428; A. I. R. 1926 Mad. 642 (1926) M. W. N. 465.
307	Dwarka v. Sankatha	*Oudh Chief Court.
308	Kuppuswami Pillai v. Muhammad Kasim	(1926) M. W. N. 236; A. I. R. 1926 Mad. 566.
310	Rajmohini Dasi v. Nagendra Kumar Talpatra	A. I. R. 1926 Cal. 887.
313	Hamid Husain v. Hadi Raza	A. I. R. 1926 Oudh 420.
315	Dharam Singh v. Bakshi	A. I. R. 1926 All. 429.
317	Ahmed Mirza Beg v. Allahabad Bank, Ltd., Lucknow	29 O. C. 26; A. I. R. 1926 Oudh 385.
320	Chunni Singh v. Lakshpat Singh	24 A. L. J. 534.
321	Rajendra Nath v. Peyari Mohan Das	A. I. R. 1926 Cal. 854.
322	Raja of Ramnad v. Kamid Rowthen	50 M. L. J. 503; A. I. R. 1926 P. C. 22; (1926) M. W. N. 376; 49 M. 335; 24 L. W. 1; 30 C. W. N. 844 **P. C.**
326	Ramu v. Puna	9 N. L. J. 45: A. I. R. 1926 Nag. 326.
329	Prem Sukh v. Parbati	7 L. 270; A. I. R. 1926 Lah. 352.
330	Roshan Bepari v. Collector of Dacca	A. I. R. 1926 Cal. 816.
331	Thomas Charles William Skipp v. Lilian Mildred Kelly	50 M. L. J. 498; A. I. R. 1926 P. C. 27; 3 O. W N. 453; 43 C. L. J 430; 28 Bom. L. R. 873; 24 L. W. 18; 30 C. W. N. 841 **P. C.**
332	Gobinda Chandra Majumdar v. Hari Charan Marwari	A. I. R. 1926 Cal. 826.
334	Muthuswami Iyer v. Ramalinga Mudaliar	23 L. W. 215; 50 M. L. J. 260; A. I R. 1926 Mad. 485.
336	Jagdish Prasad v. Raghubir	L. R. 7 A. 167 Rev.
337	Pokala Mahalakshmi Ammal, *In re*	50 M. L. J. 114; 23 L. W. 427; A. I. R. 1926 Mad. 567.
338	Bahadur Ahmed Moulvi v. Hemanta Kumar Roy	30 C. W. N. 613.
340	Narender Singh v. Bhora Chatrapal Singh	A. I. R. 1926 All. 437.
342	Keshab Lal Goswami v. Bholanath Gangopadhya	A I. R. 1926 Cal. 910.
343	Umanath Bakhshi Singh v. Ram Bakhsh Singh	13 O. L. J. 229; A. I. R. 1926 Oudh 428.
347	Mohsham Ali Khan v. Muloo	24 A. L. J. 586.
348	B. B. & C. I. Ry. v. Firm Mul Chand-Sanwal Das	*Lahore High Court.
349	Lal Jagdish Bahadur Singh v. Ragho Ram	3 O. W. N. 392; 13 O. L. J. 265; L. R. 7 A. (O.) 237; A. I. R. 1926 Oudh 458.
351	Challa Abbireddi v. Challa Venkatareddi	(1926) M. W. N. 256: 23 L. W. 644; 51 M. L. J. 60.
352	Khetra Mohan Saha v. Sarat Chandra Saha	A. I. R. 1926 Cal. 830.
353	Sheo Prasad v. Emperor	(1926) Pat. 110; A. I. R. 1926 Pat. 267; 27 Cr. L. J. 609.
354	Abdul Rahim v. Amir Begum	27 Cr L. J. 610; 7 L. 365.
355	Chandra Prasad v. Emperor	1926 Pat. 190; 27 Cr L. J. 611; A. I. R. 1926 Pat. 299.
358	Fazal v. Emperor	27 Cr. L. J. 614; A. I. R. 1926 Lah. 363.
359	Yad Ram v. Emperor	27 Cr. L. J. 615; L. R. 7 A. 115 Cr.
361	Bermu Chetty v. Emperor	(1926) M. W. N. 212; 27 Cr. L. J. 617.
361	Emperor v. Ekabbor	27 Cr. L. J. 617.
363	Chandan v. Emperor	27 Cr. L. J. 619; L. R. 7 A. 97 Cr.
365	Labh Singh v. Emperor	8 L. L. J. 146; 27 Cr. L. J. 621; A. I. R. 1926 Lah. 336.
365	Emperor v. Garib Hari	30 C. W. N. 454; 27 Cr. L. J. 621; A. I. R. 1926 Cal. 742.
368	Emperor v. Hoshiara	27 Cr. L. J. 624.
369	Badri Bishal Singh v. Ram Autar	3 O. W. N. 370; L. R. 7 A. (O.) 224; A. I. R. 1926 Oudh 417.
371	Rameshwardas Benarsidas v. New Jooria Bazar Sugar Co.	*Sind Judicial Commissioner's Court.
377	Jawahar Singh v. Sassoon & Co.	7 L. 61; A. I. R. 1926 Lah. 277.
378	Sheo Narain v. Khaderu	A. I. R. 1926 Oudh 475.
380	National Stores v. Ramsaran	9 N. L. J. 40; A. I. R. 1926 Nag. 303.
381	Gus Alexander Mackenzie v. Himalaya Assurance Co., Ltd.	30 C. W. N. 440; A. I. R. 1926 Cal. 745.

384	Chegganmull v. Desur Manicka Mudaliar	50 M. L. J. 242; A. I. R. 1926 Mad. 792.
389	Chaturi Lal v. Lakhmi Chand	L. R. 7 A. 176 Rev; A. I. R. 1926 All. 436.
390	Ram Chandra Naick v. Nazar Ali	24 A. L. J. 541.
391	Gadadhar Mandal v. Manaka Dassi	A. I. R. 1926 Cal. 859.
392	Amir Khan v. Hakumat Bibi	A. I. R. 1926 Oudh 474.
393	Rajani Kanta Dey v. Khatir Mahomed	A. I. R. 1926 Cal. 897.
394	Narain Devi v. Shankar Dass	A. I. R. 1926 Lah. 345.
394	Bisheshwardas Daga v. Anjor Singh	A. I. R. 1926 Nag. 334.
395	Anand v. Ramchandra	*Nagpur Judicial Commissioner's Court.
396	Bachint Singh v. Harnam Singh	*Lahore High Court.
397	Chotkan v. Sita Ram	A. I. R. 1926 Oudh 478.
397	Ranjit Singh v. Bhagwati Singh	24 A. L. J. 581.
398	Mohammad Aslam Khan v. Jahan Khan	*Lahore High Court.
399	Mahant Dass v. Ram Ghulam	*Oudh Chief Court.
400	Siataj Shaikh v. Bishnudas Dhar	A. I. R. 1926 Cal. 845.
401	Chet Singh v. Emperor	7 L. 65; A. I. R. 1926 Lah. 262; 27 Cr. L. J. 625.
402	Emperor v. Samai Deen	3 O. W. N. 390; A. I. R. 1926 Oudh 329; 13 O. L. J. 276; 27 Cr. L. J. 626.
403	Ghulam Jannat v. Emperor	7 L. 70; A. I. R. 1926 Lah. 271; 27 Cr. L. J. 627.
404	Hardayal Singh v. Emperor	27 Cr. L. J. 628; A. I. R. 1926 Sind 190.
406	Sheru v. Emperor	7 L. 50; A. I. R. 1926 Lah. 232; 27 Cr. L. J. 630.
408	Bhagwan v. Emperor	9 N. L. J. 43; A. I. R. 1926 Nag. 300; 27 Cr. L. J. 632; 22 N. L. R. 65.
409	Sanwalya v. Baru	27 Cr. L. J. 633.
409	*Emperor* v. *Mustali*	27 Cr. L. J. 633.
411	Madura Municipality v. Muthubalu Chetty	50 M. L. J. 384; A. I. R. 1926 Mad. 576; 27 Cr. L. J. 635.
412	Emperor v. Maung Ba Thaung	3 R. 661; 27 Cr. L. J. 636; A. I. R. 1926 Rang. 107
414	Bhika Ram v. Emperor	A. I. R. 1926 Lah. 72; 7 L. 80. 27 Cr. L. J. 638.
415	Emperor v. Salig Ram	8 L. L. J. 140; 27 Cr. L. J. 639; A. I. R. 1926 Lah. 301; 7 L. 303.
417	Rahmat Ullah v. Nawab	*Lahore High Court.
417	Shib Narain Kaibarta Das v. Abdul Ghani	*Calcutta High Court.
418	Biseswar Sarkar v. Kali Charan Ash	A. I. R. 1926 Cal. 908.
420	Duraiswamy Iyer v. O. S. Balasundaram Iyer	23 L. W. 319; A. I. R. 1926 Mad. 558.
420	Ram Charan v. Ragho Singh	A. I. R. 1926 Oudh 469.
422	Qaim v. Nura	7 L. 73; A. I. R. 1926 Lah. 234.
423	Velji Dayalji v. Firm of Nandlal	*Sind Judicial Commissioner's Court.
425	Mul Chand-Nemi Chand v. Basdeo-Ram Sarup	24 A. L. J. 420.
427	Nageswara Iyer v. Alagu Srinivasa Iyengar	23 L. W. 675; A. I. R. 1926 Mad. 743.
429	Hari Chand Rai v. Moti Ram	24 A. L. J. 495.
433	Khursaidi Begum v. Secretary of State for India	(1926) Pat. 145; A. I. R. 1926 Pat. 321.
442	Gauri v. Mangla	L. R. 7 A. 171 Rev.
444	Albert Bonnan v. Imperial Tobacco Co. (India) Ltd.	30 C. W. N. 465; A. I. R. 1926 Cal. 757.
453	Munusami Pillai v. Mahdi Hussain Khan	(1926) M. W. N. 180; A. I. R. 1926 Mad. 516; 50 M. L. J. 655.
454	Babu Lal v. Janak Dulari	24 A. L. J. 462.
456	Official Assignee of Madras v. A. Ramalingappa	50 M. L. J. 361; 23 L. W. 592; (1926) M. W. N. 366; A. I. R. 1926 Mad. 554; 49 M. 539.
457	Teju v. Ralla	*Lahore High Court.
458	Kandada Thiruvenkata Charlu v. Shaik Altoo Sahib	50 M. L. J. 251; (1926) M. W. N. 344; A. I. R. 1926 Mad. 511.
463	Deonath Singh v. Tilakdhari Singh	A. I. R. 1926 All. 420.
464	Ma Than v. Ma Kyin	3 R. 658; A. I. R. 1926 Rang. 111.
465	Radha Kishen v. Sital Prasad	*Allahabad High Court.
466	Commissioner of Income Tax, Burma v. Steel Brothers & Co. Ltd.	3 R. 614; A. I. R. 1926 Rang. 97 **F. B.**
482	Sahodra v. Bhagwan Das	*Allahabad High Court.
483	Shib Diyal v. Ali Baksh & Sons	*Lahore High Court.
484	Shanker Ban v. Ram Dei	24 A. L. J. 557; A. I. R. 1926 All. 446.
486	Bishna v. Narain Singh	*Lahore High Court.
487	Madura Hindu Parmanent Fund, Ltd. v. Kamakshi Ammal	(1926) M. W. N. 137; 50 M. L. J. 355; A. I. R. 1926 Mad. 492.
489	Tadanki Brahmayya v. Puvvala Madhavan	50 M. L. J. 282; A. I. R. 1926 Mad. 496.
492	Wazir Singh v. Moti Singh	*Lahore High Court.
501	Mirza Raja v. Secretary of State for India	A. I. R. 1926 P. C. 18; 50 M. L. J. 391; 49 M. 249; 43 C. L. J. 378; 28 Bom. L. R. 865; 24 L. W. 9 **P. C.**

505	Collector of Moradabad v. Mohammad Hidayat Ali Khan	A. I. R. 1926 All. 449.
506	Gobardhan Das v. Jagat Narain	(1926) Pat. 134; A. I. R. 1926 Pat. 291.
508	Payoth Randupurayil Sara Umma v. Kidangukittiya Rundupurayil Kunhammad	23 L. W. 584.
510	Madras & Southern Marhatta Ry. Co. v. Gopal Rai-Ram Chunder	(1926) Pat. 123; A. I. R. 1926 Pat. 273.
512	Chand Mull Dudha v. Purushotamadoss	50 M. L. J. 348, (1926) M. W. N. 328; A. I. R. 1926 Mad. 584; 24 L. W. 94.
514	Nawab v. Arura	*Lahore High Court.
515	Gurunadha Rama Seshayya v. Tripurasundari Cotton Press	50 M. L. J. 520; 49 M. 468; A. I. R. 1926 Mad. 615; 24 L. W. 102 F. B.
521	Parja Mal-Chandi Mal v. Mul Chand-Murari Lal	6 L. 250; A. I. R. 1925 Lah. 624.
522	Tambi Reddi Virareddy v. Devi Reddy	49 M. 325 & 584; A. I. R. 1926 Mad. 674.
525	Amir Hamza v. Murad Bibi	6 L. 196; A. I. R. 1925 Lah. 458.
526	Sethu Konar v. Ramasami Konar	50 M. L. J. 205; (1926) M. W. N. 251; A. I. R. 1926 Mad. 481; 49 M. 494.
528	Watson v. Watson	43 C L. J. 37; A. I. R. 1926 Cal. 703.
530	Kishen Singh v. Moti Singh	*Lahore High Court.
531	U Tun Gywe v. Ko Ko Gyi	4 Bur. L. J. 67; A. I. R. 1925 Rang. 245.
532	Bason v. Skone	43 C. L. J. 41; A. I. R. 1926 Cal. 701; 53 C. 401.
534	Srinivasa Pillai v. Balasubramania Odayar	(1926) M. W. N. 294; A. I. R. 1926 Mad. 592.
535	Dadabhoy Framji Cama v. Cowasji Dorabji Panday	A. I. R. 1925 P. C. 306 P. C.
535	Ramaswami Aiyangar v. Official Receiver of Coimbatore	50 M. L. J. 448; (1926) M. W. N. 419; 23 L. W. 734; A I. R. 1926 Mad. 672.
538	Tilok Chand Surana v. Beattie & Co.	29 C. W. N. 953; A. I. R. 1926 Cal. 204.
516	Vice-Chairman, Chidambaram Municipality v. Ganasambanadham Pillai	A. I. R. 1926 Mad. 798.
547	Tanumal v. Ganga Ram	A. I. R. 1925 Sind 103.
550	Abdul Ameeth Sahib v. Ponnambala Muthurian	(1926) M. W. N. 286; A. I. R. 1926 Mad. 679; 23 L. W. 757.
550	Karam Din v. Mehr Din	8 L. L. J. 129.
551	Roberts v. Shanks	27 Bom. L. R. 548; A. I. R. 1925 Bom. 360.
553	Debi Prasad v. Jaldhar Mahton	(1926) Pat. 113; A. I. R. 1926 Pat. 288.
554	Wazir Chand Trikha v. Nathu Ram	26 P. L. R. 123.
554	Ryali Brahmayya v. Venkatasurya Narayanamurthy	50 M. L. J. 409; A. I. R. 1926 Mad. 557.
556	Lachman Sahay v. Gauri Charan Mahton	7 P. L. T. 127; (1926) Pat. 99.
557	Mangli v. Polu Ram	8 L. L. J. 132; A. I. R. 1926 Lah. 303.
557	Govindan Nair v. Kanhirathotikayil Ithalutty	50 M. L. J. 213; A. I. R. 1926 Mad. 542; (1926) M. W. N. 442.
558	Ram Lal Singh v. Septi	(1926) Pat. 117; A. I. R. 1926 Pat. 295.
559	Lachmi Narain v. Mahammedji	6 L. 294; A. I. R. 1925 Lah. 525.
560	Dattatraya Keshav Naik v. Gangabai Narayan Naik	27 Bom. L. R. 1334; A. I. R. 1926 Bom. 137.
561	Katha Muthu Pillai v. Subramania Chettiar	50 M. L. J. 228; (1926) M. W. N. 271; A. I. R. 1926 Mad 569.
563	Maula Bux v. Chanan Mal	8 L. L. J. 134; A. I. R. 1926 Lah. 332.
564	Kishordas P. Mangaldas v. Ahmed Suleman	27 Bom. L. R. 1086; 49 B. 567; A. I. R. 1925 Bom. 516.
567	Maung San Min v. Maung Po Hlaing	A. I. R. 1925 Rang. 291; 4 Bur. L. J. 118; 4 R. 1 F. B.
570	Kishenprasad & Co. v. Rajaram Ramharakh	27 Bom. L. R. 1159; A. I. R. 1926 Bom. 13.
573	Lobo v. Babulal	8 N. L. J. 170; A. I. R. 1925 Nag. 390.
575	Coorla Spinning & Weaving Mills, Co. v. Vallabhdas Kallianji	27 Bom. L. L. R. 1168; A. I. R. 1925 Bom. 547.
588	Benode Behary Saha v. Sundari Dassya	30 C. W. N. 500; A. I. R. 1226 Cal. 779.
590	Ma Sein v. Sit Paung	4 Bur. L. J. 3; A. I. R. 1926 Rang. 44.
591	Daso Keshav Panchbhai v. Karbasappa Kariyappa Mudhol	27 Bom. L. R. 1446; A. I. R. 1926 Bom. 121.
593	Gahur Howldar v. Emperor	30 C. W. N. 503; 27 Cr. L. J. 641; A. I. R. 1926 Cal. 793.
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INDIAN CASES

1926.

VOLUME 94.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1360 OF 1925.

February 9, 1926.

Present:—Mr. Justice Sulaiman.

HIRA LAL—DECREE-HOLDER—APPELLANT

versus

TIKAM SINGH—OBJECTOR—RESPONDENT.

*Jurisdiction of Court—Appellate Court assuming jurisdiction—Second appeal—Revision—Execution of decree—Orders passed, whether appealable—Civil Procedure Code (Act V of 1908), s. 2 (2) (*b*), scope of.*

If an Appellate Court having no jurisdiction to hear an appeal assumes jurisdiction and passes an order, a second appeal would lie, and in any case the High Court would have power to revise that order. [p. 1, col. 2.]

An order passed in execution is not appealable merely because it fulfils the conditions laid down in s. 47, C. P. C. In order to be appealable, it must fall within the definition of decree in s. 2 (2), C. P. C. [*ibid.*]

The expression "any order of dismissal for default" in sub-cl. (*b*) of s. 2 (2), C. P. C., is not confined to suits only, but it also covers an order of an Execution Court dismissing the objections of an objector judgment-debtor for default. [p. 2, col. 1.]

Execution second appeal against a decree of the Fourth Additional Subordinate Judge, Aligarh, dated the 4th May 1925.

Mr. *Panna Lal*, for the Appellant.

Mr. *S K. Dar*, for the Respondent.

JUDGMENT.—This is an appeal arising out of certain execution proceedings. A decree, which was more than three years old, was put in execution and notice was served on the judgment-debtor to show cause why it should not be executed. He filed written objections admitting certain payments made out of Court and yet pleading that the application was barred by time. On the date fixed for the hearing of objections, he did not appear. The Court passed the following order:—

"Objector absent. Objection dismissed for default."

From this order the judgment-debtor appealed to the lower Appellate Court, which came to the conclusion that, even though the judgment-debtor was absent, the Court ought to have considered the plea of limitation on its merits and should have disposed of it. Instead of deciding the point of limitation itself as it was urged by the judgment-debtor, the lower Appellate Court thought that an opportunity should be given to the decree-holder to show cause, if he can, that his application was within time. The case was accordingly remanded for disposal according to law.

The decree-holder urges that no appeal lay to the lower Appellate Court, which, therefore, had no jurisdiction to set aside the order of the first Court. A preliminary objection is raised that, if no appeal lay to the lower Appellate Court, no appeal lies to this Court. This objection, in my opinion, has no force. The lower Appellate Court has assumed jurisdiction and passed an order on appeal. A second appeal would, therefore, lie. In any case, if no appeal lay to the lower Appellate Court, it has acted on an assumed jurisdiction, and I would have power in revision to revise that order.

The substantial point in the case is whether an appeal lay from the order passed by the Execution Court. An order passed in execution cannot be appealable merely because it fulfils the conditions laid down in s. 47. In order to be appealable, it must fall within the definition of decree in s. 2, sub-cl. (2). If this were not the correct interpretation of the section, the result would be that every order passed in the Execution Department, for instance a refusal to adjourn the case, would become automatically appealable, which of course is not the law. In order to be appealable the order must amount to a formal expression of adjudication, which conclusively determines the rights of the parties with regard to all controversial matters in suits (and includes the determination of any question within s. 47, but does not include any order of dismissal for default).

If objections are filed and there is adjudication *inter parties* with regard to the points of controversy, an appeal would lie; but s. 2, sub-cl. (2) (*b*), expressly exempts an order of dismissal for default. Such orders are not decrees, nor have they been made appealable orders. It follows, therefore, that no appeal lay to the lower Appellate Court.

It has been contended before me that the expression "order of dismissal for default" refers to dismissal of suits for default. I am not prepared to put such a narrow meaning to this expression. The order of the Execution Court was certainly an order dismissing the objection for default. It, therefore, cannot be called a decree so as to be appealable. In this view of the matter, no appeal lay to the lower Appellate Court, and that Court had no jurisdiction to entertain the suit. I accordingly set aside the order passed by the lower Appellate Court and restore the original order passed by the first Court. It is unnecessary for me to state what remedy the judgment-debtor now has against the order of dismissal for default.

The question of the want of jurisdiction was, however, not raised before the lower Appellate Court. It is raised for the first time in this Court. I, therefore, direct that the parties should bear their own costs of the appeal in the lower Appellate Court and in this Court.

F. Q. *Order set aside.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1371 OF 1925.
February 18, 1926.
Present:—Mr. Justice Addison.
THE FIRM CHHOTA LAL-AMBA PARSHAD—PLAINTIFFS—APPELLANTS
versus
THE FIRM BASDEO MAL-HIRA LAL—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Second appeal—Copy of first Court's judgment uncertified—Proper presentation—Limitation Act (IX of 1908), Sch. I, Art. 115—Suit for damages for non-delivery of goods per several shipments—Limitation, starting point of.

Presentation of a second appeal accompanied by an unattested copy of first Court's judgment, when an attested copy was applied for but the report was that the record could not be traced, is a proper presentation under the circumstances. [p. 2, col. 2.]

The limitation for a suit for non-delivery of goods of various shipments, starts from the last day of the arrival of the last shipment and no cause of action accrues to the plaintiff until then. [p. 3, col. 1.]

Phul Chand-Fateh Chand v. *Chhote Lal-Amba Pershad*, 90 Ind. Cas. 654; A. I. R. 1925 Lah. 513; 7 L. L. J. 360, followed.

Second appeal from a decree of the District Judge, Delhi, dated the 23rd January 1925, reversing that of the Subordinate Judge, Second Class, Delhi, dated the 31st December 1923.

Lala *Jagan Nath Aggarwal*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—A preliminary objection was taken on behalf of the respondents that this second appeal was time-barred as though it was filed within time it was not accompanied by an attested copy of the first Court's judgment though there was an unattested copy of that judgment filed with the appeal. It is clear, however, that an attested copy was applied for but was not supplied, the report being that the record could not be traced. In my opinion there has been a sufficient compliance with the law in these circumstances. It is true that up to date no attested copy has been placed on this record but the appellant is ready to do so. I see no reason to call upon him to put such an attested copy upon the record and overrule the objection.

The suit was one for non-delivery of five bales of white mulls which the defendants had contracted to sell to the plaintiffs on the 17th November, 1916. The suit was instituted on the 30th July 1920. The contract was for five bales of white mulls, December shipment three lots, 60 days grace, payment to be against Railway receipts and invoices. Various defences were raised and the plaintiffs' suit was dismissed by the Court of first instance. On appeal the learned District Judge held that the due date of the first instalment, *i. e.*, the December shipment, expired about the 30th June, 1917, and that the suit as regards that instalment was accordingly time-barred. He held, however, that the suit for the other two instalments was within time and he accepted the appeal and granted the plaintiffs a decree for Rs. 356-4-0 with proportionate costs in both Courts. Against this decision the plaintiffs have appealed while the defendants have filed cross-objections.

The principal point argued before me was the question of limitation. It was contended that the lower Appellate Court erred in dividing the contract into several parts for purposes of limitation and that the whole contract should have been treated as an indivisible one and not an instalment contract. It is unnecessary to labour this point for it is covered by authority. Two Division Benches of this Court have held that a contract such as the present one was not an instalment contract, that the defendants could have delivered goods under it up to the last day of arrival of the last shipment and that the plaintiffs could not sue for damages for breach of contract until that date had expired. These rulings are *Phul Chand-Fateh Chand* v. *Chhote Lal-Amba Perhsad* (1) and Civil Appeal No. 1000 of 1925. All the points taken in this appeal and in the cross-objections are covered by these two authorities. I, therefore, hold that the whole claim was within time.

The District Judge found that the due date for the last instalment was the 30th August 1917. It was contended, however, that here again he erred as there is good evidence which he did not consider that March shipments were arriving in September, 1917. It is clear that the defendants could have shipped the goods up to March 1917 at least and as such shipments were still arriving at Karachi in September 1917 no breach of contract took place till then. After the goods arrive it takes about a week to clear them and then the documents have to be posted to Delhi through some Bank for acceptance. This would certainly take us to the 26th September, 1917 and there is evidence that on that date the rate was Rs. 6-10-0. The contract rate *plus* forwarding charges comes to Rs. 5-6-0. The difference is Rs. 1-4-0. This has to be multiplied by Rs. 750 so that the plaintiffs' suit should have been decreed for Rs. 937-8-0 whereas the learned District Judge only allowed Rs. 356-4-0.

I accordingly accept this appeal by raising the amount decreed by the learned District Judge from Rs. 356-4-0 to Rs 937-8-0, *i. e.*, by raising it by the sum of Rs. 581-4-0. The appellant will have his costs on the latter sum in this Court and on the sum of Rs. 937-8-0 in the two lower Courts. The cross-objections are dismissed but without costs.

R. L. *Appeal accepted.*

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(1) 90 Ind. Cas. 654; A. I. R. 1925 Lah. 513; 7 L. L. J. 360.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 473 OF 1924.
February 16, 1926.
Present:—Mr. Justice Ashworth.
KARAMAT KHAN—PLAINTIFF—
APPELLANT
versus
YASIN KHAN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Landlord and tenant—Gift by lessee of his holding —Lease of same by zemindar *to donee—Termination of lease—Lease by* lambardar*—Subsequent lease by co-sharers—Priority—Suit by lessee against subsequent lessee for recovery of possession—Non-joinder of landlord, effect of.*

If a tenant of a holding gifts it away and the *zemindar* also grants a lease of the same to the donee, the first tenancy terminates. [p. 4, col. 1.]

In U. P. a *lambardar* is presumed to have, by established usage or with the consent of the whole body of co-sharers, *i. e., zemindars*, the power to grant leases, and unless the contrary is proved, the mere fact that some of the co-sharers also sign a lease along with the *lambardar* does not invalidate the lease. [*ibid.*].

If a *lambardar* authorised to grant lease on behalf of the whole body of co-sharers leases a land, a subsequent lease of the same by the whole body of co-sharers will have no priority over the earlier one. [p. 4, col. 2.]

The non-joinder of the lessor does not affect a suit by a first lessee against the second lessee for recovery of possession of the property on the ground of his lease being prior. [p. 5, col. 1.]

Appeal from a decree of the Subordinate Judge, Partabgarh, dated the 30th August 1924, in Civil Appeal No. 161 of 1924, confirming that of the Munsif, Partabgarh, dated the 3rd December 1923, in Regular Suit No. 190 of 1923.

Messrs. *Hakimuddin* and *Naziruddin*, for the Appellant.

Messrs. *Ali Zaheer* and *Radha Krishna*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff-appellant for recovery of nine plots of land from the defendants-respondents. The land in suit was originally the holding of one Ahmad Khan, brother-in-law of the plaintiff. He transferred the holding by a deed of gift to the plaintiff on the 17th May 1919. The plaintiff's case is that he also got a new lease from the co-sharers in the year following, namely, on the 5th August 1920. Ahmad Khan died in November 1921. The following month it appears that a lease was given to the defendants-respondents who have obtained possession of the holding. The plaintiff sues alternatively on the basis of the deed of gift and of the lease. The first Court held that the lease granted to the plaintiff on the 5th August

1920 was invalid, as it was granted during the continuance of Ahmad Khan's lease. The lower Appellate Court upheld this finding and also found that the two *lambardars* along with some only of the co-sharers were not entitled to execute a lease.

The plaintiff's Counsel has argued that s. 43 of the Transfer of Property Act will apply to give the plaintiff title as a tenant on the death of Ahmad Khan. It is unnecessary to invoke s. 43. The deed of gift by Ahmad Khan coupled with the lease by the *zemindar* to the plaintiff is sufficient evidence that Ahmad Khan had given up the tenancy before the lease was given to the plaintiff. The fact that Ahmad Khan was alive is no bar to the validity of this lease. The second point taken is one of greater difficulty, but I hold that the lower Appellate Court's decision was wrong. A *lambardar* may, by established usage, or with the consent of the whole body of co-sharers, have the power to grant leases. The practice is so convenient and, in these Provinces, so prevalent, that it may be presumed to exist unless the contrary is proved. Here it was not disproved. If one or both the *lambardars* were entitled to give a lease, the fact of other co-sharers also signing would not invalidate the lease. Nor could it be treated as evidence subversive of the practice. On this view, both the leases were valid and the plaintiff's lease was the earlier.

The question of what order should now be given is, however, not free from difficulty. The plaintiff first brought a suit in the Revenue Court under s. 108 (10) of the Oudh Rent Act on the allegation that he was given possession by the landlords after the execution of the lease in his favour, and had been ejected by the landlords and the present defendants-respondents. The first Court held that the suit failed as the plaintiff never having been in possession could not have been ejected. In appeal the Commissioner upheld the dismissal of the suit on two grounds, (*a*) that the landlord was not entitled to give the lease as Ahmad Khan's tenancy was still subsisting at the time and (*b*) that it was not proved that the *lambardar* signed the lease. In this appeal, I have dissented from both these findings. With the former I disagree on the merits, and with the latter because the lower Appellate Court in this suit found as a fact that the *lambardars* did sign the plaintiff's lease, and this decision has not been impugned by the respondents. Now in the present suit the first Court under the issue "Is the plaintiff a tenant of the plots in suit" has decided that the plaintiff's lease was ineffectual to give him any rights, and it is this finding which I have now reversed in this second appeal. The issue was, however, wrongly framed. It is clear that if the plaintiff never got possession, the validity of the lease would not make him a tenant. A tenant is a person liable to pay rent, and the plaintiff would not be liable to pay rent until put in possession. I should have held if it were necessary that the plaintiff, subsequent to the lease, held possession through Ahmad Khan, but, having regard to the pleadings in this case, I cannot hold this, because the point does not arise. The plaintiff has elected to fight the case on the hypothesis that he did not get possession, and the defendants have agreed that he did not get possession. Indeed, if he had got possession, the suit could not be brought in the Civil Court as the jurisdiction of the Civil Court would be barred by s. 108 (10) of the Oudh Rent Act. As brought, it is clear that the claim is not barred by s. 108 (10). Nor again can there be any question of the Revenue Court's decision operating as *res judicata* in respect of the present suit, because assuming that the plaintiff never got possession, and, therefore, is not a tenant, the present suit could not have been decided by the Revenue Court, and so the matter involved in the present suit was not one which the Revenue Court was competent to try. The first Court in this case dismissed the suit on the preliminary finding that the lease set up by the plaintiff gave him no right. That finding has now been reversed. The remaining three issues framed by the first Court, which it did not decide are:—

1. Is the suit barred by the principles of *res judicata*?
2. Is the claim barred by s. 108 (10) of the Oudh Rent Act, and
3. To what relief and damages, if any, is the plaintiff entitled?

The first two of these issues I have already decided in the above remarks. As to the last, the claim is one based on contract, but it will only lie against the landlords for failing to deliver possession after executing a lease. There was no privity of contract between the plaintiff and the defendants. There was no trespass by the defendants, as the plaintiff never got possession. As to the claim for possession, the lease gave the plaintiff a right to occupy the holding and that right can be enforced not merely against the landlords but also against the defendants as persons who hold from them. The landlords should have been joined as defendants, but this will not prevent a decree against the defendants for possession only. As the landlords have not been parties to the suit, the execution of a decree will not operate to give the plaintiff any better position against them than if the plaintiff had obtained possession from the defendants by consent or force. Accordingly, I direct that the appeal be allowed with half his costs to the plaintiff in all the Courts, since the plaintiff's valuation of the holding is Rs. 250, and his valuation of damages is Rs. 250. The plaintiff will get a decree for the ejectment of the defendants from the holding in suit.

S D.
F. C. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1792 OF 1922.

June 30, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

MOHENDRA NATH ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NABADWIP CHANDRA NANDY AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Decision as to right of easement, whether* res judicata *in suit for title—Easement—Occasional use of right—Ownership—Land under water—Possession.*

The decision in a previous suit between the plaintiff and the tenants of a village declaring a right of easement in favour of the tenants over certain property claimed by the plaintiff cannot operate as *res judicata* in a suit brought against the proprietors of the village for a declaration of the right of ownership over the same property. [p. 6, col. 2.]

The proprietor of a piece of land, over which the members of the public exercise a right of easement, does not lose his right to the land as proprietor on account of the occasional user for the purpose of exercising the right of easement. [*ibid.*]

Possession of land under water follows ownership. [*ibid.*]

Appeal against a decree of the Subordinate Judge, First Court, Midnapur, dated the 7th April 1922, modifying that of the Munsif, Second Court, at Tamluk, dated the 26th February 1921.

Dr. *Dwarka Nath Mitra* and Babu *Bhupendra Nath Ghose*, for the Appellants.

Dr. *Sarat Chandra Basak* (with him Babus *Apurba Charan Mukerji, Santosh Kumar Pal* and *Tarakeswar Nath Mitra*), for the Respondents.

JUDGMENT.

Chakravarti, J.—In the suit out of which this appeal arises the plaintiffs sued for a declaration that the lands in suit appertained to a *niskar* which they possessed in the village Banki. The facts of the case shortly stated are these: The plaintiffs apparently had a *niskar* in the village Banki comprising 41 and odd *bighas* of land covered by a *sanad* in the name of their ancestor Sahib Ram. The lands in suit really form the site of what is called a *garkhai.* The plaintiffs further stated that in the year 1903 the villagers of Banki and of other neighbouring villages complained against obstruction put by the plaintiffs on the water of that *garkhai* and the Criminal Court took proceedings under s. 133, Cr. P. C. which resulted in an order against the plaintiffs. The plaintiffs then brought a suit in the year 1904 for a declaration that the property was their *niskar* and that the defendants had no right of easement as claimed by them and as had been established in the proceedings under s. 133, Cr P. C. The plaintiffs in that suit impleaded some of the representative tenants of the villages of which villagers claimed the right of easement in question. The proprietors of the village Banki who are the defendants in the present suit were not parties in that suit. Nor did they form members of the class which claimed the right of easement in the proceedings under s. 133, Cr. P. C. Now that suit was finally dismissed by the Appellate Court on the 21st May, 1906, by which the plaintiffs' claim to stop the villagers from claiming the easement which they had established in the criminal proceedings under s. 133 was disallowed. Therefore, the result of that suit was that the villagers of Banki and the neighbouring villages were declared entitled to exercise the right of easement which they claimed when they asked for the removal of the obstruction put up by the plaintiffs. In the year 1919, the Record of Rights was published in which the lands together with the *garkhai* was recorded as appertaining to the *mal* lands of the village Banki. The plaintiffs brought the present suit basing their cause of action from the date of the final publication of the Record of Rights.

In the present case which is against the proprietors of the village Banki, the plaintiffs ask for a declaration of their *niskar* right and also for confirmation of their possession in that right.

The defendants, the proprietors of Banki, claimed the lands, as recorded, as appertaining to their *mehal* Banki and also pleaded *res judicata* and limitation.

The Court of first instance found all the issues in favour of the plaintiffs and made a decree in their favour. On appeal, however, by the defendants the lower Appellate Court has found that the plaintiffs have established that the lands in dispute were the *niskar* lands of the plaintiffs appertaining to the *niskar* of 41 and odd *bighas* of land which they claimed under the *sanad* to which I have already referred. The lower Appellate Court affirmed the decree of the first Court with regard to plot No. 2 but dismissed the plaintiffs' suit as regards plot No. 1 on two grounds, namely, that of *res judicata* and that of limitation.

The learned Advocate, who appears in support of this appeal by the plaintiffs contends that the decision of the previous suit instituted in 1904 which terminated by the judgment of the Appellate Court dated the 21st May 1905 does not form a bar of *res judicata.*

The next ground that he takes is that the finding of the lower Appellate Court that the suit was barred by limitation is erroneous.

I think these contentions are well-founded. Now, as to the question of *res judicata* it appears to us that the judgment in the suit of 1904 is no bar to the present claim of the plaintiff for these reasons—that suit was instituted by the plaintiffs primarily for a declaration that the defendant in that suit had not the right of easement claimed upon the property then in question. The parties to that suit were the villagers who claimed the right of easement upon this property. The landlords of the village Banki, were not parties. Nor did they in any sense claim the right which the defendants in that suit claimed. In fact the defendants in that suit alleged that the right of easement which they claimed was based upon a grant made by the proprietors of the village Banki. Therefore, it appears from the circumstances that the title which the defendants in that suit set up was not any title in themselves but title in the *zemindars* of the village Banki, who were no parties to that suit. Really that suit was dismissed on the ground that it was established to the satisfaction of the Court that the villagers were entitled to the right of easement claimed by them. From the facts, which I have already stated, it is quite clear that there was no determination of any question of title to this property as between the plaintiffs and the other claiming the proprietary right in the village Banki in their *zemindari* right. The decision in that suit, therefore, cannot operate as *res judicata* on the question as to whether the property appertains to the plaintiffs or to the proprietors of the village Banki.

As to the second question it appears to us that the property in question is a piece of land covered with water. The user which the defendants in that suit set up was the occasional user of the water in the exercise of their right of easement. The learned Subordinate Judge found that the plaintiffs also possessed the land as did the other members of the public. But the other members of the public exercised only the right of easement and nothing more. The proprietor of a piece of land over which the members of the public exercise a right of easement does not lose his right to the land as proprietor of the land on account of the occasional user for the purpose of exercising the right of easement. Considering the nature of the property and the nature of the user possible of such property we think the findings of the learned Subordinate Judge do not amount to any finding that the plaintiffs who are the owners of the property were excluded from the user of the land in their proprietary right. In a case like this the possession of the parties would really be determined by the question of title. As I have already stated the land in suit is covered with water. That being so we think the finding of the learned Subordinate Judge is not sufficient for the purpose of holding that the plaintiffs' suit was barred by limitation. For these reasons we think the judgment and decree of the learned Subordinate Judge ought to be set aside and the judgment and decree of the Court of first instance ought to be restored with costs of this appeal and of the appeal before the Subordinate Judge.

Cuming, J.—I agree.

S. S. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 83 OF 1926.
February 15, 1926.
Present:—Mr. Justice Kanhaiya Lal.
CHAIN SUKH—DEFENDANT—APPELLANT
versus
RAM SARUP AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Arbitration—Parties agreeing to be bound by decision of Court—Appeal.

If the parties to a suit relating to a landed property agree not to produce any evidence and to be bound by the decision of the Court arrived at after an inspection of the locality, such decision is binding on the parties and is not appealable.

Second appeal against a decree of the Subordinate Judge, Muttra, dated the 5th October 1925.

Mr. *S. C. Das*, for the Appellant.

JUDGMENT.—In the course of a pending suit brought by the plaintiffs for a permanent injunction to restrain the defendants from interfering with the construction of a certain wall by the plaintiffs and for damages, the Pleaders for the parties accompanied by their clients, stated that the sole question in dispute was whether the wall in question belonged to the plaintiffs or the defendants, and that the Court might inspect the locality and the parties shall be bound by the decision at which the Court would arrive on such an inspection. They also stated that they did not want to produce any evidence, oral or documentary, and that the plaintiffs were giving up their claim for damages. The Court fixed a date for the inspection of the locality and in the light of the *khasra* and the copy of the *khasra abadi* map on the record, and the measurements made on the spot, it came to the conclusion that both the parties were in possession of an area in excess of that given in the *khasra* of the village, that they had encroached upon the land belonging to the Government and that the disputed wall was within the boundary of the house of the plaintiffs. Having recorded that finding it decreed the claim of the plaintiffs and granted an injunction in the terms prayed for. One of the defendants subsequently tried to resile from that agreement and filed an appeal from that decision to the lower Appellate Court, which was dismissed. As observed in *Sita Ram* v. *Peare* (1) in similar circumstances, it was not open to either party to resile from the agreement and that the decision of the Presiding Judge arrived at after an inspection of the locality was binding and no longer open to appeal. In *Ram Sunder Misra* v. *Jai Kiran Singh* (2) where the defendant had made an offer to the plaintiffs that if a certain witness in the case would eat *kachcha* food served by the plaintiff, the suit should be decreed, it was held that the offer was perfectly lawful. In *Cihnna Venkatasami Naicken* v. *Venkatasami Naiken* (3) a reference of a pending suit to the arbitration of a Presiding Judge along with others as arbitrators was held to be a proceeding *extra cursum curiæ* and a decree passed in accordance with their decision was treated as a consent decree, not subject to the provisions of the Second Schedule of the C. P. C., and was, therefore, final. As the parties had stated that there would be no further evidence adduced and agreed to abide by the decision of the Court after the inspection of the locality, that decision must be regarded as final. The appeal is dismissed.

S. D.
F. Q.   *Appeal dismissed.*

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(1) 88 Ind. Cas. 611; 23 A. L. J. 525; A. I. R. 1925 All. 558; L. R. 6 A. 503 Civ; 47 A. 921.

(2) 87 Ind. Cas. 174; 47 A. 456; 23 A. L. J. 251; L. R. 6 A. 270 Civ; A. I. R. 1925 All. 271.

(3) 51 Ind. Cas. 827; 42 M. 625; 36 M. L. J. 291; (1919) M. W. N. 221; 25 M. L. T. 397.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 248 OF 1924.
March 15, 1926.
Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.
MAULA BUX—DEFENDANT—APPELLANT
versus
HAFIZ-UD-DIN AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Muhammadan Law—Gift—Transfer of Property Act (IV of 1882), s. 122—Mosque, whether person—Gift to mosque—Registration Act (XVI of 1908), s. 17 (1) ([illegible])—Gift deed, registration of.

Mosque is recognised by Muhammadan jurists as a juristic person and, therefore, a valid gift can be made in favour of a mosque.

Jindu Ram v. *Hussain Buksh*, 24 Ind. Cas. 100; 59 P. R. 1914; 52 P. W. R. 1914; 147 P. L. R. 1914, followed.

Every instrument of gift of immoveable property requires compulsory registration irrespective of the value of the property conveyed by the instrument.

Letters Patent Appeal against the judgment of Mr. Justice Raoof, dated the 10th November 1924, in Civil Appeal No. 2220 of 1923, Mr. *Shamair Chand*, for the Appellant.

Sheikh *Mohammad Munir*, for the Respondents.

JUDGMENT.—The plaintiffs seek to recover the land in dispute from the defendant Maula Bakhsh on the strength of a deed executed by certain persons in favour of a mosque, and the question debated before us is whether the document required compulsory registration. Now, the document purports to be a deed of gift and the executants describe themselves as donors. The property transferred is described as *arazi mahuba* and the document itself is called *hibanama*. In view of the clear and unequivocal terms of the deed we have no hesitation in holding that it is a transfer of immoveable property made without consideration. It is beyond dispute that under cl. (*a*) of s. 17 (1) of the Indian Registration Act every instrument of gift of immoveable property requires compulsory registration irrespective of the value of the property conveyed by the instrument.

The learned Vakil for the plaintiffs, however, invites our attention to the definition of the word "gift," as contained in s. 122 of the Transfer of Property Act; and contends that a transfer cannot be called a gift unless it is made by one person to another person, and that the mosque cannot be deemed to be a person within the meaning of the section. The answer to this contention is furnished by the judgment of the Division Bench in *Jindu Ram* v. *Hussain Baksh* (1) where Mr. Justice Shah Din after reciting the relevant passages from Abdur Rahman's Muhammadan Jurisprudence and Tyabji's Muhammadan Law, expressed the opinion that mosque is recognised by the Muhammadan jurists as a juristic person, and that a valid gift can be made in favour of a mosque.

In view of the exposition of the law contained in *Jinda Ram v. Hussain Bakhsh* (1) we must hold that the document is a deed of gift, and that it cannot be received in evidence for want of registration. Nor can the terms of the instrument be proved by oral evidence. We accordingly allow the appeal and dismiss the suit with costs throughout.

R. L. *Appeal allowed.*

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(1) 24 Ind. Cas. 100; 59 P. R. 1914; 52 P. W. R. 1914; 147 P. L. R. 1914.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 335 AND 366 OF 1922 AND 21 OF 1924.

November 28, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

KUZHAKKUMBAT MADHATHIL APPU *alias* SUBRAMANIA PATHAR—PETITIONER—APPELLANT

versus

C. ACHUTHA MENON AND OTHERS—COUNTER-PETITIONERS NOS. 1 TO 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66—Proclamation of sale—Duty of Court—Settlement of proclamation, whether can be delegated—Sale, validity of.

Under O. XXI, r. 66, C. P. C., it is the duty of the Court to settle the proclamation of sale and it cannot delegate that power to Commissioner appointed by it.

A sale held without the proclamation therefor having been settled by the Court is invalid.

Appeal against an order of the District Court, South Malabar, dated the 4th April 1921, 28th November 1923, in M. P. No. 51 of 1921, in M. P. No. 92 of 1921, and M. P. No. 221 of 1923, in O. S. No. 4 of 1917 respectively.

Mr. *K. Kutti Krishna Menon*, for the Appellants.

Mr. *A. V. Krishna Menon*, for the Respondents.

JUDGMENT.—The first point raised in this appeal is that the proclamation of sale was not settled by the Court but that the Commissioner appointed by the Court after the preliminary decree prepared the proclamation of sale and sold the property. It is for the Court to settle the proclamation of sale and it could not delegate that power to the Commissioner appointed by it. Order XXI, r. 66 directs that when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court and then such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale and specify as fairly and accurately as possible the property to be sold and a number of things. It is also contended that the appellant was not allowed to bid at the auction. The learned Judge relying upon the report of the Receiver has dismissed the appellant's application to set aside the sale. Even if the appellants was aware of the contents of the proclamation prepared by the Receiver that would not relieve the Court of its duty of settling the proclamation. As the records stand at present we are unable to say whether the allegation of the appellant is true or false. If the proclamation was not settled by the Court, the sale would be invalid. As the learned District Judge has not taken evidence in support of the allegations in the petition and as the auction-purchasers are not represented here, we think the proper course would be to set aside the order of the District Judge and direct him to restore the application of the appellant to file and dispose of it after taking such evidence as may be adduced by him and other parties to the suit. Costs of this appeal will abide the result and be provided for in the order that will be passed by the District Court.

The same order on Civil Miscellaneous Appeal No. 366 of 1922 and Civil Miscellaneous Appeal No. 21 of 1924.

V. N. V. *Appeals allowed.*
N. H.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 80 OF 1925.
November 26, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.
PESTONJI SHAPURJI NARELWALLA
—PLAINTIFF—APPELLANT
versus
JAMSHEDJI NOWROJI GAMADIA—
DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 11, O. XXXVII, rr. 2 (2), 4—Summary suit—Defendant not obtaining leave to defend—Right to ask for instalments—Instalments, procedure for grant of.

In a summary suit under the provisions of O. XXXVII, C. P. C., unless a defendant has obtained leave to defend, he cannot be allowed to appear on the hearing and make an application for stay of execution or for payment of the decree by instalments. Such a defendant may either apply for instalments under O. XX, r. 11 (2) which relief can be granted only with the consent of the decree-holder or under O. XXXVII, r. 4 ask the Court to grant him any of the reliefs mentioned therein.

Mr. *Kanga*, Advocate-General, for the Appellant.

Mr. *Coltman*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff filed a summary suit against the defendant to recover a sum of Rs. 25,000 with interest thereon on a *hundi* dated December 19, 1924. The defendant did not obtain leave from the Judge, as provided in O. XXXVII, r. 3, to appear and to defend the suit. Accordingly under sub-r. (2) of r. 2, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint should be deemed to be admitted and the plaintiff will be entitled to a decree. Order XXXVII, contemplates, then, that the Court shall pass a decree in a summary suit where the defendant has obtained no leave to appear and defend. But in this case it seems that the defendant's attorney was allowed to appear to make an application for the stay of execution of the decree up to the following *Diwali*, or in the alternative for payment of the decree by instalments. An objection was raised at the time on behalf of the plaintiff that the defendant could not be heard as no leave had been obtained. The Judge, however, was of opinion that although the defendant could not be heard on the merits of the case, he might be heard on the question whether the decree should be made payable by instalments. Accordingly, after hearing the parties, the Judge made an order that the decretal amount should be payable by monthly instalments.

The plaintiff has appealed, although it is admitted that the decretal amount has already been paid. At any rate, he will have the satisfaction of getting a decision on an interesting question of procedure. Under O. XX, r. 11, sub-r. (1):

"Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable."

That sub-r. (1) clearly contemplates that the application for instalments should be part of the hearing and an order made simultaneously with the decree. Ordinarily speaking then, a person who cannot appear at the hearing cannot be allowed to appear in order to apply for payment of the decretal amount by instalments.

Under sub-r. (2) of r. 11 of O. XX:—

"After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit."

No order can be made under sub-r. (2) except with the consent of the decree-holder, and that is a very important provision in his favour. It may be, as the Judge remarks, that in an ordinary case where the defendant appears, the Court first decrees payment for a certain sum in favour of the plaintiff, and then hears the defendant with regard to the question of instalments. But it still remains one proceeding. The hearing is not finished until a complete decree is passed directing, as the case may be, that the decretal amount should be payable at once or by instalments. The important point to notice is that the defendant in a summary suit cannot be allowed to appear while the hearing is proceeding, and in this case, in my opinion, the Judge was wrong in allowing the defendant's attorney to appear before a decree had been passed in accordance with the plaint. Thereafter he could have applied under sub-r. (2), when the decree-holder would have an opportunity of either consenting to the application or withholding his consent.

There is another way open to the defendant who has not obtained leave to appear and defend in a summary suit. He may, under O. XXXVII, r. 4, ask the Court to grant him any of the reliefs mentioned therein.

The appeal will be allowed. The appellant is entitled to his costs of the appeal.

Coyajee, J.—I concur.

R. L. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL REFERENCE NO. 1 OF 1925.
July 27, 1925.
Present:—Sir B. K. Mullick, KT., Acting Chief Justice, and Mr. Justice Kulwant Sahay.
RUP LAL SINGH—PLAINTIFF
versus
SECRETARY OF STATE FOR INDIA—DEFENDANT.

Bengal Troops Transport and Traveller's Assistance Regulation (XI of 1806), s. 3 (1) paras. 3, 4—Impressing cart against owner's will—Native officer, power of.

In case of carts let on hire, the native and Police Officer referred to in paras. 3 and 4 of s. 3, cl. (1) of the Bengal Troops Transport and Traveller's Assistance Regulation can legally impress them against the consent of their owner.

Mr. *S. Saran*, for the Plaintiff.

Mr. *L. N. Sinha*, Government Pleader, for the Defendant.

JUDGMENT.

Mullick, A. C. J.—The native officer is directed by para. 3 of s. 3 of the Regulation to provide the troops with whatever bearers, boatmen, carts and bullocks may be necessary to prosecute their route. The next paragraph empowers him in case of difficulty to seek the assistance of the nearest Police Officer who is to afford his aid in providing the number of persons and of carts and bullocks required. The section does not in terms empower the native officer or the Police to impress any carts or bullocks against the will of their owner but it is obvious that this is intended. It is not necessary here to consider whether private carts can be seized but as regards carts ordinarily let out on hire it is impossible to conceive that when a regiment is on the line of march the refusal of the owner would be sufficient to oust the jurisdiction of the officer concerned. That could not have been intended by s. 3 having regard to the object for which it was enacted. This is made clearer by comparison with s. 8 which relates to the supply of carts, etc., to military officers not commanding or proceeding with a corps or detachment and to other persons passing through the country. The third paragraph of this section by implication empowers the Police Officer to impress carts kept for hire and to compel bearers and boatmen who are accustomed to act as such to undertake such involuntary service. From this it would appear that in the case of regiments on the march it is certainly open to the native officer or the Police Officer to impress carts or bullocks which are ordinarily let out for hire.

It is contended on behalf of the plaintiff that the Regulation could not have intended to empower the native officer to use means which were contrary to law and thereby encroach upon the liberty of the subject. But the answer to this is that when a Statute confers a power it implies that the donee of that power shall be competent to do all that is needful for its exercise subject to the limitation that he cannot go beyond what is reasonable. If, in order to carry out the law, he does something which the Courts consider in the circumstances unreasonable, he will be guilty of a tort.

The answer, therefore, to the question put by the learned Subordinate Judge, in my opinion, is in the affirmative.

Kulwant Sahay, J.—I agree that in case of carts let on hire, the native and Police Officer referred to in paras. 3 and 4 of s. 3, cl. (1) of the Regulation can legally impress them against the consent of their owner.

N. H. *Reference answered in the affirmative.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 79 OF 1925.
December 3, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.
NAVANITLAL HURJIVANDAS—
APPELLANT
versus
PURSHOTTAM HURJIVAN—OPPONENT
—RESPONDENT.

Hindu Law—Guardianship—Minor wife, custody of.

Under Hindu Law husband is the natural guardian of the minor wife and is entitled to her custody unless good cause be shown to the contrary. The fact that a girl is not mature would be a ground for the Court refusing to give the custody of his wife to a husband unless her parents were dead and the Court could be convinced that no attempt to enter into conjugal relations would be made before maturity. [p. 12, col. 1.]

Mr. *Kanga*, Advocate-General, for the Appellant.

Mr. *Jayakar*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The petitioner was married to the minor in May 1922. The minor was born on December 29, 1910, and was, therefore, 11½ years old at the time of her marriage. It may be taken as admitted that in February and March 1923, the husband and wife lived together as such. Thereafter disputes arose between the minor's father and her husband's father, with the result that in March 1923, the minor having gone to her father's house, he refused to allow her to go back to her husband. After a long correspondence the husband filed this petition on October 16, 1924, praying that he might be declared to be the guardian of the person and property of his minor wife. It came on for hearing before the Chamber Judge in November 1924. He questioned the minor in his Chambers when she told him that she was afraid to live with her husband in her present state of health that her husband and his father had treated her cruelly when she lived with them, that her husband had threatened to treat her cruelly when she returned to his house and generally she asked that some time might be allowed to her. The Judge was of opinion that the girl was in good health and well-developed for her age, but although he thought that her answers to his questions were influenced by her father, he adjourned the matter for three months. A short time before the three months' expiry, an application was made to the Judge to allow the minor to be taken out of Bombay on account of her health which was successful and this matter was not heard again until the closing days of the Easter term in 1925. By the Judge's direction the minor was examined on April 10 by Dr. Miss Jhirad and her certificate appears on page 1, Part III of the printed book.

I may say at once that it is clear from the evidence that the stories put forward by the minor's father that she was in a poor state of health were absolutely false and that his main idea was to prevent the matter coming to a hearing. Miss Jhirad's certificate was proof that the girl had arrived at the age of puberty, and the Judge himself was constrained to express his opinion that the minor and her father had told an untruth when they said that the minor had not menstruated. But the Judge felt that in these days he would not be justified in ordering a fully developed girl who was able to understand her own interest to go and live with her husband so as to enable him to exercise his marital rights against the wishes of the girl. He did not decide the question of Hindu Law whether the husband was entitled to the custody of his wife; he merely said that under Hindu Law the husband either was or was not entitled to such custody, and dismissed the petition on what he called a technical ground, by which I presume he meant his own disinclination to order a minor to go and live with her husband against her wishes. Still, after referring to the action of the minor's father in asking for an order of the Court to remove the minor out of Bombay as having been entirely *mala fide*, with which conclusion I entirely agree, he finished the judgment by saying:—"In the view I take of the law I am constrained to dismiss the petition." The matter has now come before us in appeal, seven months after the Judge dismissed the petition, though, as a matter of fact, the reasons therefor as contained in the judgment were not published till June. The girl will be fifteen in another month, and when the respondent's Counsel found that we were in favour of allowing the appeal, he suggested that we should order the minor to be examined again. We saw no necessity for adopting that suggestion. If the minor has not yet attained the age of puberty, that would easily have been proved by the evidence of those who could have kept her under observation since last April, but no application was made to us to admit further evidence.

It is admitted that in law the husband is the natural guardian of his minor wife; while the opponent is clearly bent on preventing him having the custody of his wife by every possible means.

There can be no reason whatever for rejecting the petition, for the law is that the husband is entitled to the custody of his wife unless good cause be shown to the contrary. The fact that a girl is not mature would be a ground for the Court refusing to give the custody of his wife to a husband unless her parents were dead and the Court could be convinced that no attempt to enter into conjugal relations would be made before maturity, and generally speaking it is in accordance with Hindu custom that a girl after marriage lives with her parents until she attains to puberty.

Again, if there was any evidence that would satisfy us that the petitioner would ill-treat his wife, we would reject the petition, but all that his Counsel could suggest was that it was wrong for the petitioner to obtain the custody of his wife, when he intended that she should live with him as his wife.

From the evidence on the record we consider that in the ordinary course of nature, if she does so live with him no ill-effects would be apprehended. But while allowing the appeal and appointing the petitioner guardian of the person and property of his wife, we must impress upon him that his wife is now a ward of the Court, and under our protection, so that he take heed that he gives no opportunity to his father-in-law or any one else to make allegations against him to ill-treating his wife. We express our disapprobation of the opponent's conduct by making him pay the petitioner's costs throughout. His obstinacy and mendacity are responsible for the inordinate length of the record in what should have been a very simple case.

Coyajee, J.—The facts of this case are fully set out in the judgment of the learned Trial Judge. The minor Bai Nirmalagavri was born on December, 29, 1910, and is nearly 15 years old now. The petitioner Navanitlal was married to her in May 1922. The girl admittedly lived in the petitioner's house in February and March 1923. Thereafter disputes arose between the girl's father Purshottam Hurii and the petitioner's father in reference to certain business matters. The result was that the girl having gone to her father's house in or about March 1923, he refused to send her back to the petitioner.

After a careful examination of the facts disclosed in the case the learned Judge recorded his conclusions in these terms:—

"The minor's father tried to make out that the girl had been treated badly and cruelly, that the petitioner kept bad company, had tried to assault the father and the brother of the minor and had created a row, and that he had threatened to marry again, although he knew very well that the girl was in a delicate state, had not attained puberty and was not fit to perform marital rights. The petitioner has denied all the allegations. I believe the denial of the petitioner and I wholly disbelieve all the statements of the father. I have not the slightest doubt in my mind on the facts as disclosed in the affidavits and on the answers given by the father to me, that the father, is actuated by malice against petitioner's father and that he is culpably indifferent to the interest of his minor daughter. He does not care what may happen to her in future. His sole object is to wreak his vengeance on the petitioner for the differences in business matters between the petitioner's father and himself."

These conclusions are amply warranted by the record of this case. The learned Judge, however, was of the opinion that in these days the Court would not be justified in ordering a fully developed girl who is able to understand her own interest, to go and live with her husband so as to enable the husband to exercise his marital rights against the wishes of the girl. He does point out that the consequences to the girl are very serious. He says:—

"She cannot get a divorce or dissolution of marriage. The husband is free to marry as many other wives as he chooses. In this case the petitioner has very good ground for marrying another wife, if he could get one. He has been, in my opinion, very badly treated by his father-in-law and his wife. The wife under the influence of her father refused to go and live with him as she ought to do. The wife cannot blame the petitioner if he goes and marries another wife and discards her for ever."

Then he says:—

"In the view I take of the law, I am constrained to dismiss the petition."

I regret, in the circumstances of this case, I cannot agree to that order. On the evidence adduced in this case and on the findings of the learned Judge, there are no special circumstances such as would absolve the wife from the obligation of living with her husband, and her father from the duty of surrendering her to her husband. By the Hindu Law, the father is the natural guardian of his children; he is entitled to the custody of their person, and is bound to protect their interests until they attain majority. This, however, is subject to the rule that after marriage, the custody of an infant wife belongs to her husband and not to her father.

"As a rule, in the Hindu Law, the state of women is one of perpetual tutelage. 'Their fathers,' says Manu, 'protect them in childhood; their husbands protect them in youth; their sons protect them in age: a woman is never fit for independence". Youth in this text is explained by Kulluka to mean coverture. The same rule is laid down by other sages, and adopted by authoritative commentators, such as Vijnaneswara and Sulpani. Accordingly, after marriage, a woman, whether a major or a minor, comes under the protection and guardianship of her husband." (Dr. Banerjee's Hindu Law of Marriage and Stridhana, 4th Edition, page 116). In *Kateeram Dokanee* v. *Gendhenee* (1) Markby, J., observed (page 178):—

"The marriage of an infant being under the Hindu Law a legal and complete marriage, the husband, in my opinion, has the same right as in other cases to demand that his wife shall reside in the same house as himself. I do not think that any Court can deprive the husband of this right except upon some tangible and definite grounds, which show that, under the special circumstances of the case, the wife is absolved from this duty, and her parents or guardians from the duty of surrendering her to her husband; and we cannot, in my opinion, say, without contravening the Hindu Law, that the infancy of the wife constitutes such a ground, though it might, I think, be right in the case of a very young girl to require the husband to show that she would be placed by him under the immediate care of some female member of his family."

This view was accepted in *Surjyamoni Dasi* v. *Kali Kanta Das* (2). The Guardians and Wards Act, 1890, protects the rights of husbands who, by the personal law to which the minor is subject, are entitled to guardianship (s. 19).

In the circumstances of this case it seems to me that it is both in accordance with law and for the welfare of the minor that we should make the order which is proposed by my Lord the Chief Justice.

R. L. *Appeal allowed.*

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(1) 23 W. R. 178.

(2) 28 C. 37; 5 C. W. N. 195.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 814 OF 1922.
May 27, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Macpherson.

SITA RAM SINGH—APPELLANT
versus
KHUB LAL SINGH—RESPONDENT.

Evidence Act (I of 1872), s. 32 (3)—Admission, splitting up of.

An admission against the pecuniary interests of the maker when admitted into evidence under s. 32 (3) of the Evidence Act, must be admitted in its entirety and cannot be split up into parts.

Second appeal from a decision of the Subordinate Judge, Patna, dated the 20th July 1922, confirming that of the Munsif, Patna, dated the 16th March 1921.

Mr. *Manuk* (with him Mr. *S. Dayal*), for the Appellant.

Mr. *Sultan Ahmad* (with him Mr. *S. N. Rai*), for the Respondent.

JUDGMENT.

Miller, C. J.—In my opinion the matters in dispute in this case are concluded by the findings of fact of the lower Appellate Court. The suit was brought by the reversioners of Ramautar Singh against the mortgagees under a mortgage granted by his widow Dhanwanti Kuer after his death to secure payment of a sum of Rs. 400. The mortgage hypothecated certain property which formed part of the estate of her husband. That was in the year 1905. A suit was brought during the widow's lifetime by the mortgagees on the mortgage. They succeeded in that suit and put up the property for sale in execution of the decree and themselves purchased it. The widow died in 1920 and the present suit was brought by the reversioners claiming to recover the property.

The question for determination in the suit is whether the mortgagees were entitled to a charge upon the whole estate or only upon the life-interest of the widow and that again depends upon whether the sum borrowed was borrowed by the widow for purposes of legal necessity. The allegation of the defendants is that of the Rs. 400, Rs. 226 had been borrowed in order to pay for Dhanwanti's husband's *saradh*. Rs. 174, the balance, was for the cost of litigation and maintenance. The evidence shows that although the income of the estate was about Rs. 2,000, still after her husband's death Dhanwanti Kuer, the widow, was unable to get the estate into her possession. Therefore, it seems highly probable that she was in a position in which it might be necessary to borrow the money for her expenses.

Both the Trial Court and the Subordinate Judge on appeal found that the money was borrowed by Dhanwanti Kuer for purposes of legal necessity and that she was in need of money at the time. That decision, however, has been challenged on the ground that the learned Subordinate Judge admitted in evidence a statement of Dhanwanti Kuer, who, as I have intimated, was dead at the time when the present suit was brought, made in a previous suit in the year 1908 in which she stated that she took a loan from Faujdar Singh and Sheoraj Singh to defray the expenses of the funeral rites of her husband. The learned Judge accepted that statement as admissible under s. 32, cl. (3), of the Indian Evidence Act. It has been contended that the only part of that admission which is an admission contrary to her pecuniary interest is the fact that she took the loan and not the remaining part that she took the loan for a particular purpose. I am not able to agree to this proposition. I think the whole statement must be taken in order to ascertain exactly what the nature of this loan was. There might be a difference in her pecuniary liability, certainly in the liability of the estate she at that time represented, if the loan was borrowed for necessary expenses or if the loan was borrowed for purposes which were not to be regarded as necessary expenses, and I do not see very well how you can split up the admission into two parts. The whole thing works together and each part is necessary to explain the other. This I think is the view which has been taken in dealing with cases of this sort ever since the old case of *Higham* v. *Ridgway* (1) which was decided in the year 1823. The learned Judge accepted that statement which was not necessarily conclusive and not necessarily binding upon the reversioners but which I think he was entitled to accept as a corroboration of the defendants' story that in fact the money had been borrowed by Dhanwanti Kuer for purposes of legal necessity. and the further statement of one of the defendants himself that he had made enquiries at the date when the money was borrowed and he found that it was required by Dhanwanti Kuer in order to pay for her husband's *saradh*. The learned Judge said.

"Having regard to the statement of *Musammat* Dhanwanti Kuer above alluded to, I see no reason to doubt the evidence of those witnesses that Rs. 200 was borrowed by Dhanwanti for her husband's *saradh*. It is clear from her deposition also that litigation commenced soon after her husband's death."

That is really the only criticism which has been made of this judgment and it does not seem to me that the criticism is a sound one. The matter is concluded by the findings of fact and I do not think that the learned Judge took into consideration any evidence which he was not legally entitled to consider. The appeal will be dismissed with costs.

Macpherson, J.—I agree.

R. L. *Appeal dismissed.*

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(1) (1823) 2 Sm. L. C. 348.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 93 OF 1925.
December 3, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.
PURSHOTTAM HURJIVAN
—OPPONENT—APPELLANT
versus
NAVANITLAL HURGOVANDAS—
PETITIONER—RESPONDENT.

Contempt of Court—Chamber matters, publication of—Bombay High Court, practice of—Matters relating to wards and lunatics—Publication.

The practice of the Bombay High Court has been that in all Chamber matters no report of the proceedings or of the judgments delivered are allowed to be published by the Press without the leave of the Court. [p. 19, col. 2.]

In regard to matters relating to wards and lunatics and matters in which the publication of certain facts would cause injury to the individuals this rule of practice is absolute and its breach constitutes contempt of Court. [*ibid.*]

JUDGMENT.

Taraporewala, J.—(*April 17, 1925*).—The first question that arises on this notice of motion is whether the respondents were not entitled to publish a report of the said proceedings. If they were, and if the report was unfair and one-sided and caused any party prejudice, it would not be a matter for the Court to deal with as contempt of Court but it would then be a matter for the party aggrieved by the wrong reporting to take such action as he might be advised for the wrong or injury done to him. If, however, the respondents were not entitled to publish the proceedings at all, it did not matter whether it was a faithful report or a misleading report of the proceeding. They would be guilty of contempt of Court in publishing the said proceedings at all. There is no doubt that if the report besides being of matter forbidden was also a report which misrepresented the proceedings, the contempt would be more serious.

Mr. Jayakar, who appeared for the 1st and 2nd respondents, contended, on the authority of *Scott* v. *Scott* (1), that all proceedings in Court and even in Chambers were public and that any member of the public was entitled to publish the proceedings during their pendency, excepting where the matter had been heard in camera under an express order of the Court validly made on certain well-recognized principles; and that even where an order was rightly passed for hearing a matter in camera, the said order had effect only during the pendency of the proceedings; and that, immediately the proceedings terminated, any member of the public was free to publish the proceedings and the result thereof; and that to restrain the perpetual publication of the proceedings to the public, a special order of the Court, expressly forbidding such publication in perpetuity, was required; and that the jurisdiction of the Court to pass such an order was limited to a very few cases as laid down in *Scott* v. *Scott* (1). I do not think it would serve any good purpose for me to discuss the principles which are laid down by the House of Lords in *Scott* v. *Scott* (1), as justifying the Court in passing an order (1) to hear the matter in camera, and (2) that the matter heard in camera shall not be published in perpetuity.

I have only to consider how far and in what manner the ratio of the judgments applies to the facts of the present notice of motion. It is quite clear from the judgments that, leaving aside the question of matters heard in Chamber at large, each and every one of the Lords holds that there are two exceptions to the general rule that all cases and matters heard in Court are open to the public. The two exceptions referred to are cases relating to wards and to lunatics. Lord Halsbury says that they are not really exceptions, because in the very nature of the matter they do not form part of the public administration of justice.

Mr. Jayakar, however, contended that even matters relating to wards and lunatics cannot be said to have been heard in camera unless an order to that effect was made, and that, if the Court further intended to forbid publication of the proceedings in such a matter in perpetuity, an express order to that effect was necessary, and that the only difference between the cases of wards and lunatics and the other cases was, that in these two matters the said orders could be made by the Judge more freely and that in other matters the order could only be made in exceptional cases on certain well-recognised principles. I do not agree with Mr. Jayakar. In my opinion, these two matters are treated as something quite apart from all other matters which are heard in a Court of Law on the ground that they are by their very nature private. Therefore, no order for hearing them in camera or a further order forbidding publication of the proceedings therein in perpetuity is necessary. If any person wishes to publish the said proceedings, he has to obtain the leave of the Court before doing so and in exceptional cases the Court may grant such leave. If any such matter is in fact heard in public, it might be open to argument that the Judge hearing the same and the parties thereto by allowing it to be heard in public all tacitly agreed that the matter was not to be treated as private, and in such a case, of course, there could be no prohibition of the publication of the matter, because from its very hearing, privacy or secrecy was not observed. But where a matter relating to a ward or a lunatic is heard in fact in camera, no person can be heard to say that, as no express order for hearing it in camera or forbidding the publication of the proceedings in perpetuity is made, he is entitled to publish the proceedings, either during the pendency thereof or after its termination.

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(1) (1913) A. C. 417; 82 L. J. P. 74; 109 L. T. 1; 57 S. J. 498; 29 T. L. R. 520.

Mr. Jayakar further contended that even if the matter relating to wards was treated in the manner I have indicated, this was not strictly a matter relating to a ward because the minor whose custody was asked for by the petition was not then a ward of the Court. At first I was impressed by that view, but on going through the judgments in *Scott* v. *Scott* (1) carefully, and more particularly the portion relating to cases of wards and lunatics, there is no doubt in my mind that the various Lords meant, by the use of the words "matters relating to wards of Court or wards," matters in which the interests of a minor whether a ward of the Court or not were sought to be protected by an order of the Court. The matters relating to wards and lunatics are treated as private matters not because they relate to persons who have been declared wards of the Court or to persons who have been adjudicated lunatics by the Court, but because the matters relating to these two classes of cases are in their very nature domestic matters; they relate to the domestic affairs of the family, and whether the petition is rejected or an order is made making a minor a ward of the Court and appointing a guardian or declaring a natural guardian of the minor, the Court in exercising its jurisdiction therein hears a matter which is of a purely domestic nature, and therefore, necessarily not concerning the public.

I hold that this proceeding comes within one of the exceptions laid down by the House of Lords in *Scott* v. *Scott* (1). I need not, therefore, go into the further question whether a Chamber matter which does not relate to one of these exceptions is private and not open to publication either during the pendency of the matter or after its termination. When the question arises, it may be decided, although I must state here that it has been the impression of the Bar and also of litigant public in Bombay up to now that all Chamber matters are private and not open to publication without the special leave of the Chamber Judge. In my own experience as Chamber Judge, such leave was asked for by the reporters of the newspapers in two Chamber matters, one relating to a charity, and another relating to the disputes between a Goswami Maharaj and the widow of a Goswami Maharaj. In the first case I gave leave for publication of the matter as it affected the public. In the second matter, I declined to do so, as it was a dispute between two private parties and the Chamber matter before me had got nothing to do with the public.

Although Chamber matters are heard by the Chamber Judge sitting in the Court room, and when one contested Chamber matter is being argued, there is no prohibition to members of the public to be in Court and hear it, it has been always understood in this Court at least that the matter is heard in private, and that for the sake of convenience the Judge sits in the Court room and hears the matter and does not prohibit the other parties, who are interested in other Chamber matters on Board that day, from being present in Court.

Mr. Jayakar has drawn my attention to the remarks of Lord Justice Fletcher Moulton in his judgment as a member of the Appeal Court in *Scott* v. *Scott* (2), as to publication of Chamber matters. The learned Lord Justice observes (page 271*): "Many thousands of summonses in actions are heard in Chambers in the course of each year, and during all my experience at the Bar and on the Bench I have never heard it suggested that there is the slightest obligation of secrecy as to what passes in Chambers. Everything which there transpires is and always has been spoken of with precisely the same freedom as that which passes in Court." I am not prepared to discuss the question or to give my opinion on this point as it is not necessary for me to do so in this matter. The remarks of Lord Justice Fletcher Moulton may be perfectly true so far as the English Courts are concerned, but, as I have stated before, they are not true in fact as regards this Court, and so far as the experience of Counsel, who have been much longer than myself at the Bar, goes, it has never been contended in this Court that Chamber matters could be published without the leave of the Court. On the contrary, as I have stated, the impression that has always been acted upon in this Court is that Chamber matters are absolutely private whatever may be their nature and that they cannot be published at any time without the leave of the Court. At the same time I must point out that, in my opinion, the said principle cannot be rightly applied to originating summonses which are really in the nature of suits and are heard in Chamber with a view to minimise the costs.

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(2) (1912) P. 241; 81 L. J. P. 113; 107 L. T. 211; 56 S. J. 666; 28 T. L. R. 526.

*Page of (1912) 2 P.—[*Ed.*]

On my above view of the matter, I must hold that the respondents have committed a contempt of Court in publishing the said article purporting to be a report of the proceedings in a matter relating to a ward and heard by me in camera.

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Now the 1st respondent is the Editor of *The Sanj Vartaman* and in his affidavit he has tried to defend his action by saying that he received the article in question from the 2nd respondent, believed that the same was correct and published it *bona fide.* He does not say that any reporter on the staff of his paper was anxious to get the result and to have it published. No affidavit is made by *Bania* supporting the statement of Purshottam Harji. If that statement was true, I am sure Purshottam Harji, who has got so many affidavits made in these proceedings as well as in the petition under the Guardians and Wards Act, would surely have got *Bania* to make an affidavit supporting him. Purshottam Harji has got two affidavits made by two persons of his community to the effect that the petitioner told them, after the order was passed by the Court, that the Court had dissolved the marriage and that he was free to marry again, and that they expressed surprise as to how the marriage of a *Bania* could be dissolved by the Court. Both these affidavits, to my mind, contain nothing but a tissue of falsehoods. No man in his senses would say that a marriage of a Bania was dissolved by a Court of Law, and if the petitioner said that, he would know very well that no one would believe him. What can be the object of the petitioner in making such a false statement? On the other hand, he could very well say to the members of his community, because I openly said so in Court, that my sympathies were entirely with him; and that, in my opinion, his whole conduct and attitude in the matter were completely honest and *bona fide.* He had, therefore, no occasion to make out a false case before the members of his caste. Purshottam Harji has got these affidavits made with a view to support his action in publishing the report of the proceedings as something which the community wanted to know with a view to refute the false statements which were being made as to the result of the proceedings by the petitioner. These statements, to my mind, are made merely with a view to find out some excuse for the publication of the article which Purshottam Harji must have known would be contempt of Court.

The contempt of Court becomes the more serious in view of my holding that Purshottam Harji was present in Court, and knew very well that I had refused leave to publish the proceedings and that, notwithstanding that order, he defiantly published a report of the proceedings.

Coming to the article, it purports not only to be a report of the proceedings, but a comment on them. The report is grossly misleading. A person who did not know anything of the proceedings, on reading the report, would come to the conclusion that the petitioner, the husband, was entirely in the wrong, had tried forcibly to take custody of the wife, who had not attained puberty and was not in good health, and that an eminent lady Doctor had certified to that effect, and notwithstanding that certificate the Court went out of its way and appointed another lady Doctor, thus criticizing the action of the Court, and implying that the Court did it with a view to assist the husband notwithstanding his wrongful attitude, that the report of the lady Doctor appointed by the Court also did not enable the Court to make an order favourable to the husband, and that thereupon the petition was dismissed. A more misleading report of the proceedings could not have been written and published.

Mr. Jayakar tried to argue that no evidence was referred to in the report but merely the result was published. The examination by the lady Doctor appointed by the Court, which is referred to, is certainly not a part of the result. The result was merely the dismissal of the petition. The certificate of the other lady Doctor referred to was not part of the result. But Mr. Jayakar argued that certificate of the other lady Doctor referred to was not the certificate on which Purshottam Harji relied for opposing the petition. As I pointed out to Mr. Jayakar, it was merely a quibble. No doubt, two or three certificates of the lady Doctor were produced before the Court. The object of Purshottam Harji, in referring to the certificate of the lady Doctor, appears quite clearly from the article. It was with a view to show that in face of the said certificate the petition ought to have been summarily rejected. The wording of the reference to the certificate, according to Mr. Jayakar, showed that it was a certificate which was produced before me for an order directing Purshottam Harji to take the minor out of Bombay for the sake of her health. No doubt, that certificate referred to the minor requiring one year's rest out of Bombay. Even if it was used for the purpose of taking the minor out of Bombay, it was used in these proceedings, because on the adjournment of the matter I expressly ordered that the minor was not to be taken out of the jurisdiction of the Court and the certificate put in to enable the father to take the minor out of Court was thus part of the proceedings. The object for which the certificate was referred to is, however, clear as stated by me before. Further, it was not as if Purshottam Harji did not know the opinion of the Court on the facts. I told him clearly in my final examination of him, and I also stated expressly to both Counsel and Solicitor, in the presence of Purshottam Harji, that I did not believe a single word of his statement as to the bad health of the minor and consequent unfitness to live with the husband, that I held that he was acting maliciously and vindictively without slightest regard to the interest of the minor, and that he was responsible for the unhappiness which the minor might suffer as a consequence of the minor not going to her husband. Notwithstanding that he purported to give in that article a report of the proceedings showing that his action was absolutely above reproach in the matter and the husband's action was quite wrongful, and, therefore, the Court dismissed the husband's petition.

Then there appeared comments on the proceedings, and those comments clearly show the object of the publication of that article. I have expressly stated that my reason for making the order and not postponing the matter was to leave the petitioner free either to appeal from my order or to marry another wife as he thought best in the matter. Purshottam Harji must have got frightened that the petitioner might be able to marry another girl. I have no doubt in my mind that it was not out of regard to the interest of his daughter that he wanted and wants to prevent the petitioner from marrying another wife, but merely with a view to make the petitioner suffer by reason of not having the society and the help of his wife as he was entitled to. By the comments in the article, he appeals to the members of his caste to consider whether a man who has been so wrongful in his conduct like the petitioner, should be allowed to marry again by the community. The whole attempt on the part of Purshottam Harji was to further his own ideas of revenge on the petitioner.

I am of opinin, on these facts, that Purshottam Harji committed not only contempt of Court, but a very gross contempt of Court. It is open to the petitioner Navanitlal Hargovandas to take any steps he likes so far as his own interests are concerned and so far as they are harmed or prejudiced by the publication of the said article. But that does not affect the jurisdiction of this Court to punish Purshottam Harji for the contempt of Court he has committed. That is a matter between him and the Court, which any action taken by Navanitlal Hargovandas cannot affect.

I order Purshottam Harji to pay a fine of Rs. 300 and all the costs of the applicant, Navanitlal Hargovandas, as between attorney and client of this application.

As regards the first respondent, the Editor of the *Sanj Vartaman*, he has already expressed his regret for the publication of the proceedings. Mr. Jinnah has frankly stated that he is not in a position to show that the first respondent acted *mala fide* in publishing the article. He contends that he acted recklessly and negligently and even though his action may be *bona fide*, all the same he has committed contempt of Court. I agree with Mr. Jinnah and hold that he has committed contempt of Court. The Editors of newspapers ought to be more careful in publishing matter in this way and should not be allowed to escape the consequences of their acts on a mere expression of regret. I, therefore, order the first respondent to pay the costs of the applicant between party and party.

As regards the third respondent, he is a boy of seventeen. He is in the service of the second respondent, and wrote the article under the dictation of the second respondent. Considering his tender age and the influence that the second respondent was able to exert on him, I merely warn him against committing a similar act in future. I do not pass any order against him.

Mr. *Jayakar*, for the Appellant.

Mr. *Kanga*, Advocate-General, for the Respondent.

JUDGMENT.—This is an appeal from a decision of Taraporewala, J., on a notice of motion taken out by the petitioner in the course of the proceedings he had instituted under the Guardians and Wards Act for his appointment as guardian of the person and property of his minor wife.

On April 17, the Judge announced that he would dismiss the petition, but would deliver his judgment giving his reasons, therefor after the vacation.

On April 21, an article was published in the *Sanj Vartaman* headed: "Sensational case in the *Bania* community in Bombay."

It is admitted that Purshottam Hirji had got the article written out by his clerk, and had sent the clerk with it to the *Sanj Vartaman* for publication. Thereupon the petitioner gave notice to the Editor of the *Sanj Vartaman,* Purshottam Harji, and M. N. Mehta, the clerk, that the Court would be moved for an order committing them for contempt of Court.

The matter came on before Taraporewala, J., on June 18. A number of affidavits were filed in the case most of them absolutely unnecessary, and lengthy arguments were addressed to the Judge, which have been considered by him in a most exhaustive and painstaking manner; but the matter lies in a nutshell.

Whether the petition had been heard in Chambers or in Court, there can be no doubt whatever that the publication of the article, considering its contents, before judgment was delivered, constituted a contempt of Court.

However in this case, the proceedings were held in the Judge's Chambers throughout, and the question whether a newspaper can publish a report of proceedings instituted according to the rules in Chambers, but heard, as a matter of fact, in a Court room, does not arise. But the practice always has been in this Court that in all Chamber matters no reports of the proceedings or of judgments delivered are allowed to be published by the Press without the leave of the Judge. This is a very salutary practice, and, as far as I know, it has been recognised by the Press. Whether a failure to observe it in an ordinary Chamber summons issued in the course of a suit, would justify the Court in treating it as a contempt, it is not necessary to decide, but certainly with regard to matters relating to wards and lunatics and matters in which the publication of certain facts would cause injury to individuals the rule of practice is absolute. In other matters no Judge would be likely to refuse permission without very good reason, nor, on the other hand, is it likely that a newspaper Editor would wish to act counter to a practice which has now been authoritatively notified as existing.

The order made by the learned Judge imposing a fine of Rs. 300 on Purshottam Harji and directing him to pay the applicant's costs as between attorney and client was, in the circumstances of the case, a lenient one. The appeal is dimissed with costs.

R. L. *Appeal dismissed.*

PATNA HIGH COURT.

[CUTTACK CIRCUIT.]

SECOND CIVIL APPEAL No. 26 OF 1924

July 29, 1924.

Present :—Mr. Justice Ross.

KRISHNA CHANDRA GAUNTIA—
DEFENDANT—APPELLANT
versus
RAJA MAHAKUR—PLAINTIFF—
RESPONDENT.

Court Fees Act (VII of 1870), s 7 (v) and (xi) (e)—*Suit for possession by occupancy tenant*—*Valuation of suit.*

A suit for possession by an occupancy tenant against his landlord on the basis of illegal ejectment falls under s. 7 (*xi*) (*e*), Court Fees Act, only when there is no question of title to be gone into. But when a question of title is involved the case would fall under s. 7 (*v*) of the Act and the Court-fee payable would be on the market value.

[Case-law referred to.]

ORDER OF THE TAXING-OFFICER.—This is a Court-fee matter, arising out of a suit instituted by the respondent for declaration of title as an occupancy *raiyat* to and recovery of possession of 9·31 acres of *gounti raiyati* land. According to the plaint, the appellant had first settled the disputed land with the plaintiff-respondent on an annual rental of four *purugs* of paddy; and had later on agreed to settle the land with the plaintiff in perpetuity for a *nazarana* or *salami* of Rs. 300; but had afterwards dispossessed him and succeeded against him in a proceeding under s. 145 of the Cr. P. C. For the purposes of the Court-fee and the jurisdiction, the suit was valued under s. 7 (*v*) (*b*) of the Court Fees Act at five times the annual rental of Rs. 3 (which was taken to be the equivalent of the four *purugs* of paddy). The first Court decreed the suit and the defendant appeals to this Court, after an unsuccessful appeal to the lower Appellate Court, and has, on both occasions, valued the appeal in the same manner as the respondent valued the suit.

The Assistant Registrar as Stamp Reporter would treat the suit as one, not under s. 7 (*v*) (*b*), but under s. 7 (*iv*) (*c*), of the Court Fees Act, and would assess the Court-fee in each Court on Rs. 300, taking this amount as a minimum for the market-value of the disputed land since the plaintiff had set up a settlement on a *salami* of that amount. If this be correct, there would be a deficit of Rs. 26-6-0 in the Court-fee on the plaint and, if that should bind the appellant, also on each of his two appeals.

It has, however, been urged on behalf of the appellant that s. 7 (*iv*) (*c*) cannot apply as against him, because the decree of the first Court, which is all that he is interested in getting upset, shows that no declaration was treated as sought and none was given either [*Kesavarapu Ramakrishna Reddi* v. *Kotta Kota Reddi* (1) and *Haidari Begam* v. *Gulzar Bano* (2).] I am inclined to accept this contention as sound.

It has been further urged that the suit being one between landlord and tenant for recovery of possession of land from which the tenant-plaintiff had been dispossessed, s. 7 (*xi*) (*e*) of the Court Fees Act should be held to apply and the matter valued according to the rent of the preceding year, namely, four *purugs* of paddy. But s. 7 (*xi*) (*e*) speaks of a tenant being "illegally ejected," and these words have been held to differ in scope from the word "dispossessed," in *Sundar Mal Marwari* v. *Murray* (3). This interpretation was, however, not followed in *Jumla Singh* v. *Kingsley* (4), but this latter ruling does not bear on the Court Fees Act. I am thus inclined to think that the appeal must be valued not under s. 7 (*xi*) (*e*), but under s. 7 (*v*) of the Act.

The learned Vakil for the appellant has not been able to show me that if s. 7 (*v*) be held to apply, the matter comes within cl. (*a*) or (*b*) or (*c*) of s. 7 (*v*). The valuation must, therefore, be based on "the value of the subject-matter" or "the market-value of the land." In order to avoid delay and cost of an enquiry on this point the learned Vakil has agreed that Rs. 300 might, in the circumstances, be taken as the value of the subject-matter of the appeal. He has, however, asked me to refer to the Taxing-Judge, the question whether this matter is not governed by s. 7 (*xi*) (*e*) as a question of general importance, especially, in view of the facts that *Sundar Mal Marwari* v. *Murray* (3) was not followed in *Jumla Singh* v. *Kingsley* (4) and there is no ruling of the Patna High Court on the point.

Even if s. 7 (*xi*) (*e*) be held to apply, the taking of four *purugs* (1 *purug*=7 maunds) as equal to Rs. 3 only is manifestly wrong, and the learned Vakil has—again to avoid delay and cost—agreed that the annual rent may be taken to be worth Rs. 50.

Under the provisions of s. 5 of the Court Fees Act I direct that the matter be placed before the Taxing-Judge for final decision. The points arising are:—

(*i*) Whether the suit falls under sub-s. (*iv*) (*c*) or (*v*) or (*xi*) (*e*) of s. 7 of the Court Fees Act; and

(*ii*) Whether the appeal should be valued under sub-s. (*iv*) (*c*), (*v*) or (*xi*) (*e*) of s. 7 of the Court Fees Act.

JUDGMENT.

ROSS, J.—No one appears in this case. The cases referred to on the question, whether the case falls within s. 7 (*xi*) (*e*) of the Court Fees Act or not, are not of much assistance. The decision in *Sundar Mal Marwari* v. *Murray* (3) really proceeded on another ground, namely, that the suit was not one between landlord and tenant only, but also between the tenant and other persons who claimed to have acquired an interest from the landlord. The construction of two words "illegally ejected" suggested in that decision is *obiter* and does not appear to be a final decision. On the other hand, in *Jumla Singh* v. *Kingsley* (4) there is a decision that illegal ejectment is included in dispossession but that was not a decision on the Court Fees Act. The decisions in *Balasidhantam* v. *Perumal Chetti* (5) and *Promotho Nath Ganguly* v. *Amiraddi Sheikh* (6) indicate that in a suit under s. 7 (*xi*) (*e*), of the Court Fees Act, the Court will not try a question of title. The present suit is one for possession of land after determination of the question of title and the title was gone into. The case, in my opinion, falls within s. 7 (*v*) of the Act and the Court-fee is payable on the market-value of the land, *i. e.*, Rs. 300.

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(1) 30 M. 96; 1 M. L. T. 311; 16 M. L. J. 458.

(2) 25 Ind. Cas. 395; 36 A. 322; 12 A. L. J. 485.

(3) 16 Ind. Cas. 963; 16 C. L. J. 375.

(4) 21 Ind. Cas. 224; 17 C. W. N. 1201.

R. L. *Order accordingly.*

(5) 27 Ind. Cas. 162; 27 M. L. J. 475; 1 L. W. 641.
(6) 55 Ind. Cas. 178; 24 C. W. N. 151.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2775 OF 1925.
February 23, 1926.
Present:—Mr. Justice Campbell.
FIRM AMAR SINGH-DHOOMI MAL—
PLAINTIFFS-APPELLANTS
versus
FIRM JAI DIAL KAPUR AND SONS—
DEFENDANTS—RESPONDENTS.

Witnesses—Witnesses in attendance—Court's duty to examine.

A Court is not justified in refusing to examine a witness who is present in Court and for whose examination no adjournment is asked for.

Second appeal from a decree of the District Judge, Delhi, dated the 31st August 1925, affirming that of the Subordinate Judge, Third Class, Delhi, dated the 30th January 1925.

Mr. *Shamair Chand*, for the Appellants.

Lala *Chandar Gupt*, for Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The learned District Judge has described in his judgment what happened in regard to the attempt of the plaintiff to prove his accounts, and the learned District Judge has held that the Trial Court was fully justified in refusing to allow the plaintiffs to be examined and in closing their case. I cannot agree with this conclusion. No adjournment for the purpose of examining the plaintiffs was asked for. The plaintiffs were present in Court and nevertheless were prevented from entering the witness-box. The Trial Court was not entitled to prevent them. The witnesses should have been examined and the value of the evidence given at the stage at which it was given could have been appreciated at the time of final judgment.

I accept the appeal, set aside the order of the lower Appellate Court and return the case to him for a fresh decision. The learned District Judge should cause the evidence, which was excluded, to be taken by himself or by the Trial Court and then should come to a fresh decision on the appeal. Costs will follow the event. Since the lower Appellate Court has disposed of the appeal on a preliminary point and its decree is reversed, the stamp on appeal in this Court will be refunded.

R. L. *Appeal accepted.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 86 OF 1925.
November 30, 1925.
Present:—Sir Norman Macleod, KT.,
Chief Justice, and Mr. Justice Coyajee.
FRAMROZ EDULJEE DINSHAW—
PLAINTIFF—APPELLANT
versus
MAHOMED ESSA—DEFENDANT—
RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 80—Promissory note on demand—Interest, date of accrual of.

Under s. 80 of the Negotiable Instruments Act, on a promissory note payable on demand, interest begins to run from the date of the note and not from the date of demand for payment.

Best v. *Haji Muhammad Sait*, 23 M. 18; 8 Ind. Dec. (N. S.) 407, dissented from.

Mr. *M. C. Setalvad*, for the Appellant.

JUDGMENT.—The plaintiff filed this suit to recover the sum of Rs. 40,000 with interest at six per cent. from March 27, 1922, until judgment, on a promissory note, which was worded as follows:—

> March 27, 1922.
>
> On demand we promise to pay in Bombay to Mr. F. E. Dinshaw or order the sum of forty thousand rupees for value received.
>
> Ludha Ebrahim & Co.

Suleman Abdul Wahed, who carried on business in the name of Ludha Ebrahim & Co., with three other partners, having died, the record was altered by substituting as defendants the three surviving partners, the executors of the Will of Suleman.

At the hearing the defendants did not appear.

The learned Judge passed a decree for the principal amount with interest at six per cent.. only from the date of the filing of the suit, on the ground that no demand had previously been made, following the decision in *Best* v. *Haji Muhammad Sait* (1).

The plaintiff has appealed.

Under the provisions of s. 80 of the Negotiable Instruments Act when a negotiable instrument is silent with regard to interest, interest is claimable at six per cent. from the date when the principal amount ought to have been paid. The respondents have not appeared, so we have not had the advantage of hearing any argument in support of the view taken by the learned Judge.

Now the liability on a promissory note payable on demand arises from the date of the note and not from the date on which a demand is made for payment. The period of limitation for filing a suit on such a promissory note begins to run from the date of the note, so that no demand is necessary prior to the suit to provide a foundation for its being filed. It is different when the note is payable otherwise than on demand, for in such cases the liability to pay will only arise after the maturity of the note.

We think, therefore, that under the provisions of s. 80 of the Act interest in the present case runs from the date of the note, and with due respect we cannot agree with the decision referred to above.

The decree of the lower Court must be varied by directing that interest should be allowed from March 27, 1922 instead of from June 17, 1924. The appellant is entitled to the costs of the appeal.

R. L. *Decree varied.*

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(1) 23 M. 18; 8 Ind. Dec. (N. S.) 407.

PATNA HIGH COURT.

October 20, 1925.

Present:— Justice Sir Jwala Prasad, KT.

GANGADHAR MISRA—PLAINTIFF—APPELLANT

versus

Rani DEBENDRABALA DASI—DEFENDANT—RESPONDENT.

*Court Fees Act (VII of 1870), s. 7 (iv) (c), Sch. I, Art. 1—Suit for declaration with general prayer for any other relief—*Ad interim *injunction granted—Appeal from dismissal of suit—Court-fee payable.*

A vague and indefinite prayer for "any other relief to which plaintiff may be entitled" which is customarily added in a suit, does not turn a suit for mere declaration into one for a declaration with a consequential relief within the meaning of s. 7 (*iv*) (c) of the Court Fees Act. [p. 24, col. 2.]

Where, however, in a suit for declaration an *ad interim* injunction is granted on the application of the plaintiffs and on dismissal of the suit the plaintiffs in appeal seek reliefs which they had sought in first Court, the case falls under s. 7 (*iv*) (*c*) of the Court Fees Act and the Court-fee leviable on memorandum of appeal is *ad valorem*. [p. 25, col. 1.]

Reference made by the Registrar of the Cuttack Circuit Court under the Court Fees Act.

REFERENCE BY THE TAXING OFFICER.—This Court-fee matter arises out of an appeal by the plaintiffs. The suit was brought on the footing that they were the *tankidars* of *Mauza* Pratap Ramchandrapur with its two independent off-shoots of Bakshibad and Dianbad and that as such they were entitled to realize rents from their "*khatak*" or subordinate *tankidars* the defendants numbered 4 to 187. The "*peskash jama*" (or *tanki* revenue) of the *mauzas* was to be paid to Government, not direct, but through the *zemindars*, defendants Nos. 1 and 2, who, however, according to the plaint, fraudulently got themselves recorded in the Settlement *Khewats* as having "*khas dakhli*", or direct *zemindari* rights in the *mauzas*. These *dakhali* rights were also affirmed by the Revenue Court in a suit, No. 1313 of 1917-18 brought by the *zemindars*, against the appellants and some of the subordinate *tankidars*, for the rents of Bakshibad and Dianbad. The *zemindars* also brought a similar rent suit, No. 1865 of 1923-24. regarding the parent *mauza* of Pratap Ramchandrapur. According to the plaint, this is what led to the institution of the suit; and the prayers made were :—

(*ka*) that it be declared that defendants Nos. 4 to 187 have no relationship of landlord and tenant with defendants Nos. 1 to 2 but are "*khatak*" *tankidars* under the plaintiffs and have been paying the "*tanki jama*" to them ; and

(*kha*) that a decree may be passed awarding to the plaintiffs such other reliefs as they may be entitled to.

There was also a prayer for the costs of the suit with future interest, but that will obviously not affect the category or valuation of the suit and can be left out of account.

The plaintiffs valued the suit at Rs. 11,000 for jurisdictional purposes, and they paid a Court-fee of Rs. 15 on the ground that the suit, was one for a declaration pure and simple.

They valued the appeal in the same way and paid the same Court-fee on it. The Stamp Reporter objected that this was not a pure declaratory suit, since a cloud having been cast on their title, the appeal, like the suit, sought in effect to get rid of that cloud and clear up the title and possession of the plaintiffs-appellants. On the authority of the two Patna cases [*Harnarayan Pandey* v. *Suresh Pandey* (1) and *Rachhya Raut* v. *Chando* (2)] he considered that the appellants ought to pay an *ad valorem* fee on the market-value of the *mauzas* in dispute. This view was not accepted by the appellants, and the matter was thus referred to me under s. 5 of the Court Fees Act.

The learned Vakil for the appellants has contended before me that the appeal, like the plaint, has been properly stamped for the reasons given by the learned Subordinate Judge in dealing with issues Nos. 4 and 3. He has also urged that if *ad-valorem* fees be held payable, the valuation should be made, on the lines of s. 5 (*v*) of the Act, at ten-times the amount annually payable to Government for these *mauzas*, lying as they do in a temporarily-settled estate.

I desire to refer at the outset to some confusion that seems to have occurred owing to the way in which the plaint has been framed. The Stamp Reporter thought that relief was prayed for in reepect of two *mauzas* (Bakshibad and Dianbad) only; and the learned Vakil for the appellants also was unable to tell me why exactly the third and parent *mauza* (Partap Ramchandrapur) had been brought in. A careful perusal of the plaint, with particular reference to para. 18, shows that relief was prayed for in respect of all the three *mauzas*. The result is that the deficit, if any, will have to be calculated with respect to all the three *mauzas*.

Turning now to the contentions before me, the first question is whether the suit can be properly regarded as a declaratory suit within the meaning of Art. 17 (*iii*) of the Second Schedule of the Act. The learned Vakil for the appellants adopts the reason given by the learned Subordinate Judge for answering the question in the affirmative; and that reason is that, being in joint possession, the plaintiffs could not consistently have prayed for any relief but the declaration that they are entitled to realize the *tanki* rents from the subordinate *tankidars*. But *Raj Krishna Dey* v. *Bipin Behari Dey* (3) is an example of a case where a suit, brought for a declaration that the plaintiff was *sole shebait* notwithstanding an entry in the collectorate register that he was joint with the defendant, was held to be not a pure declaratory suit. It is true that in that case the plaintiff had to add a prayer for consequential relief on an objection made by the defendant under s. 42 of the Specific Relief Act; but even so, the case is a complete answer to the contention that in the present case the plaintiffs could not have asked for any but a declartory relief. Objections under s. 42 of the Specific Relief Act are, however, matters for the Court and not for the Taxing Officer, as the learned Vakil has rightly urged before me. But is it quite correct to say that the plaint in the present case did not really ask for any other relief? In the first place, there is that prayer (*kha*) for such other reliefs as the plaintiffs may be found entitled to; and it seems to me that the prayer does not cease to be a prayer for further relief merely because it is couched in general terms. Secondly, the plaint is unmistakably designed to reduce the three *mauzas* into the possession of the plaintiffs to the exclusion of the *zemindars*, and almost inevitably foreshadows an injunction in respect of the rent suit of 1923-24 brought by the *zemindars*. This view is confirmed by the fact that during the progress of the suit the plaintiffs actually moved for and obtained such an injunction, and as far as can be gathered from the order-sheet of the suit, the provisional injunction issued by the learned Subordinate Judge is in force at the present moment. In a somewhat similar case [*Deokali Koer* v. *Kedar Nath* (4)], the first two prayers, which were for declaratory reliefs, were followed by a prayer for any other relief "which the Court may find the plaintiff entitled to." The declarations sought were found to be not warranted by s. 42 of the Specific Relief Act, but before coming to the conclusion that the suit was not one "to obtain a declaratory decree where no consequential relief is prayed,"

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(1) 63 Ind. Cas. 203.

(2) 65 Ind. Cas. 294; 6 P. L. J. 662; (1922) Pat. 65; 3 P. L. T. 293; A. I. R. 1923 Pat. 113.

(3) 17 Ind. Cas. 162; 40 C. 245; 16 C. L. J. 194; 17 C. W. N. 591.

(4) 15 Ind. Cas. 427; 39 C. 704; 16 C. W. N. 838.

Jenkins, C. J., observed that "the third prayer expressly seeks relief, though it is general in its terms." In confirmation of the view, apparently, that consequential relief was prayed for in that case, his Lordship proceeded to refer to the *interim* injunction obtained by the plaintiff, and remarked that an injunction is consequential relief. Were it not for the fact that *Deokali's case* (4) can, not altogether without force, be distinguished on the ground that the declaration sought in the present case is substantially warranted by s. 42 of the Specific Relief Act, I should have considered myself bound, on the authority of that ruling, to hold that the present is not a suit within Art. 17 (*iii*) of the Second Schedule of the Court Fees Act.

Coming to the second contention on behalf of the appellants, it seems clear on the authorities that in the face of the prayer for the declaration, the present suit cannot be regarded as one for possession within s. 7 (*v*) of the Court Fees Act [*vide Harihar Prasad Singh* v. *Shyam Lal Singh* (5), *Dhakeswar Prasad Singh* v. *Jioo Choudhry* (6), *Ugra Mohan Chaudhuri* v. *Lachhmi Prasad Chaudhuri* (7), *Skama Pershad Sahi* v. *Sheoparsan Singh* (8) and *Khetra Mohan Mohapatra* v. *Ganesh Lal Pandit* (9).]

I am, therefore, inclined to hold that the present suit comes under s. 7 (*iv*) of the Court Fees Act, which provides for suits "to obtain a declaratory decree or order where consequential relief is prayed," and as the plaintiffs (with whom I am at present concerned in their capacity of appellants only) seem to be seeking relief in respect of all the three *mauzas*, they ought, in my opinion, to pay *ad valorem* fees on Rs. 11,000, their own valuation of the subject-matter of the suit and appeal. But I have not been able to find any direct authority for or against my view. There are reported decisions in which it has been laid down that we ought not to look beyond the plaint in determining Court-fees, but the contrary seems to have been done and the object and effect of plaints considered in several other reported cases. The questions that arise for decision in the present Court-fee matter are:—

(1) Whether a general prayer for relief, such as is found in (*kha*) in the present case, will suffice to convert what would otherwise be a declaratory suit into a suit within s. 7 (*iv*) (*c*) of the Court Fees Act; and

(2) Whether such a general prayer for relief, taken with the *interim* injunction subsequently obtained by the plaintiffs, will have that effect.

These questions are of general importance in my opinion, and must, therefore, be referred for decision under s. 5 of the Act.

Let the papers be, therefore, placed before the Taxing-Judge at Patna for a final decision under s. 5 of the Court-Fees Act.

JUDGMENT.—This is a Reference made by the Registrar of the Cuttack Circuit Court relating to revenue.

The plaintiffs-appellants must pay *ad valorem* Court-fee under s. 7 (*iv*) (*c*) of the Court Fees Act.

Two reliefs are sought for in the plaint—

(*ka*) that it be declared that defendants Nos. 4 to 188 have no relationship of landlord and tenant with defendants Nos. 1 and 2 but are "*khatak*" *tankidars* under the plaintiffs and have been paying the "*tanki jama*" to them;

(*kha*) any other reliefs to which the plaintiffs may be entitled may be granted to them.

The third prayer is for costs which may be ignored. The general relief contained in *kha* does not by itself subject the plaint to the liability of *ad valorem* Court-fee inasmuch as such a prayer is almost customary and being vague and indefinite is never deemed to be a substantial relief. The prayer *ka* is couched in terms that would make it declaratory but the plaintiffs have obtained an *ad interim* injunction in the lower Court which still subsists. The plaintiffs have lost the case and in appeal seek reliefs which they had sought in the first Court. The *ad interim* prayer is substantial prayer which makes the relief a consequential one bringing the case within s. 7 (*iv*) (*c*) of the Court Fees Act. In the case of *Krishna Das Laha* v. *Hari Charan Banerje* (10) the plaintiff had described the suit as one for declaration of title with consequential relief although the relief was in the nature of a declaration only. Therefore there was no dispute as to the category in which the suit fell. But the case of *Deokali Koer* v. *Kedar*

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(5) 21 Ind. Cas. 404; 40 C. 615.

(6) 46 Ind. Cas. 385; 3 P. L. J. 448.

(7) 56 Ind. Cas. 422; 5 P. L. J. 339; (1922) Pat. 6; A. I. R. 1923 Pat. 100.

(8) 41 Ind. Cas. 95: 5 P. L. J. 394; 2 P. L. W. 173.

(9) 61 Ind. Cas. 565; 6 P. L. J. 101; 2 P. L. T. 607

(10) 10 Ind. Cas. 865; 14 C. L. J. 47; 15 C. W. N. 823.

Nath (4) lends strong support to the view which I have taken. In that case there was no specific prayer in the memorandum of appeal for an *interim* injunction and there was, as in the present case, only a prayer for declaration of plaintiff's title. But in that case, as in the present, there was an *interim* injunction in the Court below on the application of the plaintiff and that was construed by Sir Lawrence Jenkins, C. J., as bringing the case within s. 7 (*iv*) (*c*).

The questions put in the reference are answered as above and the plaintiff is bound to pay *ad valorem* Court-fee.

R. L. *Answered accordingly.*

LAHORE HIGH COURT.

First Civil Appeal No. 1302 of 1921.
November 19, 1925.
Present:—Mr. Justice Zafar Ali and Mr. Justice Addison.

RANG ILAHI—Defendant—Appellant
versus
MAHBUB ILAHI and another—Plaintiffs—Respondents.

Muhammadan Law—Alienation—Mother's power to alienate infant son's property - Recovery by minor —Court's discretion to order refund of benefit—Specific Relief Act (I of 1877), s. 41.

A Muhammadan mother has no power to alienate the property of her minor son and if she does, the latter is entitled to recover possession of the property alienated. But the Court may under s. 41, Specific Relief Act, make it a condition that the minor should refund the amount by which his estate and himself were benefited. [p. 26, cols. 1 & 2.]

Imambandi v. *Mutsaddi*, 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.), *Mohori Bibee* v. *Dharmodas Ghose*, 30 C. 532; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114; 8 Sar. P. C. J. 374 (P. C.), *Dattaram* v. *Vinayak*, 28 B. 181; 5 Bom. L. R. 916 and *Limbaji Ravji Hajare* v. *Rahi Ravji Hajare*, 88 Ind. Cas. 643; 49 B. 576; 27 Bom. L. R. 621; A. I. R. 1925 Bom. 499, followed.

First appeal from the decree of the Senior Subordinate Judge, Jhang, dated the 4th February 1921.

Lala *Fakir Chand* and Mr. *J. L. Kapur*, for the Appellant.

Sheikh *Niaz Muhammad* and Mr. *Muhammad Monier*, for the Respondents.

JUDGMENT.—The property in suit consisting only of certain portions of a house devolved on the plaintiffs on the death of their father Allah Ditta in April 1905 when they were minors of tender ages. In February 1906 their mother raised Rs. 3,000 by mortgaging this property on their behalf to the defendant who is the owner of the rest of the house. The deed of mortgage executed by her was duly registered and as stated therein the term of mortgage was 60 years. The plaintiffs now sue to recover possession of the property stating that as their mother had no authority to alienate it the mortgage was void and inoperative as against them. The defendant-mortgagee pleaded that the mortgage having been made for the benefit of the minors was binding on them, that the suit was barred by time, and that in addition to the mortgage-money be was, according to the express terms of the mortgage, entitled to recover Rs, 1,100 on account of the costs of the improvements to the house made by him. The Court below came to the conclusion that the suit was within time and the mortgage was void, but that the plaintiffs were bound to pay the amount by which they were benefited. It further found that out of the mortgage-money Rs. 2,500 was paid to the creditors of plaintiffs' father who had shortly before his death executed a bond hypothecating certain house property for this amount and agreeing to pay interest thereon, that as the father died poor and left no money, the mother required Rs. 500 to bring up the plaintiffs, and that Rs. 400 was payable to the defendant on account of improvements to the house. A decree for possession of the house on condition of payment of Rs. 3,400 was accordingly passed and the parties were left to bear their own costs.

The defendant appeals to urge (1) that the suit should have been dismissed because the mother was competent by custom to make the alienation, and also because it was barred by time as one of the plaintiffs was over 21 years of age at the time of the institution of the suit, and (2) that in any case he is entitled to the full amount of the costs of the improvements. The plaintiffs have filed cross-objections against the order for payment of Rs. 3,400.

Counsel for the plaintiffs-respondents raised a preliminary objection that the appeal is not properly stamped. The value of the suit was Rs. 5,200 but the appeal is valued at Rs. 1,800 only. Counsel for the appellant states that the Trial Court having allowed him Rs. 3,400 he valued the appeal at Rs. 1,800. But the relief sought in appeal eing dismissal of the suit and not merely enhancement of the amount allowed, Court-fee was obviously payable on the value of the suit. The appellant's Counsel was, therefore, put on his option either to make good the deficiency in Court-fee or to confine his appeal to the matter for which he had paid the Court-fee. He chose the latter course and, therefore, the only question for determination as regards the appeal is whether the defendant is entitled to recover from the plaintiffs Rs. 700 more on account of the well that he has constructed in the house. This point and the cross-objections can be dealt with together.

Now, it is settled law, as is laid down by their Lordships of the Privy Council in *Imambandi* v. *Mutsaddi* (1), that a Muhammadan mother has no power to alienate the property of her minor son. This being so the mortgage in the present case was void *ab initio* and the mortgagee's position was no better than that of a trespasser. The plaintiffs are, therefore, entitled to recover possession of the property, and the question is whether, in accordance with the provisions of s. 41 of the Specific Relief Act, the relief to which they are entitled should be granted subject to the condition of their making compensation to the defendant. In *Mohori Bibee* v. *Dharmodas Ghose* (2) their Lordships of the Privy Council made the following observations with regard to this section :—"Another enactment relied upon as a reason why the mortgage-money should be returned is section 41 of the Specific Relief Act (I of 1877), which is as follows :—'Section 41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.' Section 38 provides in similar terms for a case of rescission of a contract. These sections no doubt do give a discretion to the Court, but the Court of first instance and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised." In view of the above it was held in *Dattaram* v. *Vinayak* (3) and recently in *Limbaji Ravji Hajare* v. *Rahi Ravji Hajare* (4) that "in setting aside a sale made on behalf of a minor by an unauthorised person, the Court may under s. 41 of the Specific Relief Act make it a condition that the minor should refund the amount by which his estate and himself were benefited."

We find that in the present case the minors and their estate were benefited to the extent of Rs. 3,400 and we, therefore, consider that justice requires that they should pay this amount to the mortgagee before taking possession of the mortgaged property. We agree with the Court below that the construction of the well in the house was not necessary and does not constitute an improvement, and we are of opinion that the cost of the well was rightly disallowed. The result is that we dismiss the appeal as well as the cross-objections and leave the parties to bear their own costs.

R. L. *Appeal dismissed.*

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(1) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

(2) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114; 8 Sar. P. C. J. 374 (P. C.).

(3) 28 B. 181; 5 Bom. L. R. 916.

(4) 88 Ind. Cas. 643; 49 B. 576; 27 Bom. L. R. 621; A. I. R. 1925 Bom. 499.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1407 OF 1922.

November 18, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Panton.

HIS HIGHNESS *Maharaja* BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT

versus

JAHIRUDDIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 50—Presumption of fixity of tenure—Kabuliyat *for term, effect of—Record of rights, if rebutted.*

The existence of a temporary *kabuilyat* for a term of years sufficiently rebuts the presumption raised by an entry in the Record of Rights as to the permanence of the tenure.

Ramrutno Sircar v. *Chunder Mookhee Debea*, 2 W. R. Act X Rul. 74, relied on.

Appeal against a decree of the Special Judge, Noakhali, dated the 24th March 1922, affirming that of the Assistant Settlement Officer of that District, dated the 14th February 1920.

Babus *Gobinda Chandra De Roy* and *Birendra Kumar Dass*, for Babu *Sentimoy Mazumdar*, for the Appellant.

JUDGMENT.

Greaves, J.—In this appeal the plaintiff is the appellant. The suit was brought for settlement of fair and equitable rent under s. 105 of the Bengal Tenancy Act. The defendants resisted the enhancement on the plea that their holding was a *mokarrari* holding and that they are entitled to the presumption raised by s. 50 of the Bengal Tenancy Act. The appellant contends that the defendants are not entitled to any such presumption having regard to the existence of a *kabuliyat* in respect of the land in suit dated in the year 1878. This document creates in favour of the defendants' predecessors-in-interest a lease for a term of 6 years in respect of *jote* and *basat* therein described. Both the Courts below have held that this document was merely confirmatory of an existing tenancy and, therefore, the presumption under s. 50 is not thereby displaced. We think, however, that this is not correct. As has been pointed out in the case of *Ramrutno Sircar* v. v. *Chunder Mookhee Debea* (1) where you have a temporary *kabuliyat* for a term of years the presumption of a fixed tenure from the time of the Permanent Settlement goes. The dowl-*kabuliyat* before us creates in favour of the defendants' predecessors a term of 6 years. We think, therefore, that this is inconsistent with the existence of a tenancy at a fixed rate from the time of the Permanent Settlement. It is true that the entry in the Record of Rights is in favour of the defendants for in that document the tenancy is said to be *mokarrari*. But this presumption, we think, has been rebutted by the *kabuliyat* to which we have referred. We, think, therefore, that the Courts below were wrong in holding that the *kabuliyat* of 1878 was merely a confirmatory document and being as it is for a term we think that it rebuts the presumption of the existence of a tenancy at a fixed rate from the time of the Permanent Settlement.

In the result, we set aside the decree of the Special Judge of the 24th March 1922 and send back the case to the Assistant Settlement Officer in order that a fair and equitable rent may be fixed for the holdings in suit.

As the respondents did not appear, we make no order as to costs in this appeal.

Panton, J.—I agree.

R. L. *Appeal allowed.*
Case remanded.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 17 OF 1925.
November 23, 1925
Present :—Sir Shadi Lal, KT., Chief Justice
and Mr. Justice LeRossignol.
ROSHAN—DEFENDANT—APPELLANT
versus
NIGAHIA—PLAINTIFF AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Mortgage—Suit for redemption—Mortgagee not resisting suit on ground of purchase of equity of redemption—Subsequent suit, whether barred—Defendant in possession, duty of, to resist suit.*

Where in a redemption suit the mortgagee does not resist the suit on the ground that he is a purchaser of the equity of redemption of part of the property but simply claims mortgage-money, a subsequent suit by him for possession on the ground of purchase is barred by the rule of *res judicata.*

A defendant being in possession is bound to resist a claim on all grounds that it is possible for him on his knowledge at the time to bring forward.

Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. *Katama Natchiar*, 11 M. I. A. 50; 10 W. R. P. C. 1; 2 Sar. P. C. J. 212; 20 E. R. 20, followed.

Letters Patent Appeal against the judgment of Mr. Justice Harrison, dated the 19th December 1924.

Mr. *Muhammad Tufail*, for the Appellant.

Mr. *Dev Raj Sawhney*, for the Respondents.

JUDGMENT.—Nigahia, Roshan and Jani were co-sharers in a piece of land but Jani's share was already mortgaged to Nigahia when Jani contracted to sell his equity of redemption to both Roshan and Nigahia for Rs. 700. The transaction, however, fell through and subsequently Jani sold the equity of redemption of his share to Roshan alone. Roshan then sued Nigahia and Jani for redemption and obtained a decree on payment of Rs. 300. In that suit Nigahia did not plead that one-half of Jani's share had been sold to him, but contended merely on the footing of the mortgage that over Rs. 500 were due to him. Then Nigahia brought the suit out of which the present appeal arises for possession of one-half of Jani's share on the ground that it had been sold to him.

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(1) 2 W. R. Act X Rul. 74.

The District Court and the Trial Court dismissed the suit, holding that the matter was *res judicata*, but the learned Judge of the Single Bench has held that the matter is not *res judicata*, inasmuch as "Nigahia could not have pleaded in the redemption suit that he hoped in time to assert his rights and become owner by purchase of one-half of Jani's share." From that judgment the present Letters Patent appeal has been preferred, and we consider that it must succeed.

The present suit is not a suit for specific performance of the alleged contract of sale. The facts now alleged by Nigahia are the same facts as existed at the time of the redemption suit, and what he now pleads is a completed sale. At the time of the redemption suit he was in possession of the land, and had he alleged and proved in that suit what he must prove in this suit in order to succeed, Roshan's suit for possession of one half of Jani's share would have failed. The rule laid down in *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver* v. *Katama Natchiar* (1) is that a defendant being in possession is bound to resist a claim on all grounds that it is possible for him on his knowledge at the time to bring forward. Now at the time of Roshan's suit Nigahia on his present pleas was in possession and the owner of one-half of Jani's share. He did not plead that in respect of that half share his mortgage charge had merged in a sale. On the contrary, he accepted the contest on the footing of the mortgage and claimed merely that before ouster he was entitled to Rs. 516, which included a sum representing the improvements which he alleged he had effected in the land.

For the foregoing reasons we accept the appeal and dismiss the suit with costs throughout.

R. L. *Appeal accepted.*

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(1) 11 M. I. A. 50; 10 W. R. P. C. 1; 2 Sar. P. C. J. 212; 20 E. R. 20.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1013 OF 1922.

November 3, 1925.

Present:—Mr. Justice Das and Mr. Justice Adami.

KESHO PRASAD SINGH—DEFENDANT—APPELLANT

versus

SHAMNANDAN RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Decree against dead man—Rent-decree against some dead defendants, whether wholly null—Decree as against surviving defendants, nature of—Execution sale, what passes at—Trial Court, duty of, to try all issues.

A decree against a dead person is a nullity. But the question whether the whole decree is a nullity depends on the question whether the failure on the part of the plaintiff to bring the representatives-in-interest of the deceased on the record affects his right to proceed with the suit. [p. 29, col. 1.]

A decree for rent is a nullity only against the dead defendants or their representatives as a suit for rent against some of the several joint tenants is maintainable. But such a decree cannot be executed as a decree for rent but as a simple money-decree only. Consequently at execution sale of such a decree the entire holding does not pass and the interests of the defendants dead at the institution of the suit remain unaffected. [p. 29, col. 2.]

A Trial Court should not dispose of a case on a law point only but should try all the issues that arise in the case. [p. 30, col. 1.]

Appeal against a decision of the District Judge, Shahabad, dated the 26th June 1922, confirming that of the Additional Subordinate Judge, Shahabad, dated the 2nd September 1921.

Messrs. *L. N. Singh* and *N. N. Sinha*, for the Appellant.

Messrs. *P. Dayal* and *C. S. Banerji*, for the Respondents.

JUDGMENT.

Das, J.—At some date not very relevant to this case, the Maharaja of Dumraon who is the appellant in this Court brought a rent suit against the present plaintiffs, the present defendants Nos. 4-10 and seven other persons who were dead at the date of the institution of the suit. The Maharaja was made aware of the fact that seven of the defendants were already dead and it appears that he filed a petition in the Court asking the Court not to pass any decree against the dead persons. He recovered judgment as against those tenants who are living but in the decree the names of the dead persons were included. The judgment was pronounced on the 26th April 1919. In due course the Maharaja took out execution and the holding was purchased by the present defendants Nos. 2 and 3. It is alleged by the present plaintiffs that defendants Nos. 2 and 3 are the *benamdars* of the Maharaja. The present plaintiffs applied for setting aside the sale under the provisions of O. XXI, r. 90 of the Code and that application was rejected on the 8th May 1920. On the 17th July 1920 defendants Nos. 2 and 3 took delivery of possession of the holding. On the 18th August 1920 the suit out of which this appeal arises was instituted by the plaintiffs-respondents for setting aside the decree of the 26 April 1919 on the ground of fraud. Various allegations were made in the plaint so as to raise a case of fraud from start to finish. These allegations have not been examined either by the primary Court or by the lower Appellate Court. The Courts below have decreed the suit on the ground that the decree of the 26th April 1919 obtained by the Maharaja was a nullity inasmuch as it was obtained against dead persons. It should be mentioned that the holding purchased by defendants Nos. 2 and 3 comprises an area of 14.55 acres and that the plaintiffs in this suit claim to recover 6.36 acres as their share in the holding.

It is not open to doubt that a decree against a dead person is a nullity. This was laid down in *Jungli Lal* v. *Laddu Ram Marwari* (1) but the question whether the whole decree is a nullity must depend on the question whether the failure on the part of the landlord to bring the representatives-in-interest of the deceased tenants on the record affected his right to proceed with the suit. This again must depend on the question whether the tenants who are properly sued could take the plea that the suit could not proceed until the representatives-in-interest of the deceased tenants were brought on the record. Now on this question it seems to me that only one answer is possible. Under s. 43 of the Indian Contract Act the liability of the joint promisor is joint and several and that section excludes the right of the joint contractor to be sued along with his co-contractors. It was, in my opinion, open to the landlord to bring a suit for rent against all or any of the tenants, though it may be conceded that a decree against some of the tenants cannot be executed as a rent decree and can only be executed as a money-decree. This view has been affirmed in cases far too numerous to mention. In *Annada Kumar Naskar* v. *Hari Das Halder* (2) a decree was obtained in a suit for rent against some only of the tenants. It was held that the sale did not pass the entire *jama* but that only the right, title and interest of the judgment-debtors passed. In *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (3) it was held that a suit for rent against some of several joint tenants is maintainable, as joint tenants are jointly and severally liable. In *Chandra Nath Tewari* v. *Protap Udai Nath Sahe Deo* (4) it was held that a decree obtained against some of the tenants cannot be executed as a decree for rent but that it is open to the landlord to treat the decree as a decree for money and to execute it as such. In *Joy Gobind Laha* v. *Manmatha Nath Banerji* (5) the question arose whether the whole appeal had abated because one of the tenants had died and no legal representative of the deceased had been brought on the record. It was held that the liability of the tenants being joint and several the death of one of the tenants without his legal representatives being substituted in his place did not have the effect of exonerating the other defendants from the liability. This case was followed in *Abdul Aziz* v. *Basdeo Singh* (6). I find that a similar view has been taken in this Court in *Nathuni Narayan Singh* v. *Arjun Gir* (7).

Now this being the position, it is quite clear that the entire decree obtained by the Maharaja on the 26th April 1919 cannot be regarded as a nullity. It is quite true that the holding did not pass at the execution sale which followed the decree of the 26th April 1919 and it is also true that the interests of those tenants who were dead before the institution of the suit did not pass at the sale. But the present plaintiffs were parties to the suit and their interests undoubtedly passed at the sale. In my opinion the Courts below were wrong in decreeing the claim of the plaintiffs on the ground that the decree of the 26th April 1919 was a nullity.

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(1) 50. Ind. Cas. 529; 4 P. L. J. 240; (1919) Pat. 05.

(2) 4 C. W. N. 608; 27 C. 545; 14 Ind. Dec. (N. S.) 359.

(3) 11 C. W. N. 1026.

(4) 23 Ind. Cas. 105; 18 C. W. N. 170.

(5) 30 C. 580.

(6) 17 Ind. Cas. 89; 34 A. 604; 10 A. L. J. 183.

(7) 87 Ind. Cas. 47; 6 P. L. T. 526; A. I. R. 1925 Pat. 434; 4 Pat. 187.

But the questions which were raised by the plaintiffs have not been investigated by the Courts below and I should like to point out that the course adopted by the learned Additional Subordinate Judge was wrong. It may be that he was confident that his decision on the point of law was a correct decision, but it is at least conceivable that a Superior Court may differ from him as to his decision on the point of law and, in my opinion, the learned Additional Subordinate Judge should have tried all the issues that arose in the case. This would have had the effect of not only shortening the litigation but of saving of costs to the parties.

I would allow the appeal, set aside the judgment and the decrees passed by the Courts below and remand the case to the lower Appellate Court with instructions that it should remand the case to the Court of first instance for decision of the questions of facts raised in the case. The appellant is entitled to the costs both of this Court and in the Courts below. The costs incurred in the first Court will abide the result and will be disposed of by the learned Subordinate Judge.

We are informed that one of the plaintiffs is the representative-in-interest of one of the dead persons. If that be so, his interest has not passed by the execution sale. The learned Subordinate Judge in dealing with the case will bear this in mind.

Adami, J.—I agree.

R. L. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2206 OF 1923.

August 18, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Gregory.

THE OFFICIAL TRUSTEE OF BENGAL AND AS SUCH TRUSTEE TO THE ESTATE OF THE LATE MANIK LAL SEAL—PLAINTIFF—APPELLANT

versus

ADHAR BERA AND OTHERS—DEFENDANTS RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 2, 4—Rent-decree—Death of one of tenants respondents—Non-substitution—Abatement.

If in an appeal from a rent-decree by the landlord against the heirs of a deceased tenant, one of the respondents dies and his legal representative is not brought on the record, the appeal abates only partially and can be proceeded with against the surviving respondents. [p. 31, col. 1.]

Appeal against a decree of the District Judge, Midnapore, dated the 25th June 1923, affirming that of the Munsif, Ghatal, dated the 10th April 1922.

Mr. *Gunada Charan Sen* and Babu *Santosh Kumar Bose*, for the Appellant.

Mr. *Amarendra Nath Bose* and Babu *Arun Chandra Bose*, for the Respondents.

JUDGMENT.

Cuming, J.—The facts of the case out of which this appeal has arisen are these. This suit was tried along with two other suits. The suit is one for rent brought by the landlord against six persons. These persons are the heirs of one Broja Mohan Bera, who is now dead and with whom the original settlement was made. The case of the plaintiff was that the rent of the plaint land was Rs. 103-8-2.

The case of the defendants was that the rent was Rs. 54-8-6 and that they were entitled to a remission of some Rs. 6-6-8 for Mamulchar for some of the plaint lands and that the rent of remaining plaint lands was Rs. 38-8-5. They further claimed that they were entitled to an abatement of rent as the area was less than had been stated in the plaint.

The first Court allowed the claim of the defendants with regard to an abatement for decrease in area; it did not allow the claim of Mamulchar, and gave the landlord a modified decree. Both parties appealed to the District Court; the plaintiff on the ground that the defendants were not entitled to any reduction of rent for decrease in area, and the defendants on the ground that they were entitled to Mamulchar.

During the pendency of that appeal the respondent No. 6 died and his heirs were not substituted in his place. The appeal so far as he and his heirs were concerned, therefore, abated. The District Judge then held that the appeal was in the circumstances incompetent against the other respondents in the absence of respondent No. 6 on the ground that the respondents being all heirs of Broja Mohan who was the original tenant, the liability was joint and not joint and several. He, however, decided the other points that had been urged in the appeal, in case, as he said, it might be held that he was wrong on the first point. He held that the defendants were not entitled to any reduction in the amount of rent for any decrease in the area and that the plaintiff was entitled to a decree at the rate claimed in the plaint. He further held that the defendants were not entitled to any reduction of rent on account of Mamulchar; he, therefore, dismissed the appeal and the cross-appeal. The plaintiff has appealed to this Court and has contended that in virtue of the decision of the Full Bench in Reference No. 1 of 1925 in Appeal from Appellate Decree No. 586 of 1923 [*Kailash Chandra Mitra* v. *Brojendra Kumar Ckakravarty* (1)] the learned District Judge was in error in holding that the appeal must be dismissed as against the remaining respondents.

The respondents have raised a preliminary objection that this appeal is also incompetent.

It would appear that since this appeal was filed the respondent No. 3 has died. Admittedly his heirs have not been substituted in his place, and so far as he is concerned the appeal has abated. The respondent now argues that as the liability is a joint one the appeal must fail for his absence. On this point the appellant contends that on the strength of the decision of the Full Bench to which I have already referred the liability is a several one. The respondent puts his point in this way. The respondent obtained an abatement of rent; that only the whole body of tenants could apply for an abatement of rent, and hence the appeal cannot be decreed against some of the tenants and dismissed against the others. I do not think that there is any substance in this contention. If one of the tenants can be sued for the rent, it is quite clear that he could raise alone, the plea that he was entitled to reduction of rent for decrease in area. No doubt if the appeal is dismissed as against some of the appellants and decreed against the others, the position may arise that the tenants will pay rent at different rates. That cannot be helped. In view of the Full Bench decision referred to I think that it is quite clear that this appeal can proceed in the absence of the respondent who is dead and that the appeal is not incompetent.

With regard to the appeal itself it seems to me that it is concluded by the decision of the Full Bench. The learned Counsel for the respondent frankly admits that he is not in a position to support the decree on the grounds that have been decided against him and to contest the finding of the lower Appellate Court on the grounds that have been decided against him. The result is that the appeal must be allowed and the suit of the plaintiff decreed with costs. Appellant is entitled to his costs in all the Courts.

Gregory, J.—I agree.

R. L. *Appeal allowed,*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 256.
OF 1924.
November 30, 1925.
Present:—Mr. Justice Das and
Mr. Justice Foster.
ISWARDAS MARWARI AND ANOTHER—
JUDGMENT-DEBTORS—APPELLANTS
versus
BISESWAR LAL MARWARI AND OTHERS
—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 90, 92—Limitation Act (IX of 1908), Sch. I, Art. 166—Application to set aside sale—Service of notices—Limitation—Proceedings under r. 90—Parties—Object of r. 92.

Period of limitation for an application to set aside a sale in execution of a decree is 30 days under Art. 166 of the Limitation Act but there is no time limit under that Act for serving notices upon persons affected by the order. [p. 32, col. 1.]

The sole object of O. XXI, r. 92, C. P. C., is to provide that no adverse order should be passed in the absence of the persons affected by it. Inasmuch as an application under O. XXI, r. 90 is an application in the suit itself, all the decree-holders are parties to the proceedings under the application. [p. 32, col. 2.]

Appeal against an order of the Subordinate Judge, Manbhum, dated the 16th August 1924.

Messrs. *S. C. Mazumdar* and *B. P. Varma*, for the Appellants.

Messrs. *A. B. Mukherji* and *U. N. Banerji*, for the Respondents.

JUDGMENT.

Das, J.—Biseswar Lal Marwari, Begraj Marwari and Kissen Lal Marwari obtained a decree for Rs. 33,587 as against the appellants and in execution of the decree put up to sale the property which is the subject-matter of the present application. At the auction-sale, the property was purchased by the decree-holders as also by one Salegram Marwari. The sale took place on the 23rd and 24th June 1924. On the 23rd July an application was presented on behalf of the appellants under the provision of O. XXI, r. 90 of the Code for setting aside the sale. In the cause title of that application Biseswar Marwari and Salegram Marwari appeared as the opposite party. A point was taken before the Court below that the application was not maintainable inasmuch as two of the decree-holders were not made parties to the application. The point found favour with the learned Subordinate Judge with the result that he dismissed the application without investigating the merits of the case. Hence the appeal to this Court.

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(1) 90 Ind. Cas. 211; 29 C. W. N. 1000; 42 C. L. J. 232; A. I. R. 1925 Cal. 1056.

Article 166 of the Limitation Act provides a period of 30 days for an application to set aside a sale in execution of a decree. The Article refers to the application under O. XXI, r. 90 of the Code which provides for an application to set aside a sale on the ground of material irregularity or fraud in publishing or conducting it. Rule 92 provides that no order shall be made by the Court until notice of the application has been given to all persons affected thereby. The learned Vakil appearing for the appellants contends that there is no limit of time under the Limitation Act for serving notices upon the persons affected by the order and that the learned Subordinate Judge should have acceded to his application for having notices served on the decree-holders. In my opinion the contention is right and ought to be upheld. This view has been taken both by the Bombay High Court and in our Court. In *Ganesh Bale Naik* v. *Vithal Vaman Mahalya* (1) the auction-purchaser was not made a party to the proceedings under O. XXI, r. 89 of the Code and it was contended that the application was not maintainable in the absence of the auction-purchaser. Scott, C. J., with the concurrence of Chandavarkar, J., in dealing with the point said as follows: "The first point in this appeal is a preliminary point taken by the auction-purchaser that he was a necessary party to the application of the judgment-debtor under O. XXI, r. 89, and that the application is bad as he was not made a party to it within 30 days. The contention is based upon the decision of the Allahabad High Court in *Ali Gauhar Khan* v. *Bansidhar* (2). The point, however, is now provided for by the C. P. C. of 1908, O. XXI, r. 92, which says that where in the case of an application under r. 89, the deposit required by that rule is made within 30 days from the date of sale, the Court shall make an order setting aside the sale, provided that no order shall be made unless notice of the application has been given to all persons affected thereby." A similar view was taken by this Court in *Bibi Zainab* v. *Paras Nath* (3). The decision of this Court is binding on us, and it is a decision with which I entirely agree. The learned Advocate appearing on behalf of the respondents contends that an application under O. XXI, r. 90, cannot be entertained by the Court unless all the persons affected by the application are named in the cause title. With great respect, I think that r. 92 meets the objection completely. There is no particular meaning in the contention that it is necessary to have the parties affected by the application as parties to the application. The whole object of the rule is to provide that no adverse order should be passed in the absence of the persons affected by the order and r. 92 protects all the persons who may be affected by an adverse order by providing that "no order shall be made unless notice of the application has been given to all persons affected thereby." In one sense all the decree-holders are already parties to the proceeding, for an application under O. XXI, r. 90 is an application in the suit itself and, therefore, it seems to me that they are all parties to the proceeding. The auction-purchaser is the only person who is not a party to the suit, but so far as the auction-purchaser in the present case is concerned, he was cited as an opposite party in the proceedings under O. XXI, r. 90. In my opinion the learned Subordinate Judge should have acceded to the application of the decree-holders and issued notices upon those decree-holders who were not named in the cause title as the opposite party.

I would accordingly allow the appeal, set aside the order passed by the Court below and remand the case to that Court for disposal according to law. Costs are reserved and will be dealt with by the learned Subordinate Judge.

Let the record be sent down at once.

Foster, J.—I agree.

R. L. *Appeal allowed.*

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(1) 19 Ind. Cas. 475; 37 B. 387; 15 Bom. L. R. 244.

(2) 15 A. 407; A. W. N. (1893) 173; 7 Ind. Dec. (N. S.) 981.

(3) 75 Ind. Cas. 430; 4 P. L. T. 491; 1 Pat. L. 361; 2 Pat. 800; A. I. R. 1924 Pat. 37.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 988 OF 1923.

November 20, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

RAJANI KANTA DAS GUPTA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
ABANI KANTA DAS GUPTA—PRINCIPAL DEFENDANT AND SURESH CHANDRA DAS GUPTA AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 43—Benami *transaction—Onus of proof—Fraud—Delay—Intention to delay—Ostensible owner, when entitled to retain property.*

The onus of proving that the ostensible owner is not the real owner is on the plaintiff. [p. 34, col. 2.]

If a simple *benami* is alleged in the plaint without any suggestion indicating that a fraud or an illegal act was contemplated, the defendant would have to aver and prove that the fraud or the unlawful act that was intended was carried out. [*ibid.*]

It is not fraudulent to shield some particular property from being proceeded against by creditors so long as there are other properties from which the just dues of the creditors may be realized. [p. 35, col. 1.]

An intention to delay creditors is not necessarily fraudulent or unlawful. [*ibid.*]

Mere delay caused to creditors in the realization of their dues is not of any consequence so long as there has been no deprivation of the creditors in respect of their just dues. [*ibid.*]

Fraud in respect of creditors involves an element of loss or injury of a substantial character and not merely inconvenience caused by delay in the realization of what is due. [*ibid.*]

Where nothing has been done to carry the fraud or illegal purpose into effect the disposer is entitled to have the property reconveyed. [p. 35, col. 2; p. 36, col. 1.]

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must be effected. [p. 36, col. 1.]

Overt acts done or steps taken for the purpose of effecting the fraud or the accomplishment of the illegal purpose, if comparatively insignificant or harmless, do not disentitle the disposer to relief but a partial yet substantial execution of an illegal purpose disentitles the disposer to the assistance of the Court. [*ibid.*]

If the disposer has been frustrated in his attempt to carry out his fraudulent or illegal purpose he is entitled to the relief. [*ibid.*]

Jadu Nath Poddar v. *Rup Lal Poddar*, 33 C. 967; 10 C. W. N. 650; 4 C. L. J. 22, *Petherpermal Chetty* v. *Muniandy Servai*, 35 C. 551; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98 (P. C), followed.

Appeal against a decree of the District Judge, Noakhali, dated the 27th November 1922, affirming that of the Subordinate Judge of that District, dated the 5th October 1920.

Dr. *Sarat Chandra Basak* (with him Babus *Ramesh Chandra Sen* and *Jitendra Kumar Sen Gupta*), for the Appellants.

Sir *Provash Chandra Mitter* (with him Babus *Tarakeswar Pal Choudhury* and *Jnan Chandra Roy*), for the Respondents.

JUDGMENT.

Mukerji, J.—The suit out of which this appeal arises was instituted by the plaintiff on the following allegations: Plaintiff was one of the partners in a business named Friend and Co., which ran into debts, and the creditors of the firm were about to take proceedings for realizing their dues from out of the plaintiff's properties. The plaintiff thereupon in 1892 executed a *benami kobala* in favour of the father of the defendant Abani in respect of some of his properties. Some years later, the Comilla Loan Office, one of the creditors of the partnership business, in execution of a decree obtained by them brought to sale in 1895 some of the properties covered by the *kobala*. The plaintiff thereupon satisfied their dues and got the properties sold reconveyed to himself in 1900 in the name of one Tara Kanta. The plaintiff instituted this suit against Abani and the heirs of Tara Kanta for declaration of his title to the properties, *maliki* title and title by adverse possession.

The defence of the defendants shortly stated was that the *kobala* of 1892 was not a *benami* document but represented a genuine and *bona fide* transaction and that Tara Kanta in his purchase of 1900 was *benamdar* for Abani's father and not for the plaintiff.

These pleadings raised several clear issues notably the issues framed as Nos. 7, 11 and 13. These issues raised the following questions:—Whether Abani's father was *benamdar* for the plaintiff; whether Tara Kanta was *benamdar* for the plaintiff or for Abani's father; and if Abani's father was *benamdar* for the plaintiff, is the plaintiff entitled to recover. It should be observed that Tara Kanta's heirs did not set up any title in themselves but supported the defence of Abani. A case of title by adverse possession was also set up in the plaint but in view of the allegation that the plaintiff used to receive the profits of the properties through Abani's father, such a case cannot be said to be well-founded; though if that allegation is found to have been established it would lend support to the plaintiff's case as to the *benami* nature of the transaction.

The Courts below have dismissed the plaintiff's suit. The Subordinate Judge in an elaborate judgment dealt with the facts, circumstances and probabilities of the case and arrived at the following conclusions. He was unable to believe the plaintiff and his witnesses that the *kobala* of 1892 was a *benami* transaction and he found that the plaintiff had failed to make out that he was in possession of the properties covered by the *kobala*. As regards the *kobala* of 1900 he was unable to come to a finding in plaintiff's favour and held that the plaintiff acquired no title under it. These findings were sufficient to dispose of the plaintiff's suit; but the learned-Subordinate Judge also recorded his findings on Issue No. 13, which related to the question of the maintainability of the suit. His findings on this issue were in these words:

"There is no sufficient evidence to prove that plaintiff amicably paid up all his creditors. Evidently the object of the *kobala* of 1892 was to defraud the creditors, and the plaintiff cannot recover if the fraud was carried into effect. As there is no sufficient evidence to show that his debts were paid up by the plaintiff, I cannot find that the object to defraud the creditors failed. This issue is, therefore, found against the plaintiff. I may observe that there is also no reliable evidence that the plaintiff defrauded any of his creditors."

The plaintiff appealed against the aforesaid decision. The learned District Judge, on appeal, formulated two questions which he thought called for his decision: *viz.*, (1) was the *kobala* of 1892 a *benami* document; and (2) if so, is the plaintiff prevented from recovering the property on the ground that the transaction was fraudulent and the fraud was carried out?

As regards the first of the questions set out above, the learned Judge to quote his own words in his judgment was of opinion that there were more points in favour of the plaintiff's case than were noted in the judgment under appeal and that the evidence was fairly evenly balanced between the parties. He, however, thought that in view of his decision on the second question it was not necessary for him to come to a decision on the first.

As regards the second question the learned District Judge was of opinion that the fraudulent intention pleaded by the plaintiff was the delaying of his creditors, that it is a fraudulent act to transfer one's property to delay the payment of one's debts, that the evidence to prove that the plaintiff's debts had been paid off was inadequate, and that assuming that they had been paid off, upon the plaintiff's case itself they were not paid off till 1313 or 1314, *i. e.*, about 1907, and that in the absence of any explanation from the plaintiff this delay must be attributed to the fraudulent act of the plaintiff. He was thus of opinion that fraud had been carried out and that, therefore, the plaintiff was not entitled to succeed. In this view of the matter he dismissed the plaintiff's appeal.

This mode of dealing with a first appeal on facts, apart from the erroneous view of the law which the decision purports to embody, is highly unsatisfactory. It precludes this Court, when it disagrees with the Court below on the view of the law, from dealing with the matter finally and necessitates a remand, which means considerable harrassment to the litigants.

Now as to the view of the law taken by the learned District Judge several questions arise and it is necessary to deal with them categorically in order that there may be no misapprehension as to how the case should be treated on remand, as that is the order which we feel we must make in the present case.

The first question which arises is the question of onus of proof. The learned District Judge was of opinion that when the fraudulent intention is set out in the plaint and when as in this case the alleged *benami* transaction took place more than 25 years before the suit and there has been no deed of release the onus lies heavily on the plaintiff to prove that fraud was not carried into effect. In this proposition which the learned Judge laid down for the apprisement of the evidence I am not sure that he was right. The onus of proving that the ostensible owner is not the real owner is undoubtedly on the plaintiff; and the fact that the transaction took place so long ago and that there has been no deed of release, together with the fact that the transferee was in possession casts the onus heavily on him for proof of the *benami* nature of the transaction. That, however, is a different matter altogether. If a simple *benami* is alleged in the plaint without any suggestion indicating that a fraud or an illegal act was contemplated the defendant would have to aver and prove the fraud or the unlawful act that was intended and carried out. If the plaintiff's own allegation is, that a fraud was meant to be per petrated and in the present case that statements in the plaint are capable of that interpretation he has got to establish that the fraud was not carried into effect. But when in his plaint he alleged that fraud was not carried into effect and the creditors were all paid off, and in the defendant's written statement it is asserted that the transaction was not *benami* but real though it is also disputed that the creditors have all been paid off, that onus is considerably lightened. In such a case it is not necessary that the plaintiff should be expected to call the creditors themselves or produce other direct evidence to prove that they were paid off.

As regards fraud the learned Judge's findings are that the fraudulent intention was to delay the creditors that the creditors, even if it be held that they have realized their dues, were delayed, that in the absence of any evidence to show another reason for the delay the Court must assign the delay to the fraudulent act of the appellant and hold that the fraud has been carried out. I am of opinion that in the above findings there is an error resulting from a confusion between the principle embodied in s. 53 of the Transfer of Property Act and the principle on which a Court refuses to assist a plaintiff to recover property from his *benamdar*. The two principles are essentially distinct. As regards the latter principle it should be held that it is not fraudulent to shield some particular property from being proceeded against by creditors so long as there are other properties from which the just dues of the creditors may be realized; and mere delay caused to creditors for the realization of their dues is not of any consequence so long as there has been no deprivation of the creditors in respect of their just dues. An intention to delay creditors is not necessarily fraudulent or unlawful. Fraud in respect of creditors involves an element of loss or injury of a substantial character, and not merely inconvenience caused by delay in the realization of what is due. In all such cases it is the fraudulent or unlawful purpose of which the accomplishment either wholly or in a substantial part that has to be proved. The learned Judge's findings, in my opinion, are wholly inadequate for the purpose of refusing relief to the plaintiff on this ground. It is noteworthy that in the judgment of the Trial Court there are findings indicating that the plaintiff had properties, not covered by the *kobala* of 1892, against which the creditors could have, if they had liked, proceeded, and this finding does not appear to have been assailed before the learned District Judge.

In the earlier decisions in this country a considerable divergence of judicial opinion is noticeable on the question as to the circumstances under which the Court would refuse relief to the plaintiff. These decisions have been very carefully reviewed in an elaborate judgment of Mookerjee, J., in the case of *Jadu Nath Poddar* v. *Rup Lal Poddar* (1). The learned Judge summarised the correct view of the law in these words: "Although where the intended fraud has been carried into effect, the Court will not allow the true owner to resume the individuality, which he has once cast off, in order to defraud others, yet, if he has not defrauded any one, the Court will not punish his intention by giving his estate away to another, whose retention of it is an act of gross fraud." This distinction between the effect of fraud merely intended and a fraudulent purpose carried into effect appears to have been recognized by the Legislature in s. 84 of the Indian Trusts Act II of 1882 which runs in these words:—"Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee or the effect of permitting the transferee, to retain the property might be to defeat the provisions of any law the transferee must hold the property for the benefit of the transferor." This view of the law has been affirmed by the Judicial Committee in the case of *Petherpermal Chetty* v. *Muniandy Servai* (2). Their Lordships in that case quoted with approval the opinion expressed by Mr. Mayne in his Hindu Law (7th Edition, page 595 para. 446) as to the result of the authorities on this subject of *benami* transactions. From this decision of the Judicial Committee the propositions deducible are the following:—

1. Where nothing has been done to carry the fraud or illegal purpose into effect and the fraud or illegal purpose remains only in the intention the disposer is entitled to

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(1) 33 C. 967; 10 C. W. N. 650; 4 C. L. J. 22.

(2) 35 C. 551; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98 (P. C.).

have the property reconveyed. 2. To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must be effected. 3. Overt acts done or steps taken for the purpose of effecting the fraud or the accomplishment of the illegal purpose if comparatively insignificant and harmless, do not disentitle the disposer to relief but a partial yet substantial execution of an illegal purpose or effectuation of fraud disentitles the disposer to the assistance of the Court; and 4. If the disposer has been frustrated in his attempt and the fraudulent or illegal purpose has been absolutely defeated he is entitled to relief.

So far as the *kobala* of 1892 is concerned the necessary findings of fact being arrived at, the law as enunciated above will have to be applied.

As regards the *kobala* of 1900 the learned District Judge has not considered the effect of it at all. Apparently he was of opinion that the plaintiff was not entitled to succeed on the basis of this *kobala* also on the principles which governed the *kobala* of 1892. If this was his view he was in error. The law has been summarised in Mr. Mayne's Hindu Law, 8th Edition, page 613, para. 447 in these words:—"Even before the decisions referred to in s. 445 it was held in Bengal that there was nothing to prevent a man enforcing his rights against a *benamdar* where he had made a new purchase taking the conveyance in the name of a stranger, even though he had done so for the purpose of preventing the property from being seized by creditors."

It is clear, therefore, that the effect of the *kobala* of 1900 must be separately considered.

The decree of the learned District Judge, therefore, cannot be supported. It must be and accordingly is set aside and the case remitted to his Court so that the appeal may be re-heard and disposed of in the light of the above observations.

Costs of this appeal will abide the result.

Suhrawardy, J.—I agree.

R. L. *Appeal allowed:*
Case remanded.

PATNA HIGH COURT.

CIVIL REVISION No. 328 OF 1925.
January 5, 1926.
Present:—Mr. Justice Das and
Mr. Justice Ross.
MUHAMMAD IBRAHIM AND OTHERS—
DECREE-HOLDERS—PETITIONERS
versus
CHHATTOO LAL AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 39, 41—Decree transferred for execution—Failure to execute—Circumstances attending failure to execute certified to Court passing decree—Jurisdiction, cessation of, of Executing Court.

The Court to which a decree is sent for execution ceases to have any jurisdiction to deal with the case after it has certified to the Court which passed the decree the circumstances attending the failure to execute it. [p. 37, col. 2; p. 38, col. 1.]

J. G. Bagram v. *J. P. Wise*, 1 B. L. R. F. B. 91; 10 W. R. 46; 1 Ind Dec. (N. S.) 114 (F. B.), and *Manorath Das* v. *Ambica Kanta Bose*, 1 Ind. Cas. 57; 13 C. W. N. 533; 9 C. L. J. 443, referred to.

Application for revision of an order of the Munsif, Muzafferpur, dated the 29th June 1925.

Messrs. *Khurshaid Husnain* and *Syed Ali*, for the Petitioners.

Messrs. *Rai T. N. Sahai* and *Aditya N. Lal*, for the Opposite Party.

JUDGMENT.

Das, J.—This application is directed against the order of the learned Munsif of Muzafferpur, dated the 29th June 1925. The circumstances are these: On the 18th May 1925 the petitioners obtained a decree for Rs. 144-5-9 against Chhattoo Lal in the Court of Small Causes in Calcutta. On the application of the petitioners, the Small Cause Court, Calcutta, sent the decree for execution to the Muzafferpur Court under the provisions of s. 39 of the C. P. C. The petitioners applied for execution in accordance with law; but ultimately on the 21st May 1924 his execution case was dismissed for default and the learned Munsif in seisin of the matter certified to the Calcutta Small Cause Court the circumstances attending the failure to execute the decree. The order of the learned Munsif is not before us but we must presume that he acted under s. 41 of the C. P. C. Thereafter certain properties belonging to the judgment-debtors were sold at the instance of Mohan Prosad Sahu who had obtained a decree as against the judgment-debtors and there being assets of the judgment-debtors in the hands of the Muzafferpur Court the petitioners applied on the

20th April 1925 for attachment of the surplus sale-proceeds which amounted to Rs. 3,436-15-3. On the 27th April 1925 Rs. 1,432-15-9 out of the surplus sale-proceeds in the hands of the Muzafferpur Court was attached at the instance of the petitioners, the Court at the same time directing that the petitioners should obtain another order from the Calcutta Small Cause Court transferring the decree for execution to that Court. The order of the Calcutta Small Cause Court transferring the decree for execution to the Muzafferpur Court was received on the 30th April 1925. Thereafter other decree-holders who had obtained decrees as against the judgment-debtors came in and the surplus sale-proceeds were attached at the instance first of Mohan Prosad, then of Bihari Lal and lastly of Sham Narain Singh. On the 24th June 1925 the petitioners applied for liberty to withdraw Rs. 1,432-15-9 out of the surplus sale-proceeds. They contended that their attachment was first in order of time and that they were entitled to withdraw the sum attached without reference to the rights of the other attaching creditors. Similar applications were presented on behalf of the other attaching creditors and they applied for rateable distribution of the assets. The learned Munsif took the view that s. 73 of the C. P. C., did not apply to the facts of the case and that the distribution of the assets could only be made in order of respective attachments. That being the position, the petitioners contended that their attachment being first in point of time they were clearly entitled to withdraw the sum of Rs. 1,432-15-9 from the Court. In dealing with that application the learned Munsif came to the conclusion that the attachment at the instance of the petitioners was wholly irregular inasmuch as the Muzafferpur Court was no longer in seisin of the execution case and it is the propriety of this order which is the subject-matter of the application before us.

I am of opinion that the view taken by the learned Munsif is correct and that this application must be dismissed. I entirely agree that the Court executing a decree sent to it has the same powers in executing such decree as if it had been passed by itself; but the point is whether on the 27th April 1925 the date of the order of attachment of Rs. 1,432-15-9 the Muzafferpur Court had any jurisdiction over the matter. It will be remembered that on the 21st May the Muzafferpur Court had not only dismissed the execution case for a default but acted under the provision of s. 41 of the C. P. C. Various cases have been cited before us by Mr. Khursaid Husnain but those cases decide that the mere striking off of an application for execution does not terminate the jurisdiction of the Court to which the decree is sent for execution to execute the decree; but at the same time those cases recognize that the jurisdiction ceases as soon as the Court takes action under s. 41 of the C. P. C. and certifies to the Court which passed the decree the circumstances attending the failure on the part of the transferee Court to execute the decree. In the Full Bench case of *J. G. Bagram* v. *J. P. Wise* (1) the question was whether or not a Court to which a decree passed by another Court has been transmitted under the provision of s. 286 of Act VIII of 1859 was competent of its own authority to entertain a fresh application for execution after the first application had been struck off by itself for default. It will be noticed that in the Code of 1859 there was no provision similar to the one contained in s. 223 of the Code of 1882 or s. 41 of the present Code. In dealing with this point Mr. Justice Mitter said as follows:—"It will be further observed that the law does not contain any express provision as to how and when the execution records are to be re-transmitted to the Court by which the decree was passed. I do not mean to say that such a thing cannot be done at all, but all that I mean to say is that it can be done only when an order to that effect has been received from the said Court, or from some other Court exercising appellate jurisdiction over the matter." It was clearly recognised by Mr. Justice Mitter in the Full Bench case to which I have referred that the jurisdiction to execute a decree by a Court to which the decree is sent for execution ceases when an order is passed by that Court to the effect that it is unable to execute the decree. In delivering the judgment of the Full Bench, Peacock, C. J., said as follows:—"The order for striking off the application for execution of the decree did not strike the copy of the decree off the records of the Court to which it was sent for execution; and as long as it remains there, the Court to which it was sent may deal with it, and any application for execution of it as if it was a judgment of that Court." But in this case the decree was no longer in the record of the Muzafferpur Court on the 27th April 1925. This was the view which I think was taken by Mookerjee, J., in *Manorath Das* v. *Ambica Kanta Bose* (2). That learned Judge said that the Court to which a decree is transferred for execution retains its jurisdiction to execute the decree until the execution had been withdrawn from it or until it had fully executed the decree and had certified the fact to the Court which sent the decree, or had executed it so far as that Court was able to do within its jurisdiction and certified that fact to the Court which sent the decree. In my opinion s. 41 of the Code makes it quite clear that the Court to which a decree is sent for execution has no jurisdiction to deal with the execution case after it takes action under s. 41 of the Code.

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(1) 1 B. L. R. F. B. 91; 10 W. R. 46; 1 Ind. Dec. (N. S.) 114 (F. B.).

I would dismiss this application with costs. Hearing-fee two gold *mahurs.*

Ross, J.—I agree.

R. L. *Application dismissed.*

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(2) 1 Ind. Cas. 57; 13 C. W. N. 533; 9 C. L. J. 443.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES
Nos. 99 AND 100 OF 1923.
November 12, 1925.
Present:—Mr. Justice Suhrawardy
and Mr. Justice Mukerji.
Srimati SABITRI DASI AND OTHERS —
APPELLANTS
versus
NADIAR CHAND BARIK AND OTHERS
—RESPONDENTS.

Adverse possession—Co-owner, ouster of—Knowledge of adverse possession—Mode of proof—Second appeal —Mixed question of law and fact—Finding of fact, consideration of.

The question of adverse possession is a mixed question of law and fact. In dealing with the question in second appeal the findings of fact should be considered to see whether the inference drawn by the Appellate Court was proper or not. [p. 38, col. 2.]

The ouster of a co-sharer in order to render the possession adverse need not be violent nor need notice of adverse holding be actually brought home to the other co-sharers by personal or formal communication but it is sufficient if contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. [p. 39, col. 1.]

Balaram Guria v. *Syama Charan Mondal*, 60 Ind. Cas. 298; 24 C. W. N. 1057; 33 C. L. J. 344, *Jogendra Nath Mukherjee* v. *Rajendra Nath Bhattacharjee*, 68 Ind. Cas. 200; 26 C. W. N. 890; A. I. R. 1922 Cal. 54, *Jagannath Marwari* v. *Chandni Bibi*, 67 Ind. Cas. 31; 26 C. W. N. 65; 34 C. L. J. 432, *Joynarain Sen Ukil* v. *Suchitra Debya*, 65 Ind. Cas. 8; 26 C. W. N. 206; 33 C. L. J. 592; A. I. R. 1922 Cal. 8 and *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh*, 27 Ind. Cas. 465; 20 C. W. N. 51; 21 C. L. J. 253, referred to.

Appeals against the decrees of the District Judge, Bankura, dated the 11th September 1922, affirming those of the Subordinate Judge of that District, dated the 30th March 1922.

Mr. *Bankim Chandra Mukerji*, and Babu *Charu Chandra Ganguly*, for the Appellants.

Babu *Kali Kinkar Chakravarti*, for the Respondents.

JUDGMENT.

Mukerji, J.—The substantial question in these two appeals is whether the findings of the Courts below to the effect that the possession of defendants Nos. 1 to 5 should be treated as adverse to the plaintiffs and the defendants Nos. 6 to 10 and that the title of defendants Nos. 6 to 10 has become extinguished by the adverse possession of defendants Nos. 1 to 5 are correct. The question of adverse possession is a mixed question of law and fact. In dealing with this question we have got to take into consideration the findings of fact arrived at by the lower Appellate Court and then to see whether the inference which that Court has drawn from these facts was proper or not. Now what are the facts that have been found by the lower Appellate Court in this case? It has been found in the first place that in 1279 the Roys granted a settlement of the whole of the *mokarrari* interest to the defendant No. 1. By this settlement the title of the predecessors of defendants Nos. 6 to 10 was altogether ignored It has next been found that defendants Nos. 1 to 5 who claim under that settlement have been paying the whole of the *mokarrari* rent to the superior landlord since 1279. Nextly it has been found that defendants Nos. 1 to 5 have on several occasions mortgaged the whole of the *mouzah* and have treated it as their sole property ignoring the rights of the predecessors of defendants Nos. 6 to 10. From these facts the Court of Appeal below has come to the conclusion that the possession which was exercised by defendants Nos. 1 to 5 has become adverse to the plaintiff and defendants Nos. 6 to 10. The learned Advocate appearing on behalf of the appellants argues that these facts even if correctly found would not go to show that the possession exercised by the defendants Nos. 1 to 5 was in assertion of a hostile title and to the knowledge of the defendants Nos. 6 to 10 and the plaintiffs. It is true that knowledge has got to be found; but it is not necessary that there should be direct evidence of such knowledge. If the circumstances are such that from them inferences as to knowledge on the part of the persons against whom a hostile title is set up are sufficient to lend to the inference that they had such knowledge, it is enough. The learned District Judge towards the close of his judgment observes that he agrees with the Court of first instance that the circumstances are such as to justify the conclusion that there was a complete ouster of the other co-sharers by the defendants Nos. 1 to 5. This finding, in my opinion, involves the requisite finding as to knowledge. A number of decisions of this Court have been cited before us in the course of the argument *viz*, the decisions in the cases of *Balaram Guria* v. *Syama Charan Mandal* (1), *Jogendra Nath Mukherjee* v. *Rajendra Nath Bhattacharji* (2) *Jagannath Marwari* v. *Chandni Bibi* (3) and *Joynarain Sen Ukil* v. *Suchitra Debya* (4). The principles laid down in all these cases, so far as this matter is concerned are well-settled. But it is always a question as to the sufficiency of facts from which legitimate inference as to adverse possession may be drawn. As has been laid down in the case of *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh*. (5) the ouster of the co-tenants in order to render the possession adverse need not be violent or intimidating expulsion or repulsion nor need notice of adverse holding be actually brought home to the other co-tenants by personal or formal communication; but it is sufficient, if contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. The facts are that since 1279 the defendants Nos. 1 to 5 are in possession that they treated the property as their own ignoring the rights of the other co-sharers, that they all along paid rent of the entire *mokarrari* and lastly there is the fact that there was refusal on the part of the landlords to accept the rent from defendants Nos. 6 to 10 although the date of such refusal is not to be found in the judgment. The cumulative effect of all these facts is irresistible and it goes to show that there was adverse possession by the defendants Nos. 1 to 5 with an assertion of a hostile title. In these circumstances it is not possible for this Court sitting in second appeal to say that the finding of the learned District Judge was wrong. There is one other matter to which reference may also be made. It appears from the written statement of defendants Nos. 6 to 10 as also from the judgments of the Courts below that the case which was set up on behalf of those defendants was that they were in separate possession of the shares which belonged to them, that they had leased out those shares and had been in possession of those shares by collection of rent and at other times by recovery of *burga* produce. Evidence was given by them in support of that case and that case according to the judgments of the Courts below had failed. It is true that even if that case failed it has to be found that defendants Nos 6 to 10 have acquired title by adverse possession. But the fact that a case of separate possession of a specified share was set up and that has not been established is important because that shows that in point of fact the appellants before us never made in the Court of first instance a case to the effect that the possession of defendants Nos. 1 to 5 was to be treated as their own possession. In this view of the matter I am of opinion that the decree passed by the lower Appellate Court is correct and that these appeals should be dismissed with costs.

Suhrawardy, J.—I agree.

M. B. *Appeals dismissed.*
R. L.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2021 OF 1925.
February 1, 1926.
Present:—Mr. Justice Dalip Singh.
MAKHAN SHAH AND ANOTHER—DEFENDANTS —APPELLANTS
versus
Musammat HALIMA AND OTHERS— PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—

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(1) 60 Ind. Cas. 298; 24 C. W. N. 1057; 33 C. L. J. 344.

(2) 68 Ind. Cas. 200; 26 C. W. N. 890; A. I. R. 1922 Cal. 54.

(3) 67 Ind. Cas. 31; 26 C. W. N. 65; 34 C. L. J. 432.

(4) 65 Ind. Cas. 8; 26 C. W. N. 206; 33 C. L. J. 592; A. I. R. 1922 Cal. 8.

(5) 27 Ind. Cas. 465; 20 C. W. N, 51; 21 C. L. J. 253.

Plaintiff's possession recently disturbed—Suit for declaration—Receiver, appointment of.

Appointment of a Receiver under O. XL, r. 1, C. P. C., is competent even if the suit is one for declaration.

Amarnath v. *Tehal Kaur*, 67 Ind. Cas. 383; 4 U. P. L. R. (L.) 73; A. I. R. 1922 Lah. 444, *Kadir Bakhsh* v. *Ghulam Mohammad*, 55 Ind. Cas. 50; 2 U. P. L. R. (L.) 56; 30 P. W. R. 1920 and *Ishri* v. *Shib Ram*, 71 Ind. Cas. 743; A. I. R. 1923 Lah. 239, referred to.

Where plaintiff's possession has been only very recently disturbed, the Appellate Court will not interfere with the discretion exercised by the Court below in the appointment of a Receiver.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Ludhiana, dated the 18th May 1925.

Sheikh *Niaz Muhammad*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The sole question in this appeal is whether the Receiver appointed by the Court has been rightly or wrongly appointed in the exercise of the Court's discretion under O. XL, r. 1. Counsel for the appellants has relied on the following facts:—

1. That the plaintiffs are not in possession, but the learned District Judge has found that the disturbance of possession is very recent and I do not think that in the circumstances of this case it is necessary to interfere with the order on that ground.

2. Counsel contends that the income of the property is too small to justify the appointment of a Receiver. This is a matter which can be dealt with when the Receiver, if any, is actually appointed and his emoluments are fixed.

3. Counsel contends that O. XL, r. 1 (2) applies to the circumstances of this case and as the suit is declaratory no Receiver can be appointed. *Amarnath* v. *Tehal Kaur* (1) is against this proposition and I see no reason, therefore, to interfere, with the discretion exercised by the lower Court: see *Kadir Bakhsh* v. *Ghulam Mohammad* (2) which was upheld in Letters Patent Appeal and *Ishri* v. *Shib Ram* (3). I accordingly dismiss the appeal with costs.

R. L. *Appeal dismissed.*

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(1) 67 Ind. Cas. 383; 4 U. P.L. R. (L.) 73; A. I. R. 1922 Lah. 444.

(2) 55 Ind. Cas. 50; 2 U. P. L. R. (L.) 56; 30 P. W. R. 1920.

(3) 71 Ind. Cas. 743; A. I. R. 1923 Lah. 239,

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 368 OF 1924.
January, 27, 1926.
Present:—Mr. Prideaux, A. J. C.
SADASHEO AND OTHERS—PLAINTIFFS—APPELLANTS
versus
S. N. FADNAVIS—DEFENDANT—RESPONDENT.

Co-operative Societies Act (II of 1912), s. 42 (6), r. 42—Dissolution of registered society—Jurisdiction of Civil Courts—Liquidator's order, appeal from.

A Civil Court has no jurisdiction to question the legality of the acts of a liquidator in a matter connected with the dissolution of a registered society. [p. 42, col. 1.]

Ganpat Ramrao v. *Krishnadas Padmanabh*, 57 Ind. Cas. 423; 22 Bom. L. R. 732; 44 B. 582, *Mathura Prasad* v. *Sheobalak Ram*, 42 Ind. Cas. 968; 40 A. 89; 15 A. L. J. 863 and *Beni Madho Singh* v. *Tahsildar of Unao, Liquidator of Dewara Bank*, 44 Ind. Cas. 353; 4 O. L. J. 583 followed.

Under r. 42 of the rules under the Co-operative Societies Act II of 1912 made applicable to the Central Provinces by Notification No. 355 of the 26th September 1916 no appeal lies from any order of a liquidator. [p. 41, col. 2.]

Appeal against a decree of the District Judge, Nagpur, dated the 9th July 1924, in Civil Appeal No. 74 of 1924.

Mr. *M. R. Bobde*, for the Appellants.

Mr. *K. K. Gandhe*, for the Respondent.

JUDGMENT.—The plaintiffs are members of the Borkhedi Co-operative Credit Society. That Society has been ordered to be liquidated by the Registrar, and the defendant has been appointed liquidator by that officer. The plaintiffs complain that the defendant is trying to recover money from them by issue of warrants of attachment, and they ask for an injunction against the defendant prohibiting him from recovering any amount on account of one Nathugir. An objection was raised that under s. 42, cl. (6) of the Co-operative Societies Act, 1912, no Civil Court can entertain the suit. That section and clause is as follows:—

"Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act."

The objection prevailed in the first Court, and the suit has been dismissed. An appeal to the District Judge shared the same fate.

The case was decided in the first Court, without going into the merits on the preliminary objection; but the lower Appellate Court gives the facts of the case and states that they were not disputed in that Court. These facts the Judge expressed in the following words:—

"The Borkhedi Co-operative Credit Society which had been registered as a Society with unlimited liabilities under Act II of 1912 and which had 17 members on its roll had borrowed some money from the Central Bank, Nagpur. As it failed to re-pay the loan on the due date, the Central Bank obtained an award against it from the Registrar, Co-operative Credit Societies and in execution of this award, the property of one of the members of the Society, *viz.*, Nathugir was attached. Nathugir who like the rest of the members of the Society was jointly and severally responsible for the amount decreed by the award deposited the entire decretal amount in the Central Bank in order to avert the sale of his attached property. Thereafter the Registrar being satisfied that the affairs of the Society were not being carried on satisfactorily cancelled the registration of the Society under s. 39 of Act II of 1912 and ordered its liquidation and appointed Mr. S. N. Fadnavis, Pleader, Nagpur, as liquidator of the Society. The liquidator after going through the accounts of the Society found that the members of the Society had borrowed money from time to time from the Society and had re-paid certain sums and that some money was outstanding against each of the members of the Society except Nathugir. He, therefore, called upon each member under s. 42, cl. (2) sub-cls. (*b*) and (*e*) to contribute towards the assets of the Society the amount due by them each to the Society as per statement filed by him before me. He did so with the approval of the Registrar who gave a certificate as required by the proviso to s. 225 of the C. P. Land Revenue Act of 1917 that the money should be recovered from the members of the Society as if it was an arrear of land revenue. Accordingly the liquidator applied to the Deputy Commissioner to have the money due by each member of the Society recovered from him as if it was an arrear of land revenue. It is this action of the liquidator which is sought to be impeached by the plaintiffs in the present case."

It is contended here that the action of the liquidator was *ultra vires*, and that the Courts below are wrong in holding that the Civil Court had no jurisdiction to try the present suit. And it is further contended that Mahadeogir the *Guru* of Nathugir paid off the debt due to the Central Bank and that, therefore, the debts due by the Society to the Central Bank having been fully satisfied by Nathugir the liquidator could not call upon the members of the Society to contribute towards the payment of that debt, and further that the action taken by him is really in the interests of Nathugir. Dealing with this point the lower Appellate Court writes:—

"But from this it does not follow that the members of the Society to whom the Society advanced loans out of the money borrowed from the Central Bank have ceased to be the debtors of the Society. They are still liable to the Society for the money borrowed by them and the liquidator was fully justified in calling upon them to pay off those debts. It is true that the money that would be recovered from the members of the Society would be applied to pay off the sum paid by Nathugir to the Central Bank minus his own liability, but I fail to see how this fact affects the liability of the members to pay off the debts due by them to the Society. Nathugir by paying off the debt due by the Society has stepped into the shoes of the Bank and occupies the position of the creditor of the Society and the fact that he is one of the members of the Society cannot affect his position. Plaintiffs allege that Nathugir is not a member of the Borkhedi Society. If that is so, it is not open to them to say that the Society has satisfied the debt due to the Central Bank and the liquidator was perfectly justified in calling upon the members to pay off the debt due by each of them to the Society."

It is here contended that part of the plaintiffs' case is that it is not mentioned in the plaint that they subscribed the money which Mahadeogir paid for the Society. After considerable consideration I have come to the conclusion that the decision of the Courts below is correct. The section of the Co-operative Societies Act on which the Courts below have disposed of the case is very clear and in the rules under the Co-operative Societies Act II of 1912 made applicable to the Central Provinces by Notification No. 355 of the 26th of September 1916, and to Berar by Notification No. 356 of the same date, rule No. 42 states that "no appeal shall lie from any order of the liquidator," It seems to me that there can be no doubt that the liquidator was acting in a matter connected with the dissolution of a registered society and even if wrong, as the order was one within s. 42 of the Act, it cannot be questioned in a Civil Court. The orders are clearly matters connected with the dissolution of a registered Society, and a Civil Court has no jurisdiction: see *Ganpat Ramrao* v. *Krishnadas Padmanabh* (1) and *Mathura Prasad* v. *Sheobalak Ram* (2) and also *Beni Madho Singh* v. *Tahsildar of Unao, Liquidator of Dewara Bank* (3).

There seems no force in this appeal, and I dismiss it with costs. The appellants will pay respondent's costs. I fix Pleader's fees at Rs. 20.

R. L. *Appeal dismissed.*

(1) 57 Ind. Cas. 423; 22 Bom. L. R. 732; 44 B 582.
(2) 42 Ind. Cas. 968; 40 A. 89; 15 A. L. J. 863.
(3) 44 Ind. Cas. 353; 4 O. L. J. 583.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 449 OF 1923.
October 30, 1925.
Present:—Mr. Justice Spencer.
APPU BHATTA—PLAINTIFF—APPELLANT
versus
UNNA SUNDARIAMMA AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Madras Hindu Transfers and Bequests Act (I of 1914)—Bequest in favour of unborn child, validity of—No intervening life-interest, effect of.

The vesting of an estate cannot be kept in abeyance pending the happening of an uncertain event nor even by the appointment of trustees. [p. 43, col. 1.]

A person unborn at the death of a testator cannot avail himself of the provisions of the Madras Hindu Transfers and Bequests Act in a case where no life-estate is interposed between the death of the testator and the time provided for his taking the property. [*ibid.*]

[Case-law discussed.]

Second appeal against a decree of the District Court, South Kanara, in A. S. No. 408 of 1921, preferred against that of the Principal District Munsif, Mangalore, in O. S. No. 97 of 1920.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. Sundara Rao*, for the Respondents.

JUDGMENT.—The plaintiff in this suit claimed the property of his deceased great grandfather on the strength of a Will executed by her in 1883. The testatrix died in 1886. The plaintiff was born in 1899 and he must have come of age in 1917. The suit was brought in 1920. The Will in Ex. II provided that the testatrix's grandson Subraya, who is the 2nd defendant in this suit and his wife Yamuna Bai should manage the estate as agents for the testatrix; collect the amount due to her under a mortgage and out of it pay off mortgages due by her and meet the expenses of her funeral ceremonies and maintain their children and lastly, without alienating the property in any manner, they should deliver all the properties moveable and immoveable to the great-grandchildren of the testatrix upon their attaining their majority. At the time when the Will was made and also when Lakshmi died, no great-grandchildren had been born. The Will on the face of it is in favour of a person unborn at the deceased of the testatrix. Madras Act I of 1914 has since validated bequests and transfers in favour of unborn persons in the Presidency of Madras. In *Kudapa Venkayamma* v. *Kankarla Narasamma* (1) and *Muthusami Iyer* v. *Kalyani Ammal* (2) has been held that this Act has the effect of validating dispositions made under Wills executed before the date when the Act came into force, provided that some life-estate was interposed. Abdur Rahim, J., observed that if there was no intervening life-estate, the argument of the appellant's Vakil that only persons born on the date of the death of the testator could take, would no doubt have force. In *Shanmuga Devar* v. *Shanmuga Devar* (3) it was held for similar reasons that if a life-estate was created and an ulterior estate was bequeathed to a person on his attaining age, the disposition would be valid provided that the final vesting took place after the passing of the Act. It has, therefore, been argued in the first place by Mr. Seetharama Rao that Ex. II creates life-estate. But I cannot accept this contention, because the Will provides that the 2nd defendant, Subraya and his wife were to hand over all the properties moveable and immoveable upon their great-grandchildren attaining their majority. The Will does not give them authority to retain those properties for the length of their lives. The testatrix speaks of her grandson and his wife as her "agents." It is obvious that after her death they could no longer fulfil the capacity of

(1) 36 Ind. Cas. 150; 40 M. 540; 31 M. L. J. 33; 20 M. L. T. 221; 4 L. W. 189.
(2) 38 Ind. Cas. 223; 40 M. 818; 21 M. L. T. 93; 5 L. W. 334.
(3) 53 Ind. Cas. 203.

agents. Assuming that her intention was that they should be trustees or executors to carry out the provisions of her Will, the question then arises whether a person unborn at the date of the Will can avail himself of the provisions of the Act of 1914 in a case where no life-estate is interposed between the death of the testatrix and the time provided for his taking the property. The cases referred to in the lower Appellate Court's judgment *Varadaraja Mudaliar* v. *Narayanaswami Mudaliar* (4) is not of much help as it was a decision of Mr. Justice Kumaraswami Sastri in a case arising within the limits of the city of Madras to which Madras Act I of 1914 did not apply, although similar provisions have been applied subsequently by the Imperial Act VIII of 1921. If there was no person in whom the estate could vest at the date of the testatrix's death it follows that there was an intestacy. The vesting of an estate cannot be kept in abeyance or be, as the District Munsif observes, indefinitely postponed upon the bare contingency of the 2nd defendant having male issue. It is hardly necessary to quote authorities. But Maynes Hindu Law, page 512, West and Bhuller Hindu Law, pages 179 and 112 and *Nilcomul Lahuri* v. *Jotendro Mohan Lahuri* (5) make it clear that the vesting of an estate cannot be kept in abeyance pending the happening of an uncertain event, nor by the intervention of trustees, as was the case in *Gordhandas Soondardas* v. *Bai Ramcoover* (6).

Mr. Seetharama Rao's second argument, therefore, was that the testatrix's grandchildren took a life-estate which was determinable by the birth of children. The Will, however, contains no valid gift of the remainder at the date when it was executed. There is no direction in it as to the disposal of the surplus income. To treat the grandchildren as having a life-estate defeasible upon the birth of children to them makes the gift in favour of unborn persons no more valid, as there is no provision in the Will that if there should be no great-grandchildren born at the date of the testatrix's death, the grandchildren should take the estate absolutely. In *Nafar Chandra* v. *Rotan Mala Debi* (7) both the sons and his wife whom he was to marry were made beneficiaries under the Will and were alive at the time of the testatrix's death and the property was vested in the executors. *Jamnabai* v. *Dharsey* (8) was a case in which all the estate vested in trustees for the benefit of the son who was to be adopted by the testator's widow. It does not appear that the son to be adopted was unborn at the date of the testator's death. It was held in the end that the widow took an absolute estate. The facts in *Amrito Lall Dutt* v. *Surnomoyee Dassee* (9) which came up in *Amrito Lall Dutt* v. *Surnomoni Dasi* (10) and *Watkins* v. *Administrator-General of Bengal* (11) can be distinguished from the present case. The Will in that case created a power. The question was whether a direction to accumulate the income of the estate was valid during the continuance of the life-estate. It was held that the accumulation could go on for so long a time as the absolute vesting of the entire interest could be withheld. No case has been quoted in which a disposition has been made in favour of a person unborn in which the vesting of the estate was postponed without the interposition of any life-estate.

I am, therefore, of opinion that the lower Courts were right in finding that the dispositions in this case in favour of a person unborn were invalid and had not been validated by the passing subsequently of Madras Act I of 1914, seeing that if the validity of the transaction had been questioned at any time in Probate or other proceedings undertaken after the testatrix's death but prior to the passing of that Act it must have been held that the Will was invalid and that in consequence an intestacy had been created, and a disposition invalid at the date of the testatrix's death could not be rendered valid by the subsequent birth of a great grandson, nor could an intestacy be converted into a testacy in consequence of an event happening after the death of the testatrix.

The second appeal is dismissed with costs.

V. N. V.

Appeal dismissed.

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(4) 27 Ind. Cas. 298; 27 M. L. J. 681.

(5) 7 C. 178; 8 C. L. R. 401; 3 Ind. Dec. (N. S.) 664.

(6) 26 B. 449; 3 Bom. L. R. 857.

(7) 7 Ind. Cas. 921; 15 C. W. N. 66; 13 C. L. J. 85.

(8) 4 Bom. L. R. 893.

(9) 24 C. 589; 1 C. W. N. 345; 12 Ind. Dec. (N. S.) 1061.

(10) 25 C. 662; 2 C. W. N. 389; 13 Ind. Dec (N. S.) 435.

(11) 56 Ind. Cas. 376*n*; 47 C. 88.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 248 OF 1924.
December 15, 1925.
Present :—Mr. Justice Cuming and
Mr. Justice B. B. Ghose.

JADU NATH SINGHA—DECREE-HOLDER
—APPELLANT
versus
KRISHNA RANGINI DASSYA—
JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Step-in-aid of execution—Issue of notice under O. XXI, r. 66 C. P. C.—Affidavit, swearing in of—Limitation, fresh start of.

Issue of notice under O. XXI, r. 66, C. P. C., to the judgment-debtor in order that he might be present to assist the Court in drawing up the sale proclamation, not on the motion of the decree-holder but of its own accord is not a step-in-aid of execution. Nor does the swearing in of an affidavit by the decree-holder's identifier to the effect that the notice had been served unaccompanied by any application oral or written give a fresh start to limitation. [p. 45, col. 1.]

Pran Krishna Das v. *Protap Chandra Dalal*, 38 Ind. Cas. 536; 21 C. W. N. 423, distinguished.

Annopurna Thakurani v. *Dhirendra Nath Chakravarty*, 54 Ind. Cas. 1; 24 C. W. N. 55; 30 C. L. J. 518, followed.

Appeal against an order of the Officiating Subordinate Judge, Faridpur, dated the 4th April 1924, reversing that of the Munsif, Second Court, Goalnundo, dated the 25th September 1923.

Dr. *Radha Benode Pal*, for the Appellant.

JUDGMENT.

Cuming, J.—This appeal arises out of an application for execution. The judgment-debtor objected that the application for execution was time-barred. The objection was overruled by the first Court and it was allowed by the lower Appellate Court and the application for execution was dismissed. The facts appear to be these: The application for execution in the present case was made on the 27th July 1922. It was contended by the decree-holder that the limitation was saved, because on the 29th July 1919 an affidavit was put in proving that certain notice under O. XXI, r. 66, C. P. C. had been served on the judgment-debtor. It would appear that in this former execution case notice had been duly served under O. XXI, r. 22 and service of these notices was proved on the 12th July 1919. The Court then ordered that notice under r. 66, O. XXI should be given to the judgment-debtor in order that he might be present to assist the Court in drawing up the sale proclamation. It may be pointed out that this issue by the Court of the notice under O. XXI, r. 66 could not of itself be described as an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution because this notice was issued not on the application of the decree-holder but by the Court itself on its own motion and, therefore, the issue of the notice could not come in under cl. (5) Art. 182 of the Limitation Act as an application to Court to take some step-in-aid of execution.

Be that as it may, the decree-holder does not depend on the issue of the notice to save limitation. He contends that on the 30th July an affidavit was sworn by the identifier that the notice had been served and he contends that this swearing on the affidavit on the 30th July was a step-in-aid of the execution. I do not think that there is any substance in this contention. The swearing of an affidavit by the identifier cannot by any stretch of imagination be described as applying in accordance with law to the proper Court for execution or to take some step-in-aid of execution which clearly means some application made by the decree-holder. It does not, however, appear that he made any application on the 30th July. All that was done was that an affidavit proving service of notice was put in. This is merely a proof of the fact that a certain act had been done. It does not seem to me that it was an application to the Court to take any further step, because, in the first place, the decree-holder had nothing whatever to do with the issue of this notice under r. 66, O. XXI, C. P. C. That was a matter for which the Court was responsible and which the Court took on its motion and not on any application of the decree-holder. The decree-holder was not in any way responsible whether these notices under r. 66 were or were not served.

Dr. Pal who has appeared for the appellant has referred us to the case of *Pran Krishna Das* v. *Protap Chandra Dalal* (1) in support of his contention that the filing of an affidavit in proof of service of notice was a step-in-aid of execution. The facts of that case, however, are different from those of the present case. In that case the question was as to the service of notice under O. XXI, r. 22 which had to be served on the judgment-debtor before any further step in execution could be taken. Mr. Justice Woodroffe in disposing of the case remarked

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(1) 38 Ind. Cas. 536; 21 C. W. N. 423.

"I am not myself disposed in the present case to take a narrow view of the facts, and from these facts we have it that notice was served in pursuance of a previous order of the Court, that the service was proved, and that may be taken to be an invitation to the Court to proceed to the next order which should have been made in these proceedings, namely, that the decree be executed." The reason being possibly that until notice had been served on the judgment-debtor under O. XXI, r. 22 no further step-in-execution could be taken. This case has been distinguished in the case of *Annopurna Thakurani* v. *Dhirendra Nath Chakravarty* (2) a decision to which I was myself a party and where it was directly held that the swearing of an affidavit merely filed by the decree-holder's identifier unaccompanied by any application oral or written does not give a fresh start to limitation. In the present case it does not appear that there was any application either written or oral made on behalf of the decree-holder at the time when the affidavit was filed. So it cannot be said that an application was made by the decree-holder to the Court to take any step-in-aid of execution.

The result must be that the appeal fails and is dismissed. The respondent not having appeared there will be no order as to costs.

Ghose, J.—I agree that this appeal should be dismissed.

R. L. *Appeal dismissed.*

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(2) 54 Ind. Cas. 1; 24 C. W. N. 55; 30 C. L. J. 518.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 54 OF 1925.
November 12, 1925.
Present:—Mr. Justice Devadoss and
Mr. Justice Waller.
PARVATHI AMMAL—PETITIONER—
APPELLANT
versus
K. G. VENKATESWARA AIYAR AND
OTHERS—RESPONDENTS.

Letters Patent (Mad.), cl. 15—Order refusing leave to file memorandum of objections in forma pauperis—*Discretion—Interference in appeal.*

When the order complained of in an appeal under cl. 15 of the Letters Patent is merely the result of the exercise of discretion on the part of the Judge in a matter which was a proper subject for the exercise of that discretion, the Appellate Court would rightly decline to interfere.

De Souza v. *Coles*, 3 M. H. C. R. 384, followed.

Quære.—Whether an order refusing leave to file a memorandum of objections *in forma pauperis* is a judgment under cl. 15, Letters Patent.

Appeal against an order of Mr. Justice Krishnan, dated the 11th November 1924, on C. M. P. No. 3775 of 1924, praying for leave to file a memorandum of objections *in forma pauperis* to Appeal No. 116 of 1924, preferred to the High Court against a decree of the Court of the Subordinate Judge, South Malabar, at Palghat, in O. S. No. 21 of 1921.

Mr. *C. S. Swaminadan*, for the Appellant.

Mr. *P. S. Narayanasami Iyer*, for the Respondents.

JUDGMENT.

Waller, J.—This is an appeal against an order of Krishnan, J., rejecting an application for leave to file a memorandum of objections *in forma pauperis*. It is argued that no appeal lies against such an order. There are, no doubt, some decisions to that effect, *e. g.*, *Appusami Pillai* v. *Somasundara Mudaliar* (1) and *Banno Bibi* v. *Mehdi Hussain* (2). But the former has since been expressly dissented from in *Tuljaram Row* v. *Alagappa Chettiar* (3) and the latter proceeded on a *ratio decidendi* which is no longer maintainable. The pronouncement of Sir John Edge in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (4) is also relied on. Speaking for myself, I should welcome any clear cut definition which would render unnecessary the discussion which is at present, almost inevitable, whether a particular order does or does not pass the test laid down in *Tuljaram Row* v. *Alagappa Chettiar* (3). That test is never particularly easy of application and would be extremely difficult to apply in a case like this. I, however, see no reason to consider the very large question raised by that pronouncement. Assuming that there is a right of appeal against an order like this, I think that we should not interfere. The question is one of the exercise of discretion. That is, of course, not the test of non-appealability, but "when the determination complained of is merely the result of the exercise of discretion on the part of the Judge in a matter which was a proper subject for the exercise of that discretion, the Appellate Court would rightly decline to interfere." *De Souza* v. *Coles* (5). Here, the Judge had discretion to admit the application, but he thought fit not to exercise it in the appellant's favour. I think, that we should decline to interfere with his order. The appeal is dismissed without costs. One month for paying the necessary fees.

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(1) 26 M. 437.

(2) 11 A. 375; A. W. N. (1889) 70; 6 Ind. Dec. (N. S.) 667.

(3) 8 Ind. Cas. 310; 35 M 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1.

(4) 87 Ind. Cas. 313; 49 M. L. J. 25; 23 A. L. J. 555, A. I. R. 1925 P. C. 155; L. R. 6 A. (P. C.) 117; (1925) M. W. N. 474; 2 O. W. N. 535; 41 C. L. J. 628; 22 L. W. 246; 27 Bom. L. R. 872 (P. C.).

Devadoss, J.—I agree.

V. N. V.

Appeal dismissed.

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(5) 3 M. H. C. R. 384.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 624 AND 625 OF 1925.
November 17, 1925.
Present:—Mr. Justice Mukerji.
RAM SAKHI DEBYA CHOWDHURANI
AND OTHERS—DECREE-HOLDERS—
PETITIONERS
versus
RADHA NATH DE AND OTHERS—
JUDGMENT-DEBTORS—OPPOSITE PARTIES.

Execution sale—Bid, inadequate—Court, if has discretion to refuse bid.

By virtue of the third condition on the back of the sale certificate, it is in the discretion of the Court or the officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so. [p. 47, col. 1.]

Rajendra Prasad Jha v. *Upendra Nath Jha*, 27 Ind. Cas. 805; 21 C. L. J. 174; 19 C. W. N. 633 and *Fazil Meah* v. *Prosanna Kumar Roy*, 68 Ind. Cas. 305; A. I. R. 1923 Cal. 316, relied on.

When the Court thinks fit not to accept a sale and orders a re-sale, the order should state reasons for the same.

Rule against an order of the Court of the Additional Munsif at Jamalpur (Mymensingh), dated the 25th February 1925, in Case Nos. 1227/1653 and 1293/1718 of 1924.

Babu *Prafulla Chandra Nag*, for the Petitioners.

Babu *Bimal Chandra Das Gupta*, for the Opposite Parties.

JUDGMENT.—These two Rules are directed against an order passed by the learned Munsif of Jamalpore on the 25th February 1925 by which he directed a re-sale of certain properties which had been previously sold in execution of two decrees for rent. The decree-holder himself purchased the properties for Rs. 71 and Rs. 89 at the sale. The bids were accepted by the *Nazir* the decree-holder having filed a petition to set off his decretal dues against a part of the purchase money. The *Nazir* submitted the usual report to the Court and the Court thereupon on the 25th February 1925 on receipt of the *Nazir's* report ordered the cases to be put up on the 23rd March 1925 for confirmation of the sales. On the 25th February 1925 petitions were filed by one Radha Nath Dey in the said two cases in which he stated that he had filed *vakalatnamas* in those cases and had given instructions for bidding at the sales but that the officers of the decree-holder acting collusively with some other persons had caused the properties to be sold secretly and had purchased the same for themselves. The petitioner Radha Nath Dey also stated that he was willing to purchase the two items of property covered by the two sales at Rs. 400 each. The learned Munsif on receipt of the said petitions and on hearing the Pleaders of all the parties ordered the properties to be re-sold on the 26th March 1925. On that date petitions were filed by the decree-holder in which it was stated that the decree-holder was absent, that an appeal against the said orders of the 25th February was contemplated and that the sales should not take place until that appeal was disposed of. That application was rejected and the decree-holder refused to bid at the sales and the properties were knocked down to Radha Nath for Rs. 400 for each plot, that is to say, for Rs. 800 in all. The *Nazir* submitted a report as to the sales which had taken place and the bids of Radha Nath were accepted by the Court. The orders of the 25th February 1925 which have been challenged on behalf of the petitioners in these two Rules unfortunately do not give any reason and on a perusal of those orders it would seem as if there was no valid ground for ordering re-sales. The learned Munsif should have in the aforesaid orders given some reasons as to why he thought it necessary not to accept the bids of the decree-holder and why he thought that re sales were necessary in the present cases. It is the omission on the part of the Munsif to record his reasons in this respect which probably led to the issuing of these Rules. The facts of the case, however, have now been placed before me in the counter-affidavit which has been filed on behalf of the opposite party and it appears to me that, as a matter of fact the opposite party might very well contend that the properties had originally been sold at inadequate prices and also that he had no opportunity of bidding at the sales. The question in these circumstances is whether the Court had a discretion to make the order which it did and whether that discretion has been properly exercised in view of the circumstances of these particular cases. It has been laid down by this Court in several cases amongst which reference need only be made to the decision of Coxe, J., in the case of *Rajendra Prasad Jha* v. *Upendra Nath Jha* (1) and to the unreported* decision of Newbould, J., in the case of *Fazil Meah* v. *Prosanna Kumar Roy* (2) that by reason of the third condition on the back of the sale proclamation a discretion is reserved to the Court to accept or not to accept a bid in view of the particular circumstances disclosed in the case and that condition expressly states that it shall be in the discretion of the Court or the officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so. Upon the facts to which I have referred it can reasonably be held that the Court, if it had a discretion, was right in exercising that discretion upon the particular facts of these cases. The orders passed for re-sale, therefore, in my opinion appear to be correct and I decline to interfere in these cases. The Rules must, therefore, be discharged with costs one gold *mohur* in each case.

R. L. *Rules discharged.*

(1) 27 Ind. Cas. 805; 21 C. L. J. 174; 19 C. W. N. 633.

(2) 68 Ind. Cas. 305; A. I. R. 1923 Cal. 316.

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*Since reported as 68 Ind. Cas. 305—[*Ed.*]

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 397 OF 1925.
August 25, 1925.
Present:—Mr. Justice Fawcett and
Mr. Justice Madgavkar.
SHANKARLAL PURSHOTTAM GOR—
APPLICANT
versus
THE DAKOR TEMPLE COMMITTEE
— OPPONENT.

Civil Procedure Code (Act V of 1908), O. I, r. 8, scope of—Hindu temple—Scheme of management—Practice departure from—Right of worship—Levy of fees—Rules under scheme—Court's power to alter.

Order I, r. 8, C. P. C., is merely an enabling provision of law and does not prevent a representative suit being brought in any other manner that the law permits. [p. 50, col. 2]

Though due consideration is to be given to an established practice in an institution when framing a scheme, it is not necessary that scheme and rules thereunder must conform to it. The interests of the institution and the facilitating of the work of management are the primary matters for consideration both in preparing the scheme and making any modifications in it. There should be provided means of progress even if it involves *some departure from* the established practice. [p. 49, col. 2; p. 50, col. 1.]

Chotalal Lakhmiram v. *Manohar Ganesh Tambekar*, 24 B. 50 at p. 54; 2 Bom. L. R. 516; 4 C. W. N. 23; 26 I. A. 199; 7 Sar. P. C. J. 559; 12 Ind. Dec. (N. S.) 570 (P. C.), *Ramanathan Chetti* v. *Murugappa Chetti*, 29 M. 283 at p. 288; 10 C. W. N. 825; 8 Bom. L. R. 498; 16 M. L. J. 265; 4 C. L. J. 189; 3 A. L. J. 707; 1 M. L. T. 327; 33 I. A. 139 (P. C.) and *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood*, 35 Ind. Cas. 30; 43 C. 1085 at pp. 1102, 1103; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 43 I. A. 127; 8 L. B. R. 517 (P. C.), referred to.

A right of worship at a temple is not an absolutely unrestricted right. It is subject to reasonable *regulations for preventing overcrowding*, etc. Courts should be slow to recognise without proper evidence claims of right which would materially interfere with the rights of trustees to regulate the worship and ceremonials of temples in the interests of the whole community. [p. 51, col. 2.]

Ankapati Subba Reddi v. *Tippana Narayana Reddi*, 12 Ind. Cas. 537; 21 M. L. J. 1027 at p. 1030; 10 M. L. T. 428, referred to.

Taylor v. *Timson*, (1888) 20 Q. B. D. 671; 57 L. J. Q. B. 216; 52 J. P. 135, distinguished.

A distinction must be drawn between a temple and its inner sanctuary. Every Hindu has a right to enter a Hindu temple and obtain sight of the idol and perform his act of worship from a distance without payment of fees. But the right of access to Holy of Holies is not equally free and may be regulated by special rules. [p. 55, col. 2.]

Rules framed under a scheme become a part of it and are liable to be superseded or altered by the Court having power to modify or alter the scheme. [p. 52, col. 2; p. 53, col. 2.]

Mr. *G. S. Rao*, for the Applicants (Gors).

Sir *Chimanlal Setalvad*, (with him Messrs. *M. K. Mehta* and *M. K. Thakore*), for the Sevaks.

Mr. *Ratanlal Ranchhoddas*, for the Dakor Temple Committee.

Mr. *Kanga*, Advocate-General, (with him Mr. *S. S. Patkar*, Government Pleader), for the Advocate-General.

Mr. *H. V. Divatia*, for Tambekar.

JUDGMENT.

Fawcett, J.—The facts out of which this application arises have been fully stated in this Court's judgment of April 11, 1919, in Appeal No. 223 of 1915, and need not be re-stated. That judgment, and the consequential one of September 22, 1919, have been set aside under the judgment of their Lordships in Privy Council Appeal No. 95 of 1923. In that judgment it is said :—"The High Court at Bombay had power conferred upon it by cl. 20 of the scheme confirmed by His Majesty's Order in Council upon an application made to it with that object to alter, modify or add to the rules sanctioned by the District Judge, but it had no other power, and that power it did not exercise; it may, however, still be exercised upon application properly made to it." Accordingly the present application has been made by twelve Gors "for themselves and on behalf of the other Tarwadi Mewada Gors, residing at Dakore." Their main contention is that the rules framed by the Temple Committee and sanctioned by the District Judge are illegal and *ultra vires*, so far as they impose fixed fees in payment for passes, whether on the Gors or the general public entitled to worship in the temple at Dakore. They also urge that some of the rules are objectionable, so far as they impose on the Gors the necessity of obtaining a free pass for entering the *nij mandir* and ascending the *sinhasan* for the purpose of performing worship and other religious rites. Detailed modifications of certain rules are proposed.

We have heard all the parties concerned in the matter. The Advocate-General supports the contention that no fees should be charged, but is in favour of free passes being required for entry to the *nij mandir* and ascending the *sinhasan*. This view is also taken by opponent No. 3, the representative of the Tambekar family who have a special position with reference to this temple. On the other hand, the Temple Committee and the representatives of the Sevaks oppose the modification of the rules.

Before considering the questions that arise upon their merits, it is necessary to dispose of a preliminary objection that was raised by Sir Chimanlal Setalvad for the Sevaks. He contends that under cl. 20 of the scheme it is not competent to this Court to interfere with the rules framed by the Temple Committee and sanctioned by the District Judge and that the powers of this Court under that clause are confined to an alteration of the provisions of the scheme itself.

Clause 20 says :—

"The provisions of this scheme may be altered, modified or added to by an application to His Majesty's High Court of Judicature at Bombay."

Clause 12 says :—

"The Committee shall have power,

(1) To take the temple property into their custody and to provide for efficient checks for its preservation, maintenance and growth.

(2) To make rules for the guidance of their business.

(3) To make rules for securing the punctual performance of the Seva by the Sevaks in due conformity with the established practice of the institution.

(4) To make rules for the issue of passes as to the admission into the *nij mandir* and on the *sinhasan patia* in order to prevent overcrowding and preserve order at those places, provided that such rules shall not affect any member of the Tambekar family or interfere with the decided rights of the Sevaks and the Gors.

(5) To make rules for keeping accounts in a proper manner.

(6) To provide for punishment for the breach of the rules.

(7) To have all the rules framed by them sanctioned by the District Court of Ahmedabad to the intent that the rules, which sanctioned, shall have the same force as if they were part of this scheme.

(8) To modify, alter and rescind any of the rules made by them with similar sanction."

In view of the express provision in cl. 12 (7) that "the rules, when sanctioned, shall have force as if they were part of this scheme," we feel no doubt that the objection fails. Sir Chimanlal contends that this does not make the rules part of the scheme, but only means that the rules are to be executed and obeyed, as if they were part of the scheme. This distinction is not, in our opinion, justified. The case is analogous to one where an Act confers power to make rules under the Act and enacts that rules so made "shall be of the same effect as if they were contained in" the Act. In such a case there is the high authority of Lord Herschell for saying that such words can be given no "other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly, as if they were in the Act." See *Institute of Patent Agents* v. *Lockwood* (1). Similarly Lord Watson says at page 365*:—"Such rules are to be as effectual as if they were part of the Statute itself." A similar view was taken by a Full Bench of this Court in *Secretary of State for India* v. *Bhaskar Krishnaji*

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(1) (1894) A. C. 347 at p. 360.

*Page of (1894) A. C.—[*Ed.*]

Samant(2), in regard to rules made under the Indian Forest Act, 1878, which under s. 77 of that Act "have the force of law." The Bench held that in view of this provision such a rule "must be considered as taking its place within the Act."

Accordingly we hold that the effect of the words I have referred to in cl. 12 (7) of the scheme is to make the rules now under consideration part of the scheme for the purpose of cl. 20. This is in accordance with the opinion already expressed both by this Court (see the paper of the appeal to the Privy Council, page 227, lines 39-41) and the Privy Council in the extract from their judgment already given. The latter opinion is necessarily entitled to the greatest weight, even if it is not binding on us.

The main question to be decided is the legality of (*a*) requiring passes and (*b*) imposing fees for passes (1) in the case of Tarwadi Mewada Gors residing at Dakor and (2) in the case of worshippers at the temple. As to (1) it is, in my opinion, clear that to impose fees on Gors would "interfere with the decided rights of the........... Gors" within the meaning of cl. 12 (4) of the scheme, and that any rules purporting to impose such fees would be *ultra vires.* The legality of rules levying such fees was the main issue in Suit No. 18 of 1887 between the Gors and the Sevaks, and was decided in favour of the Gors by Mr. Dayaram Gidumal (P. C. paper book, pages 320 and 323). This decision was upheld by this Court in First Appeal No. 36 of 1888 (*ib* pages 330 and 332) The learned Judges went further and held that the levy of fees from worshippers also was illegal—that is a question which can best be considered later. But, so far as the Gors are concerned, I agree with Diwan Bahadur Rao that rules imposing fees for passes on them would be *ultra vires.*

Sir Chimanlal Setalvad contended the contrary. His first point was that there was nothing in the decrees passed in Suit No. 18 of 1887 or First Appeal No. 36 of 1888 to make the present rules inconsistent. So far as they provide for *free* passes to Gors, this must be conceded, unless we go further and hold that to require any passes at all is an interference with the decided rights of the Gors. The latter was the view which Diwan Bahadur Rao asked us to adopt: but, in my opinion, this is going too far. The declared rights of the Gors were made "subject to the right of the Sevaks to enforce orderliness and decency of worship," and the pass-system is one which, if properly designed and worked, can help considerably towards the maintenance of such orderliness and decency. The rules requiring free passes from Gors are based on this ground (*cf.* r. 56), and I think the District Judge rightly distinguished between Gors having to take a pass and having to pay a fee for it (P. C. paper-book, page 116). With due deference I do not agree with the view taken in the Appeals of 1915 (*ib.* page 229) that rr. 56 and 57 should be amended, so far as they require free passes, as being restrictions upon the established rights of the Gors to enter with their *yajmans* into the *nij mandir.* They are in a sense "restrictions" but they are very small ones and fall within the excepted rights of the Sevaks mentioned in the decree that I have already referred to. Those rights have also to be regarded under cl. 12 (4) of the scheme, and the Temple Committee in working the rules can, I think, be trusted to see that the requirement of a free pass does not unduly interfere with a Gor's right of free access to the *nij mandir* and of ascending the *sinhasan patia* with the permission of the attendant Sevaks; and the requirement is one calculated to promote the general interests of the institution and one of which the Gors cannot reasonably complain. The *gravamen* of their complaint in the suit of 1887 was the loss of emoluments caused by the levy of fees (*cf.* P. C. paper-book, pages 286 and 328), and not the requirement to take out passes apart from such levy.

Sir Chimanlal contended that the decrees in the litigation between the Gors and the Sevaks could not bind the Temple Committee, who were not parties to that litigation. With this may be taken Diwan Bahadur Rao's contention that the rules must be in accordance with the established practice of the institution. Both contentions, in my opinion, go too far. The Privy Council no doubt approved the direction of this Court that in framing the scheme due consideration was to be given to the established practice of the institution: *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (3). But that does not mean that the scheme and any rules thereunder must always conform to such established practice. A scheme in fact supersedes established practice: *Ramanathan Chetti* v. *Murugappa Chetti* (4) and the interests of the institution and the facilitating of the work of management are the primary matters for consideration both in preparing the scheme and making any modifications in it: *Mahomed Ismail Ariff* v. *Ahmed Moola Dawood* (5). There should be means of progress, even if this involves some departure from established practice; and the provisions of cl. 12, especially sub-cls. (1), (4), (9) and (11), show that the framers of the scheme had this in mind. On the other hand, the scheme directs that the established practice of the institution is to be regarded in framing rules under sub-cls. (3) and (18) of cl. 12, and r. 17 speaks of a "reasonable regard to the past practice." Inasmuch as sub-cl. (4) of cl. 12 especially provides for rules for the issue of passes, and does not say that in framing such rules "regard must be had to the established practice of the institution," whereas it does say such rules shall not "interfere with the decided right of the Sevaks and Gors" it seems perfectly clear that the Committee are not tied down to past practice. In fact this would prevent them making any rules for passes at all, if the practice prior to 1883 is to be observed, as Diwan Bahadur Rao contends it should. This can clearly never have been intended. Equally it is quite clear that, as sub-cl. (4) expressly says the rules shall not interfere with the decided rights of the Sevaks and the Gors, the decrees in the litigation between them cannot be put entirely on one side, as Sir Chimanlal Setalved asks us to do.

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(2) 89 Ind. Cas. 498; 27 Bom. L. R. 973 at p. 997; A. I. R. 1925 Bom. 485; 49 B. 759.

(3) 24 B. 50 at p. 54; 2 Bom. L. R. 516; 4 C. W. N. 23; 26 I. A. 199; 7 Sar. P. C. J. 559; 12 Ind. Dec. (N. S.) 570 (P. C.).

Nor do I think his contention that those decrees can only be given effect to in favour of the individual plaintiffs in the suit of 1887, and not in favour of the Gors as a class, is on any sounder footing. It is quite clear that the plaintiffs sued not merely on their own behalf but on behalf also of their brother Gors as a class and permission to sue on behalf of all having the same interest was in fact asked for under s. 30 of the C. P. C., 1882, corresponding to O. I, r. 8 of the present Code. The prayer was apparently not allowed, and instead the various other Gors affected were joined as plaintiffs (see per Parsons, J., at page 331 of the P. B.) But the suit was treated as a representative suit and a decree granted in regard to the general rights and privileges of the Gors against the Sevaks (*ib.* pages 292 and 393). Parson, J., thought this irregular, but that interference was not called for (*ib.* pages 331-332). In the circumstances, the decrees must obviously be treated as establishing the rights of Gors generally, at any rate of those Gors who are Tarwadi Mewada Gors residing at Dakore, the class to which all the plaintiffs belonged. Order I, r. 8, C. P. C., is merely an enabling rule and does not prevent a representative suit being brought in any other manner that the law permits. Thus one or two persons can sue in respect of maladministration of property belonging to the community: *Thackersey Dewraj* v. *Hurbhum Nursey* (6) and an injunction obtained by them will enure for the benefit of all others similarly affected: *Purandas Mohandas* v. *Girdharlal Mathuradas* (7). See also Halsbury's Laws of England, Volume IV, Art. 1134 and footnotes (*q*) and (*r*) at pages 518, 519. The case is one which, in my opinion, clearly falls under *Explanation VI* to s. 11 of the C. P. C. Moreover, the scheme impliedly recognises that the suit in question was a representative one by providing in cl. 12 (4) for "the decided rights of the Sevaks and the Gors." The suit of 1887 (it was originally filed in 1884) was the only litigation in regard to rules for passes; and it is absurd to suppose that the framers of the scheme meant that only the rights of the individual plaintiffs and defendants to that suit should be respected. I agree, therefore, with the view taken by the District Judge that the concession as to a free pass should apply to all the Tarwadi Mewada Gors who hold *Vrittis* at present (P. B. page 116), a view upheld by this Court in Appeals of 1915 (*ib.* page 229).

The remaining contentions of Sir Chimanlal Setalvad on this point may be taken together. He argued that the rights of the Gors, as so decreed, were not allowed to prevail against the Receiver or subsequent-y against the Temple Committee, and that was equivalent to a judicial decision that the decrees in the litigation referred to did not bind the Temple Committee. He also contended that, as r. 13 of the scheme as sanctioned by the Privy Council allows the pass rules with fees to continue, until the rules mentioned in cl. 12 are framed and sanctioned, there was no longer any objection to those rules being allowed under cl. 12 (4). Both these arguments unduly ignore the provisional nature of the orders and directions referred to. They merely amount to allowing the old rules to continue, without prejudice to the contentions of the respective parties, to be dealt with when rules were made and sanctioned under cl. (12). Mr. McCorkell's judgment (P. B., page 341) refers to the necessity of having some rules pending the framing of a scheme so as to avoid the necessity of referring every current question of management for orders to the District Judge: and he naturally preferred to continue rules which had been working since 1883 and not been interfered with by the Receiver to the task of drawing up *interim* rules, which were sure to be objected to by one side or the other. In my opinion, it is absurd to treat this order, or r. 13 of the scheme, as anything but provisional and 'without prejudice.' Sir Chimanlal referred to *In re Suttan Coldfield Grammar School* (8) in support of his contention that r. 13 should be given some degree of finality, though it was expressed to be of a provisional nature. But that was an entirely different case. A scheme was framed, which in form was final and not provisional. It was argued that it was not 'final,' because it contained a clause saying that it might in whole or in part be varied by a future scheme. It was held that this merely reserved the statutory right to make future schemes, which the present scheme could not either then or thereafter prejudice. The contention that the continuance of the rules for passes with fees was not a purely "temporary arrangement" has already been twice rejected by this Court (P. B. pages 227 and 258); and, I think, there is clearly no substance in it.

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(4) 29 M. 283 at p. 288; 10 C. W. N. 825; 8 Bom. L. R. 498; 16 M. L. J. 265; 4 C. L. J. 189; 3 A. L. J. 707; 1 M. L. T. 327; 33 I. A. 139 (P. C.).

(5) 35 Ind. Cas. 30; 43 C. 1085 at pp. 1102, 1103; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 43 I. A. 127; 8 L. B. R. 517 (P. C.).

(6) 8 B. 432 at p. 450; 4 Ind. Dec. (N. S.) 664.

(7) (1897) Un. P. J. 165.

There remains the question of the legality of levying fees for passes from ordinary worshippers. No doubt this was stigmatised as improper, illegal and *ultra vires* in the previous litigation (P. B., pages 320, 330 and 332). But these remarks seem to me *obiter dicta* so far as the rights of worshippers, and not the rights of Gors, which were the subject-matter of the suit, are concerned. They must, of course, be treated with great respect, and we propose to do this in dealing with the present application. But, on the other hand, it is, I think, clear that a right of worship at a temple is not an absolutely unrestricted right. It obviously must be subject to reasonable regulations for preventing overcrowding, etc. Thus in *Ankapati Subba Reddi* v. *Tippana Narayana Reddi* (9) it was held that the mere fact that a person had offered worship at a particular place for a number of years would not necessarily give him a right to do so; and that the Courts should be slow to recognise, without proper evidence, claims of right which would materially interfere with the rights of trustees to regulate the worship and ceremonial of temples in the interests of the whole community.

Similarly in England a parishioner's right to attend Church is subject to his obeying the reasonable directions of the Churchwardens as to which seat he shall occupy; and fees or rents can be charged for pews or enclosed seats in a Church, *cf.*, Halsbury's Laws of England, Volume XI, Arts. 1453, 1457, at pages 737 to 741. The argument that because there is a statutory duty upon members of the Church of England to go to Church, there is a correlative general right to go to Church on those who are obliged to go [*Taylor* v. *Timson* (10)] does not apply to Hindus and others in India. There is also, as pointed out in my learned brother's judgment which I have had an opportunity of perusing, a distinction between the temple and the inner sanctuary, which should be borne in mind. The levy of fees for admission to the latter is not on the same footing as a similar levy for admission to the main hall of the temple. Accordingly, I can see no sufficient ground for treating the rules prescribing the pass-system as illegal and *ultra vires* in so far as they have imposed fixed fees in payment for the passes, "*whether upon the Gors or the general public entitled to worship in the temple at Dakore*," as was done in this Court's judgment of April 11, 1919 (*ib.* page 227), which has been set aside. So far as the judicial decisions of 1887 and 1890 treat of rights other than those of the Gors and the Sevaks, they are not recognised in cl. 12 (4) of the scheme as prevailing over the general power of the Committee "to make rules for the issue of passes," etc; and for reasons, I have already given, I do not think it is legitimate to bring in "the established practice of the institution" in considering this question. The words "to make rules for the issue of passes" are wide enough to cover what is as is pointed out by Lord Herschell in *Institute of Patent Agents* v. *Lockwood* (1) an ordinary accessory right to fix such fees as may be thought reasonable and necessary for carrying into effect the object of the rules. Also the rules allowed to continue under cl. 13 of the scheme provided for the levy of fees. Therefore, so far as *yajmans* are concerned, I do not think it was beyond the legal competence of the Temple Committee to frame, and of the District Judge to sanction, such rules as are now before us, and I accept the view put before us by the learned Advocate-General on this point.

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(8) (1881) 7 A. C. 91; 51 L. J. P. C. 8; 45 L. T. 631; 30 W. R. 341.

(9) 12 Ind. Cas. 537; 21 M. L. J. 1027 at p. 1030; 10 M. L. T. 428.

(10) (1888) 20 Q. B. D. 671; 56 L. J. Q. B. 216; 52 J. P. 135.

But, of course, in dealing with the application, we are not confined to the question of legality alone. As a controlling authority, by virtue of the power reserved to us in cl. 20 of the scheme, it is our duty to consider also the objections that have been urged to allowing fees to be charged for passes. It is an important question on which we can, in my opinion, properly interfere, having due regard to the well-known principles on which alone a controlling authority should interfere with the *bona fide* exercise of the power to make and sanction rules which has been entrusted to specific bodies or persons. I am prepared to accede to the statement that the levy of such fees is not unprecedented or confined to this temple alone: thus I see it is stated by Seshagiri Ayyar, J., in *Kalyana Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar* (11) that "in all the important temples in Southern India, devotees are called upon to pay a fixed sum for the *archana* that has to be performed." On the other hand, such payment is opposed to Hindu sentiment on the subject, as stated by Mr. Dayaram Gidumal (page 320) and Mr. Kennedy (page 116), though the supposition that no other temple in India does anything of the sort seems incorrect. In the present case I agree with my learned brother that the onus lies on the Temple Committee to establish a case justifying the levy of fees from the public visiting the temple and that they have not done this. The financial position of the institution certainly does not indicate any such necessity.

In my opinion, therefore, the rules (as printed at pages 119 to 132 of the P. B.) only require modification to the extent detailed in my learned brother's judgment, and we order accordingly.

As to costs after hearing the parties, we order that, as the Gors and the Sevaks have each partially failed and partially succeeded and the appearance of the representative of the Tambekar family was not really necessary, each party should bear his own costs, except the Advocate-General, whose costs should be paid out of the funds of the institution by the Temple Committee.

Mr. Ratanlal has kindly agreed to translate the modifications of the rules which we have directed: and the translation, if agreed to, should be appended to the decree, otherwise the translation will be settled on speaking to the minutes of the decree.

Madgavkar, J.—This is an application by certain Gors of Dakore, asking this Court to alter certain rules framed by the Dakore Temple Committee and sanctioned by the District Judge, Ahmedabad, under the scheme framed by this Court as modified by the Privy Council. The applicant had applied to the District Judge, Ahmedabad, in a Miscellaneous Application No. 21 of 1912 and to this Court in Appeal No. 223 of 1915. The opponents Sevaks Jairanchod and others after obtaining leave in this Court, appealed to the Privy Council in Appeal No. 95 of 1923. That appeal was allowed by their Lordships of the Privy Council, who held that the judgment of this Court, in appeal dated September 22, 1919, was not competent and must be set aside on the ground of jurisdiction. Their Lordships of the Privy Council added an expression of opinion that this Court had power conferred upon it by cl. 20 of the scheme to alter or modify or add to the rules sanctioned by the District Judge and that this power would be exercised upon application properly made to it.

Accordingly, the Gors who had succeeded in appeal to this Court but who failed in the appeal before the Privy Council make the present application asking this Court under cl. 20 above, to modify certain rules made by the Dakore Temple Committee.

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(11) 38 Ind. Cas. 73; 40 M. 212 at p. 220; 31 M. L. J. 777; 20 M. L. T. 490; 5 L. W. 625; (1917) M. W. N. 400.

The opponents are, firstly, the Temple Committee by its Manager, secondly the Advocate-General as representing the public and, thirdly, added on his own application, Gopalrao Manohar Tambekar, the Manager of the *inam* villages. The five Sevaks, the appellants to the Privy Council, were, on their own application, added as opponents by this Court. All the interested parties are, therefore, represented.

Details apart, the main grievance of the Gors applicants relates, firstly, to passes; and, secondly, to fees imposed by the Committee. Again, speaking broadly, the application is supported by Tambekar and, in regard to fees, by the Advocate-General, and is opposed by the Sevaks and the Temple Committee.

A preliminary objection as to jurisdiction was taken on behalf of the Sevaks. The scheme itself, as framed by this Court and amended by the Privy Council is to be found at pages 282-284 part III, Exhibits, the rules as sanctioned by the District Judge at pages 119 to 131 of the Printed Book, and the judgment of this Court in Appeal No. 293 of 1915 on pages 224 to 232 of the Privy Council Record.

The objection of jurisdiction is that the last clause of the scheme under which alone this application would lie does not apply to rules framed by the Committee but only to the provisions of the scheme itself. That clause is as follows: "The provisions of this scheme may be altered, modified or added to by any application to His Majesty's High Court of Judicature at Bombay." The words on 'necessity arising' after the words 'may' which had originally been inserted by this Court, were omitted by direction of the Privy Council.

It is argued for the Sevaks that this power applies only to the provisions of the scheme itself and not to rules framed by the Committee under cl. 12 of the scheme. Sub-clauses 7 and 8 of cl. 12 are as follows:—

"The Committee shall have power,

"(7) to have all the rules framed by them sanctioned by the District Court Ahmedabad to the intent that the rules when sanctioned shall have the same force as if they were part of the scheme;

"(8) to modify, alter and rescind any of the rules made by them with similar sanction."

It is contended that even though the rules framed by the Committee and sanctioned by the District Court have the same force as if they were part of the scheme, this does not make them provisions of the scheme within the meaning of the last cl. 20 above. To this position the Committee assents, but the other parties oppose on the ground that the rules sanctioned by the District Court are part of the scheme and, therefore, within the purview of cl. 20.

I am of opinion that the objection for the Sevaks and the Committee is not tenable. The scheme read as a whole is clear. It had to be framed because of the previous mismanagement of the temple by the Sevaks and Tambekar and the quarrels and litigation between these two parties and the Gors to the prejudice of the temple, the deity and the worshippers. To safeguard these last supreme interests, a Committee was appointed with a resident member on the spot and with powers as defined in cl. 12. The power of making as well as of altering rules was, however, subject to sanction by the District Court of Ahmedabad, and the power to alter the scheme itself was kept in reserve by this Court. This power applied to all the provisions of the scheme at any time. Under cl. 12, sub-cl. 7, the rules framed by the Committee and sanctioned by the District Court become part of the scheme and it is only because they become part of the scheme that they have force in law. The argument for the Sevaks pressed to its logical conclusion would mean either that the rules framed by the Committee and once sanctioned are irrevocable except on the initiative of the Committee and sanction by the District Court under cl. 12 sub-cl. 8, or that this Court would have in the first instance to add an express clause to the scheme, empowering itself to alter the rules and then allow an application such as the present. I do not think that the first alternative is consistent with the reservation of powers in this Court under cl. 20. The second alternative is merely a roundabout way, which serves no purpose and leads to the same result as the present application. Even apart from the continuous litigation in regard to the temple, neither upon the scheme as a whole nor the pertinent clause is it reasonable to hold that the procedure contended for on behalf of the Sevaks was the one contemplated. I am of opinion that cl. 7 has exactly the same construction as though it read that the rules shall be part of the scheme and shall have the same force. In other words they are as liable to alteration or modification by this Court as any other provisions of the scheme itself. The preliminary objection against the application, in my opinion, fails.

On the merits it is contended for the Gors that the system of passes and of fees is opposed, firstly, to the established practice, secondly, to the decided rights of the applicants Gors, which are expressly safeguarded by cl. 12 of the scheme, and, thirdly, to the conclusion of the Courts in the judgment of the Assistant Judge of Ahmedabad in Suit No. 18 of 1887 which is to be found on pages 285 and 323, Part III, and to the judgment of this Court in First Appeal No. 36 of 1888 from this decree pages 328 to 332. It is also argued that the necessity for passes or tickets or fees is not shown.

For the Sevaks and the Committee it is contended that in the interests of the Temple both the passes and the fees are indispensable and that they are not contrary to the decided rights of the Gors. These rights are the rights not of a class but only of the particular plaintiffs in the suit of 1888, and passes and fees have worked well in practice from 1883 to 1919. There are also affidavits to show that fees are levied in numerous other temples of both Vaishnavas and Shaivaits such as Dwarka, Rameshwar and others, and it is argued that this Court ought not to interfere with the rules framed by a practical body such as the Committee, which contains leading and disinterested Vaishnava gentlemen of weight and experience.

With this last contention I entirely agree both on general principles as well as on the scheme as framed. As I have said above, the management is intended to be left in the hands of the Committee and the framing of the rules is within the power of the said Committee, subject only to the sanction of the District Court. Once that sanction is obtained it would ordinarily require very good grounds before this Court would allow or lightly entertain any application to alter such rules. The managing member who is always on the spot, the Committee which can often meet there, the District Judge who is within easy distance and knows the local conditions are authorities far better placed to judge ordinarily all matters within the scope of the rules than we are. As was observed in *Attorney-General* v. *Bishop of Worcester* (12):

"This Court is in the constant habit of altering schemes which have been settled under its decrees, as the alterations of times and circumstances have required; and it has frequently done so upon petition in the causes in which the decrees have been made; and I do not think that the power of the Court to make such alterations can depend upon the character in which the decree has been made by the Lord Chancellor......

"It is obvious I think that the Court must proceed upon such applications with the utmost possible caution; that what has been done by the Court must not be disturbed, except upon the most substantial grounds, and upon the clearest evidence, not only that the scheme does not operate beneficially, but that it can by alteration be made to do so consistently with the object of the foundation."

Similar observations were made by Lord Alverstone, C. J., in *London County Council* v. *Bermondsey* (13).

It is in this spirit that the present application should, in my opinion, be disposed of; and it appears preferable to dispose of the question of passes or tickets separately from that of fees. In spite of the elaborate arguments for the applicants, the passes do not, in my opinion, affect their right as decided by the Courts. The present r. 56 expressly makes reference to their decided rights in Appeal No. 36 of 1838 and the concluding words 'and they will be given a free pass for the same' show that no obstruction in the way of their exercise of these rights is implied or achieved. On the other hand the opinions of the Courts from the time the passes have been issued are practically unanimous that the confined space of the *nij mandir* and much more of the *sinhasan* and the large number of pilgrims who desire to enter it, particularly on *punam* day and festival days, as well as the necessity for the safe custody of the valuable ornaments on the person of the idol—all these circumstances render some regulation of entrance into the *nij mandir* absolutely necessary; and other than passes or tickets no other means of regulation are suggested. The mere fact that passes were not issued for centuries is no argument. Railways did not then exist, the population was not so numerous, nor travel so safe; and even in the old days, as is pointed out on behalf of the applicants Gors in other applications, the management of the temple both on the part of Tambekar and of the Sevaks left a great deal to be desired. On all these grounds it appears to me that no case is made out for our interference in the matter of the passes, even as regards Gors. The only point in favour of the application as regards the passes is perhaps r. 60 under which Vaishnavas of Dakore Gam can apparently enter the inner temple without passes. There is nothing on the record to show the number of families of Vaishnavas or the number out of these, who habitually resort to the inner temple; and in any case the concluding sentence of r. 60 gives the Manager the power to exclude the Vaishnavas at times of crowd or for any other proper reason. For these reasons, as regards the free passes in general and r. 56 in particular the application, in my opinion, fails.

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(12) (1852) 9 Hare 328 at pp. 356, 361; 21 L. J. Ch. 25; 16 Jur. 3; 68 E. R. 530; 18 L. T. (o. s.) 86; 89 R. R. 471.

(13) (1191) 1 K. B. 445; 80 L. J. K. B. 141; 103 L. T. 760; 75 J. P. 52; 9 L. G. R. 79; 27 T. L. R. 141.

As regards the fees, it appears that they were first imposed by Sevaks and continued by the Receiver appointed by the Court and then by the Temple Committee. The scale of fees is moderate; and at a late stage of the case a clerk in the office of the temple has put in an affidavit with annextures showing the number of passes and the amounts realised. Here again the argument for the applicants rests on two bases. Firstly, of legal rights, and, secondly, of custom. No fees are charged to the applicants themselves. They are levied on the pilgrims desirous of entering the *nij mandir* and of performing certain special ceremonies, which involve the touching of the deity, ascending the *sinhasan* and remaining for some time near the idol. In the judgment in the original suit of 1888, the idea of taking fees in Hindu temples was characterised as repugnant to Hindus and was the subject of very strong comment. It appears that while there are other famous temples such as Pandharpur, where no fees are levied, there are equally others not less famous such as Dwarka, which is second, if at all, only to Dakore, and Rameshwar, where fees are levied. On the first point it appears to me necessary to distinguish between the levy of fees in the main body of the temple, such as the *Sabha Manday*, and the levy of fees in, so to speak, the Holy of Holies and for special rites, as distinguished from the general worship or *Darshan* and sight of the idol. As far as I know, it is undoubted that every Hindu has ordinarily a right to enter a Hindu temple and obtain sight of the idol and perform his act of worship from a distance in the main body of the temple, such as the *Sabha Mandap* here, without any payment of fees; and payment for mere entrance would, I think, undoubtedly be repugnant to Hindu ideas. On the other hand, not only in a Hindu temple but also in other places of worship, there is often a Holy of Holies to which access is not equally free and is regulated by special rules for the special right to enter and perform worship therein; and there does not appear to me to be the same sentiment against the regulation of entrance into this Holy of Holies by whatever rules may be necessary from the point of view of that particular religion and that particular form of worship in that particular temple. Thus, in the ordinary Hindu temple, the Sewak is not always present, the doors of the inner temple where the idol is kept are not always open but are locked up, while he is away, so that without his presence and permission contact with the idol is impossible. At the same time it is, I think, undoubted that until the Sevaks started and the Receiver continued the system of fees for entrance in the *nij mandir* and for special forms of worship, such compulsory fees were not known in the Dakore temple. Therefore, to a certain extent, the onus is, in my opinion, on the Committee, which wishes to perpetuate these fees, to show that they are necessary or at least advisable. And as it happens, these passes and fees have been enforced for a period of exactly thirty years from 1887 to 1918 till the decision of this Court in 1919 in Appeal No. 223 of 1915, which decided against the fees. Pending the appeal by the Sevaks to the Privy Council, the Sevaks applied to this Court in Civil Application No. 828 of 1919 that the levy of fees for passes should be continued pending the decision of the Privy Council. That application was dismissed on the September 22, 1920, and fees have not since then been levied. We are, therefore, now in a position to see the consequences of the imposition of these fees for a period of thirty years, and their cessation for a period of five years, as shown in the annexures. A, B, by the clerk to the temple.

From these annextures it would appear that the cessation of fees has caused the number of passes both for *Darshan* and for *Charansparsha* and *Kesarsnana* to rise enormously from 11208 and 13641 in 1921 to 21600, and 66400 respectively. Column 4 of annexture A shows that during the later years the total sale-proceeds from these passes and tickets varied from Rs. 7,000 to Rs. 8,000 a year. Under the judicious management of the Committee the income is nearly Rs. 2,00,000 and the expenditure about Rs. 1,65,000. After the total expenditure there is usually a surplus of at least Rs. 15,000 in ordinary years. There is a total reserve of nearly Rs. $1\frac{3}{4}$ lacs.

The net balance is divided in equal shares between the temple funds and the Sevaks. From these figures I conclude that from a pecuniary point of view the imposition of these fees is not necessary for the temple itself and serves the interests of the Sevaks more than that of the temple. If so, and particularly in view of the objection of the Advocate-General representing the general public, I am of opinion that the cessation of the fees has gone on for five years not only without prejudice of the temple but also to the substantial convenience of the worshippers in the inner temple, as is apparent from the large increase in their members. The cessation of fees should, therefore, continue, at least until a clear case of necessity for their imposition is made out by the Temple Committee to the satisfaction of the District Court of Ahmedabad, in which case under cl. 12, sub-cl. 8 of the scheme, it would be open to the Committee to re-impose them. Whether such a necessity will arise, as was argued before us, from famine years or other fall in the revenue of the temple necessary for the up-keep for the services of the idol and the maintenance of the cattle or otherwise, must be a matter for the future on which it is not advisable for us to express any opinion at present.

In the result, therefore, the application, in my opinion, fails as regards free passes or tickets and succeeds as regards fees. As regards fees the payment whether to the temple or to the Sevaks or to the Gors should be, as far as possible, entirely a matter of option with the worshippers and not a matter of compulsion.

R. L. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 322 OF 1925.

February 9, 1926.

Present:—Mr. Findlay, Offg. J. C.

R. B. M. B. KINKHEDE—DECREE-HOLDER—APPLICANT

versus

MOHANYA—JUDGMENT-DEBTOR—NON-APPLICANT.

Limitation Act (IX of 1908), Sch. I, Art. 164—Application to set aside ex parte *decree—Nature of fraud permissible to prove—Remedies open to applicant.*

It is not correct that for the purposes of Art. 164 of the Limitation Act the only fraud that is relevant to be considered in the application for setting aside an *ex parte* decree is a fraud with reference to the service of the notice and that s. 18 of the Limitation Act does not otherwise apply to such an application. It is open to the applicant in such a case to prove a fraud practised on him by the decree-holder which prevented him from appearing in Court on the date of hearing. [*ibid.*]

The applicant in such a case has a dual remedy, one by an application to set aside the *ex parte* decree and another by a civil suit to set aside the decree as having been obtained by fraud. [*ibid.*]

Radha Raman Shaha v. *Pran Nath Roy*, 28 C. 475; 5 C. W. N. 757 (P. C.) and *Khagendra Nath Mahata* v. *Pran Nath Roy*, 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.), referred to

Application for revision against an order of the Additional District Judge, Nagpur, dated the 25th August 1925, in Miscellaneous Appeal No. 3 of 1925.

Mr. *W. R. Puranik*, for the Applicant.

Mr. *W. H. Dhabe*, for the Non-Applicant.

ORDER.—The decree-holder-applicant, Rao Bahadur M. B. Kinkhede, obtained a preliminary decree for foreclosure against the non applicant Mohanya on 30th November 1921. The usual 6 months were allowed for payment. On 6th September 1924 the plaintiff applied for decree final. At the hearing on the 14th October 1924 the present non-applicant alleged that he had made a payment of Rs. 200 and the case was adjourned to the 4th of November 1924, in order to enable the plaintiff's agent to make a reply. At this hearing the non-applicant and the other defendants remained absent and the decree was made final.

On 6th January 1925 the present non-applicant filed an application to have the final decree set aside, making allegations of fraud against the decree-holder's agent and stating that it was in consequence of an assurance given by this man that he had not appeared in Court on 4th November 1924. The Judge of the first Court held that the application was barred by time and that he could not consider the allegations of fraud offered by Mohanya. The Subordinate Judge was apparently of opinion that, having regard to Art. 164 of the Limitation Act, fraud could only be enquired into if it related to the service of summons or notice. In the present case, admittedly the non-applicant had been served with notice of the application for decree absolute. The Subordinate Judge read Art. 164 of the Limitation Act as implying that where there has been proper service, the application must be made within 30 days of the date of the decree, and was of opinion that it was not competent for him to go into the allegations of fraud as the question of the applicant Mohanya's knowledge of the decree only became material thereunder when he had not been duly served.

The present non-applicant appealed to the Court of the Additional District Judge, Nagpur. This Judge was of opinion that O. IX, r. 13, C. P. C., laid down that an *ex parte* decree could be set aside when the defendant was prevented by any sufficient cause from appearing. Obviously, he held that fraud might be such a sufficient cause. As regards Art. 164 of the Limitation Act, he was of opinion that s. 18 thereof applied in the peculiar circumstances of this case, and that, if Mohanya's allegations regarding the fraud practised on him were made out, he was entitled to an extension of time upto the date on which he had knowledge of the final decree having been passed. The application for setting aside the decree absolute was accordingly remanded for re-trial to the first Court, and the decree-holder has now come up here in revision against the said order of the Additional District Judge.

I am not impressed by the preliminary objection which was offered on behalf of the non-applicant that no application for revision lies in the present case, even if it be assumed that the finding on the point of limitation was an erroneous one. Obviously, in my opinion, if the Judge of the lower Appellate Court was wrong in holding that it was permissible for the first Court to enquire into the allegations of fraud made in an application, and not by separate suit, a question of the Court exercising a jurisdiction, which did not vest in it, did arise. *Prima facie*, therefore, I am of opinion that the present application lies.

I am not prepared, however, to accept the contention offered on behalf of the applicant that, for the purposes of Art. 164 of the Limitation Act, the only fraud, which can be relevant to be considered in the application in question was a fraud with reference to the service of notice and that s. 18 of the Limitation Act could not be applied, even if we assume that Mohanya's explanation as to why he did not appear on the 4th November 1924 be correct in point of fact. The decision in *Biroo Gorain* v. *Jainurat Koer* (1) has been quoted, however, in support of the applicant. I do not see that this decision has any peculiar relevancy in the present case, concerned as it was with the consideration of r. 2 of O. XXI, C. P. C. A similar remark applies to the decision in *Pasumarti Payidanna* v. *Ganti Lakshminarasamma* (2). In my opinion, the applicant had both remedies, *viz.*, that by application and the one by suit open to him: *cf* *Radha Raman Shaha* v. *Pran Nath Roy* (3) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (4).

The only question which indeed remains is whether the non-applicant was entitled to the benefit of s. 18 of the Indian Limitation Act. For my own part, I cannot see the slightest reason why this provision does not apply *proprio vigore* to the facts of the present case. The non-applicant alleged that he did not appear in the decree, final, proceedings on the date we are concerned with as a result of an express representation from the decree-holder's agent that he should not, and need not, so appear. If this is established, he is clearly entitled to an extension of time upto the date on which he came to have knowledge of the decree absolute, in other words, the date on which it came to his knowledge that the alleged fraud had been practised on him.

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(1) 13 Ind. Cas. 63; 16 C. W. N. 923; 16 C. L. J. 174.

(2) 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525.

(3) 28 C. 475; 5 C. W. N. 757 (P. C.).

(4) 29 C. 395; 29 I. A. 99; 6 C. W. N. 433; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.).

I am, therefore, of opinion that the Additional District Judge was correct in remanding the case, as he did, for enquiry into the alleged fraud. The present application is dismissed. The applicant must bear the non-applicant's costs. I assess Rs. 25 as Pleader's fees.

G. R. D.
N. H. *Application dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1537 OF 1925.

January 21, 1926.

Present:—Mr. Justice Dalip Singh.

DHANPAT RAI—DECREE-HOLDER—APPELLANT

versus

NATHE KHAN AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5—Mortgage suit—Preliminary decree—Decree made final without separate sheet—Irregularity.

Where in a mortgage suit, a preliminary decree is made final by an endorsement on the preliminary decree-sheet and no formal decree is drawn up, the absence of a separate decree-sheet should be considered only an irregularity and the Court should be considered to have made the decree final.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Amritsar, dated the 9th May 1925.

Lala *Shaukat Rai*, for the Appellant.

Mirza *Asghar Beg*, for the Respondents.

JUDGMENT.—The sole question in this appeal is whether under the terms of the decree passed on the 16th day of March 1921 by the learned Senior Subordinate Judge, which was made final on the 15th of October 1921, the decree-holder is entitled to execute separately for costs against the judgment-debtors mentioned in the decree-sheet.

The preliminary decree declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the 16th day of April 1921 was Rs. 27,921 and that the amount of Rs. 24,923-4-6 should carry interest at the rate of 9 per cent. per annum until realization. It was further declared that if such payment was not made on or before the 16th of April 1921 the mortgaged property should be sold and the proceeds applied in payment of what was declared due to the plaintiff together with subsequent interest and subsequent costs. The decree further went on to say that Nathe Khan, Sain Das, Shahab Din and Jalal Din should pay the plaintiff costs of the suit amounting to Rs. 1,526-10. No separate final decree was drawn up but on the decree-sheet the learned Senior Subordinate Judge endorsed the words: "This decree is made final" and signed and dated the same. It seems that the decree-holder took out execution for the total sum found due under the decree, namely, Rs. 27,921 which included the Rs. 1,526-10, found due as costs. The mortgaged property was sold and Rs. 15,695 was recovered by the decree-holder. The decree-holder has now taken out execution against the judgment-debtors named in the decree for the costs alone.

The learned Senior Subordinate Judge has dismissed this application on two grounds:—

(1) That as the decree-holder has already taken out execution for costs and recovered more than the total sum due for costs, there was nothing left to execute so far as costs were concerned. I cannot see how it can be said that the decree-holder's realization of Rs. 15,695 out of Rs. 27,921 due can be said to be in complete satisfaction of the Rs. 1,526-10-0 costs which were included in Rs. 27,921.

(2) The learned Senior Subordinate Judge has held that the decree-holder cannot proceed against the present judgment-debtors without a separate personal decree under O. XXXIV, r. 6 C. P. C. So far as this point is concerned, it seems to me that rightly or wrongly the decree already gave a personal decree against the aforenamed judgment-debtors for the amount of the costs and that, therefore, it was not necessary for the decree-holder to get a further decree under O. XXXIV, r. 6, C. P. C., for the amount of the costs.

The learned Counsel for the respondents has further contended that as no final decree was drawn up, therefore, there is no execution open to the decree-holder at all. In the first place I am not satisfied that where a preliminary decree is given for costs alone, that decree cannot be executed after it has been made final. Further I do not think that the absence of a formal decree-sheet can in the circumstances of this case be taken to mean that no final decree was passed. By the endorsement on the decree-sheet the learned Senior Subordinate Judge intended to make the preliminary decree the final decree and the absence of a separate decree-sheet should in my opinion, only be taken to be an irregularity. I, therefore, accept the appeal and remand the case for disposal. The appellant will have his costs of this appeal.

R. L. *Appeal accepted.*
Case remanded.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 5010 OF 1922.

September 23, 1925.

Present:—Mr. Justice Crump.

RACHEL BENJAMIN—PLAINTIFF

versus

BENJAMIN SOLOMON BENJAMIN—DEFENDANT.

Jews—Marriage law applicable—Monogamy—Divorce, claim of, by Jewish wife—Grounds—Dissolution of Jewish marriage, how effected—Decree nisi *—Alimony—Letters Patent, Bombay, cl. 12—Jurisdiction to entertain matrimonial suits between Jews.*

Clause 12 of the Letters Patent of the Bombay High Court gives that Court jurisdiction to entertain a suit arising out of matrimonial disputes between Jews and the law applicable would be Jewish Law "with such adaptations to the circumstances of the case as justice may require." [p. 64, cols. 1 & 2.]

Jews in Bombay, generally speaking, are monogamous, and a husband cannot marry a second wife during the lifetime of her first husband except in certain specified exceptional cases. [p. 67, col. 2.]

A jewish wife can claim divorce on account of repeated ill-treatment received from her husband or turning her out of doors or prohibiting her from visiting her parental home. [*ibid.*]

A Jewish marriage can be dissolved by Courts of State and it is not necessary to obtain a ritual 'get' or 'bill of divorcement' executed by the husband. [*ibid.*]

The Court may in a case where the parties are Jews grant a decree *nisi* for dissolution of marriage. [p. 68, col. 1.]

It cannot be doubted that the Court has also power among the Jews to grant a permanent alimony. [*ibid.*]

Mr. *M. L. Maneksha*, for the Plaintiff.

Mr. *Mulla* (with him Messrs. *Bahadurji* and *Amin*), for the Defendant.

JUDGMENT:—This is a suit between a husband and a wife of the Jewish persuasion. The wife, who is the plaintiff, seeks for relief against the defendant, the husband, on the ground of cruelty and adultery. The facts which are admitted are as follows:—

The families of the parties live in Bombay. On August 12, 1918, there was an agreement in writing between the fathers of the two parties whereby each agreed to contribute Rs. 10,000, the whole sum of Rs. 20,000 to be invested in the joint names of the two parties. This sum of Rs. 20,000 was apparently intended to be the wife's dowry (Ex. 7). That agreement is the starting point of the history of this case and it is clear that the intention expressed in this writing was never departed from but that full effect was not given to it. Sometime in March 1919 War Bonds of the face value of Rs. 20,000 were purchased. To this sum plaintiff's father contributed Rs. 10,000 and the defendant Rs. 10,000. Bonds of the face value of Rs. 10,000 were bought in the name of plaintiff, and bonds of a similar value in the name of defendant. Plaintiff or her father kept the bonds in her name, and defendant kept the bonds in his name. In May 1919, it was decided to sell the bonds as it was thought that the value would fall. The sale was through Messrs. Forbes & Croft, and two cheques were issued by them, each cheque representing the sale-proceeds of one of the two lots. The sale-proceeds Rs. 20,000 were invested in piece-goods and the transactions resulted in a loss. From August to the end of October 1919 there was correspondence over this matter, and some settlement was effected. On November 4, 1919, the parties were married. At the time of the marriage a *Kethuba* was executed. Shortly after the marriage plaintiff's father, who was engaged in business in piece-goods, went to Basra. There he suffered a heavy loss. He returned about February 7, 1920. On February 15, 1920, plaintiff left defendant's house and complained to the Police that defendant had assaulted her. On February 17, 1920, she applied to the Chief Presidency Magistrate for an order for maintenance under s. 488 of the Cr. P. C. On February 19, 1920, the parties appeared before the Magistrate and the matter was compromised. Thereafter plaintiff returned to the defendant's house. On February 22, 1920, defendant produced the plaintiff's jewellery and plaintiff signed a receipt for it. On March 10, 1920, plaintiff again left the defendant's house. She returned in April 1920 and remained until July 5, 1920. On that date she again left the defendant and on August 17, 1920, she wrote a letter to Mr. A. J. Raymond, at that time the elected Head of the Jewish Community in Bombay, asking for his intervention. On August 22, 1920, a son was born to plaintiff, and by the intervention of friends a reconciliation was effected. On Augnst 28, 1920 plaintiff returned to the defendant's house and remained there till June 5, 1921. On that day she again left the defendant. On June 6, 1921, plaintiff's father complained to the Police that defendant had assaulted plaintiff. On June 7, 1921, plaintiff filed a complaint to the Second Presidency Magistrate under s. 323 ofthe Indian Penal Code. On June 23, 1921, the Magistrate dismissed the complaint for want of independent evidence. Correspondence followed but plaintiff declined to return to her husband. On May 16, 1922, defendant went through the form of marriage with another woman. On May 22, 1922, plaintiff complained to the Jewish Benevolent Society. A meeting was held on May 31, 1922, at which both parties were present. The consideration of the matter was referred to five 'Rabbis.' This meeting was adjourned to June 7. On that day the five 'Rabbis' pronounced their decision which was in favour of plaintiff. Defendant refused to abide by it, and was ex-communicated.

There are various matters of fact in dispute. These I shall deal with later. The plaintiff's case, put shortly, is that her husband cruelly ill-treated her, drove her out of the house, and contracted a second marriage which is invalid under the law by which the parties are governed. She contends (1) that the decision of the 'Rabbis' has dissolved the marriage, (2) that if that is not so then defendant should be compelled to give her a bill of divorcement, or alternatively that the Court should decree dissolution of the marriage. She claims various reliefs on the dissolution of the marriage of which the principal one is that defendant should be ordered to pay to her the sum of Rs. 25,555 specified in the *Kethuba* executed at the time of the marriage. The main defences are a denial of the allegation of ill-treatment and an assertion that the second marriage is valid; the plaintiff is not, therefore, entitled to a divorce *in pais*; the Court has no jurisdiction to entertain a suit of this nature between parties professing the Jewish faith.

It will be convenient to set out the issues which have been raised:—

1. Whether plaintiff is entitled to the payment of Rs. 25,555 as claimed in the plaint.
2. Whether plaintiff's father gave Rs. 10,000 to the defendant as part of plaintiff's dowry.
3. Whether plaintiff brought with her clothes, ornaments and wearing apparel of the value of Rs. 5,000 as alleged by her.
4. Whether plaintiff left behind her jewellery, ornaments, wedding presents and furniture as mentioned in Ex. C to the plaint.
5. Whether defendant ill-treated and molested the plaintiff as alleged in the plaint.
6. Whether plaintiff is entitled to any maintenance, and, if so, what.
7. Whether plaintiff is entitled to a declaration that her marriage with defendant is dissolved.
8. Whether plaintiff is entitled to a decree directing the defendant to give a divorce to the plaintiff.
9. Whether this Honourable Court has jurisdiction to grant a declaration and pass a decree as stated in the two preceding issues.
10. Whether plaintiff is entitled to a decree for dissolution of marriage.
11. Whether defendant was entitled according to Jewish Law and custom to marry a second wife during the lifetime of plaintiff.

The case gives rise to a number of questions which are by no means easy to resolve in the absence of any authority.

I propose to deal first with the question of jurisdiction and the question of the law to be applied to the parties in this suit, if the Court can entertain it.

In order to understand the question of jurisdiction it is necessary to approach it historically. Before the creation of the High Court there were two Courts: the Supreme Court exercising jurisdiction in the Town and Island of Bombay, and the Sadar Diwani Adalat exercising jurisdiction over the rest of the Bombay Presidency.

The Supreme Court had jurisdiction under the Charter of 1823. An examination

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of that Charter will show that the jurisdiction fell under four heads, *viz.*, Common Law, Equity, Ecclesiastical, and Admiralty. The Court was thus (1) a Court of Common Law having the jurisdiction and authority of the Court of King's Bench 'as far as circumstances will admit'; (2) a Court of Equity having power to administer justice 'as near as may be' according to the rules and precedents of the High Court of Chancery; (3) a Court of Ecclesiastical jurisdiction having power to administer the Ecclesiastical Law 'as used and exercised in the Diocese of London in Great Britain,' and (4) a Court of Admiralty. The limits of the jurisdiction were the Town and Island of Bombay with certain exceptions which need not here be specified.

The Sadar Diwani Adalat was established in 1799 and sat in Bombay until 1820. In that year it was transferred to Surat. In 1827 it was re-transferred to Bombay. This Court was a Court of Appellate Jurisdiction to which appeals lay from the Local Courts established by the Company in the interior of the Presidency.

In 1856, the case of *Ardaseer Cursetjee* v. *Perozeboye* (1) came before the Privy Council on appeal from the Supreme Court. The plaintiff was a Parsi lady and she sued her husband, a Parsi, for restitution of conjugal rights. The suit was heard on the Ecclesiastical side of the Supreme Court. The defendant objected that the Court had no jurisdiction but the objection was overruled. On appeal the Privy Council upheld the objection. The importance of the case lies in this that it is well-known that this case was one of the matters taken into consideration in framing cl. 12 of the Letters Patent of the Bombay High Court. The case is further important as showing what the jurisdiction of the Supreme Court, and that of the Sadar Diwani Adalat, was in cases of this nature. The Privy Council held that the suit was not maintainable, and, put shortly, the ground of the decision was that it was impossible to apply the Law of the Diocese of London, a Christian Law, to persons professing the Zoroastrian religion. Their Lordships approached the case as being strictly an Ecclesiastical proceeding, and having concluded that for this reason the suit could not be maintained, they proceed as follows (page 390*):—

"But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them (the Parsees.) We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them, but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief, but it must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as, for time out of mind, were incident to their own caste; nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages. Such remedies we conceive that the Supreme Court on the civil side might administer, or at least remedies as nearly approaching to them as circumstances would allow. In suits commenced on the civil side, the peculiar difficulties which belong to the exercise of Ecclesiastical jurisdiction in some matrimonial cases would not arise. Proceedings might be conducted on the civil side with such adaptation to the circumstances of the case as justice might require, though on the Ecclesiastical side such modification would be wholly irreconcilable with Ecclesiastical Law.

"We have been led to make these observations, not merely by general considerations but more particularly by the case of *Mihirwanjee Nuoshirwanjee* v. *Awan Ball* (2). That case shows that the *Sudder Adawlut* at *Bombay* will take cognizance of matrimonial suits between Parsees, and will afford them such relief as a due regard to their own laws and customs will allow; it also proves, as indeed must be expected, that those laws and customs are wholly at variance with the principles which govern the matrimonial law of the Diocese of *London*, and incompatible with the Ecclesiastical Law, as in such cases is administered. One instance will suffice. It appears that, under many circumstances, the husband is permitted to take a second wife, the first being alive."

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(1) 6 M. I. A. 348; 10 Moo. P. C. 375; 4 W. R. P. C. 91; 1 Suth. P. C. J. 265; 1 Sar. P. C. J. 548; 19 E. R. 130; 14 E. R. 533.

(2) 2 Borr. Bom. Sud. Dew. Rep. 209.

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An examination of the case cited from Borrodaile shows that the Court had no doubt as to the jurisdiction to entertain a suit by a Parsi lady for a divorce from her husband. The parties resided outside the jurisdiction of the Supreme Court.

Their Lordships of the Privy Council, therefore, decided that the Supreme Court, in the exercise of its Ecclesiastical jurisdiction, could not entertain a suit between Parsis for restitution of conjugal rights. They suggested, but did not decide, that the Supreme Court on its civil side could deal with matrimonial disputes between parties other than Christians, applying to those cases the law of the parties with any necessary modifications. They tacitly at least approved of the practice of the Courts subordinate to the Sadar Diwani Adalat in dealing with such matters. It would be difficult to hold on this decision that the Supreme Court could not upon its civil side have entertained such a suit as that now before me, and it must follow that the law to be applied would have been the Jewish Law.

Until 1861 there was no change in the constitution of the Courts. In that year the Act for establishing High Courts of Judicature was passed (24 & 25 Vic. c. 104). The Supreme Court and the Sadar Diwani Adalat were abolished (s. 8). The jurisdiction of the High Court which took their place is defined by s. 9. That jurisdiction is two-fold:—

1. Such as is prescribed by the Letters Patent to be issued under the Act.

2. All the jurisdiction vested in either of the Courts abolished by the Act 'save as by such Letters Patent may be otherwise directed and subject and without prejudice to the Legislative powers of the Governor-General of India in Council.'

It is necessary for the present purpose to consider the original Letters Patent of 1862. It will be seen that the following jurisdictions are defined.—

(I) Civil Jurisdiction, cls. 11 to 20.

(II) Admiralty and Vice-Admiralty Jurisdiction cls. 31 and 32.

(III) Testamentary and Intestate Jurisdiction, cls. 33 and 34.

(IV) Matrimonial Jurisdiction, cl. 35.

In *Nusserwanjee Pestonji Wadia* v. *Eleonora Wadia* (3) the Appellate Court had recourse to the Despatch of the Secretary of State of May 14, 1862, forwarding the Letters Patent as an aid to the construction of this document. I am, therefore, entitled to refer to paras. 17 and 33 of that Despatch. The first of these paragraphs explains the scope of cl. 12. "17. The terms of cl. 12...are intended to include every description of case over which the Moffussil Courts have jurisdiction." Then there follows a reference to the decision of the Privy Council in *Ardaseer Cursetjee* v. *Perozeboye* (1) in the following words:—

"Further, a decision of the Judicial Committee of the Privy Council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitation as to whether that Court could administer a remedy in such cases on the civil side. It is one object of the present Charter to do away with all such restrictions and limitations, as far as this can be done without trenching on the proper province of legislation. It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong, as are exercised by the Courts not established by Royal Charter, and thus to place the Court of first instance in the Presidency Towns, and in the interior of the country in this respect, as nearly as may be, on the same footing."

The scope of cl. 12, so far as concerns the matter before me, is thus clear. Apart from this commentary the words 'suits of every description' could hardly be more comprehensive.

As I shall show presently the cases where Christian parties are concerned are specially provided for in the Letters Patent, and in the legislation undertaken in consequence thereof. Also the Parsis have now their own Matrimonial Tribunal constituted by a Special Act of the Legislature. In other communities in this country divorce is possible by act of the parties themselves, or is practically unknown owing to the existence of polygamy. But nonetheless there are cases in the reports in which the High Court in its original civil jurisdiction has exercised jurisdiction in matrimonial disputes and has applied the law of the parties for the purpose of giving relief. In *Dadadji Bhikaji* v. *Rukmabai* (4) a decree for restitution of conjugal rights was made as between Hindus. In that case Sargent, C. J., said (page 310*): "It was not attempted to be denied that, since the expression of opinion by the Privy Council in *Ardaseer Cursetjee* v. *Perozeboye* (1) 'the Civil Courts of this country 'should afford remedies for the evils incidental to married life,' suits for the restitution of conjugal rights had frequently been entertained by the Civil Courts in the case of natives, whether Hindus or Muhammadans." In a later case, *A.* v. *B.* (5), a suit for divorce by a Muhammadan lady against her husband was entertained without objection. It may be observed that the fact that the Legislature has made provision from a very early time for the administration of Hindu Law between Hindus and Muhammadan Law between Muhammadans does not affect the question of jurisdiction. What law is applicable is a different question.

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(3) 20 Ind. Cas. 492; 38 B. 125; 15 Bom. L. R. 593.

It would appear from the decision of the Privy Council that in dealing with matrimonial disputes the law to be applied was the law of the parties. That being so in the case of the Supreme Court, the same rule applied to the High Court by virtue of cl. 18 of the Letters Patent of 1862 and cl. 19 of the Amended Letters Patent of 1865. Whether that would be so in other matters it is unnecessary to consider. The case of Muhammadans and Hindus was provided for in the Charter of 1823, but as regards inhabitants of Bombay it has been held that the English Common Law is applicable: see *Naoroji Beramji* v. *Rogers* (6) (Parsis): *Lopes* v. *Lopes* (7) (Portuguese). In the case last cited, Westropp, C. J. recognised that question of matrimonial law formed an exception to the general rule (page 190†). Section 112 of the Government of India Act, 1915 was cited in argument but it is open to doubt whether the words used cover a suit such as this. If the Court has jurisdiction it must, in the absence of any Statute, apply either the English Law or the law of the parties. In my opinion the Law of the parties, here the Jewish Law, is applicable. That appears to be the result of the cases. The history of the legislation upon this question is dealt with in Chap. IV of Ilbert's Government of India (3rd Edition), and at page 359* the learned Author sums up the case as to "the law applicable to persons neither Hindus nor Muhammadans" and arrives at the same conclusion.

Reliance has been placed on cl. 35 of the Letters Patent as limiting the jurisdiction in matrimonial disputes to cases where the parties are Christians. There are, however, no expressions limiting the jurisdiction which the Supreme Court possessed 'on its civil side.' The scope of this clause is confined to proceedings between Christians. It was intended to re-place in a wider and more modern form the Ecclesiastical jurisdiction of the Supreme Court. The scope of the clause and of the proviso is explained in para. 33 of the Despatch. The intention was that legislation should be undertaken to deal more completely with matrimonial disputes between Christians, and it is well-known that after a prolonged delay due to the difficulty of determining whether residence or domicil should be the test, the Legislature selected the former alternative, and enacted the Indian Divorce Act of 1869. I find nothing here which touches the case of persons other than Christians, or in any way trenches upon the jurisdiction conferred by cl. 12.

But the main argument for the defence—and it is this which has made it necessary for me to examine the matter at some length—rests upon the decision of the Appeal Court in *Nusserwanjee Pestonjee Wadia* v. *Eleonora Wadia* (3). It is necessary to examine that case carefully in order to understand what was the question before the Court. The plaintiff, a Christian lady, was married to the defendant, a Parsi, at the marriage Register Office in the District of Kensington in the county of London. She came to Bombay and sued the defendant under the matrimonial jurisdiction of the High Court, which is strictly speaking the jurisdiction conferred by cl. 35 of the Letters Patent. There is no other matrimonial jurisdiction to nomine, and it is limited to cases arising between Christians. In the Trial Court an issue was raised and the argument turned on the interpretation of s. 2 of the Indian Divorce Act, 1869, *viz.*, whether the 'residence' of the petitioner justified the requirements of

(4) 10 B. 301; 10 Ind. Jur. 461; 5 Ind. Dec. (N. S.) 588.

(5) 21 B. 77; 11 Ind. Dec. (N. S.) 54.

(6) 4 B. H. C. R. O. C. J. 1.

(7) 5 B. H. C. R. O. C. J. 172.

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†Page of 5 B. H. C. R. O. C. J.—[*Ed.*]

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that section. The Court held upon that narrow point that there was jurisdiction. The case went on appeal. An examination of the judgment will show that the Court first considered the provisions of the Indian Divorce Act, and then pointed out that the High Court had such matrimonial jurisdiction as was conferred by the Letters Patent, or as was exercised by the Supreme Court. The Ecclesiastical jurisdiction of the Supreme Court could not be exercised between Parsis [*Ardaseer Cursetjee* v. *Perozeboye* (1)]: cl. 35 of the Letters Patent only gave matrimonial jurisdiction between Christians. The Indian Divorce Act, 1869, was enacted to supplement cl. 35 of the Letters Patent, and s. 4 limited the jurisdiction to decree restitution of conjugal rights to cases between Christians. Therefore, it was held that the Court had no jurisdiction where the defendant was a Parsi. The true effect of that decision is that in the exercise of the matrimonial jurisdiction conferred by cl. 35 of the Letters Patent, or the Indian Divorce Act, 1869, the High Court had no jurisdiction to give a decree for restitution of conjugal rights in a case where the plaintiff is a Christian and the defendant a Parsi. No case is an authority except upon its own facts. Here the parties are Jews and the question is whether cl. 12 of the Letters Patent gives this Court jurisdiction to entertain a suit arising out of matrimonial disputes between Jews. The decision of the Appeal Court does not touch the true construction of cl. 12. The arguments of Counsel in the Appeal Court are somewhat more fully set out in the report of the case *Nusserwanjee Pestonji Wadia* v. *Eleonora Wadia* (3). The only reference made to cl. 12 of the Letters Patent was for the purpose of illustrating the meaning of the word "resides." The case proceeded solely on the basis that the suit was one in the exercise of the "matrimonial jurisdiction" conferred by cl. 35 of the Letters Patent or by the Indian Divorce Act, 1869. It follows that nothing was there decided which is in any way relevant to the question now before me. I reach this conclusion the more readily as it avoids the position which the Privy Council deprecated so strongly in *Ardaseer Cursetjee* v. *Perozeboye* (1), when their Lordships said (page 390*): "But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them." Those words are as applicable to Jews as to litigants of any other persuasion, and, as I have endeavoured to show, cl. 12 of the Letters Patent was deliberately intended to remove the difficulty. I hold, therefore, that I have jurisdiction to entertain this suit, and that in deciding it the Jewish Law must be applied "with such adaptations to the circumstances of the case as justice may require."

It may further be pointed out that the Courts outside Bombay exercise jurisdiction in matrimonial disputes between persons who are not Christians, and that the jurisdiction, so far as I know, has never been questioned [*cf.* *Abdul* v. *Hussenbi* (8) and *Bai Hansa* v. *Abdalla* (9)], and it would be highly anomalous were it necessary to hold that the High Court had no jurisdiction in such matters as between members of those communities living in the City of Bombay.

[Here his Lordship discussed the evidence in the case and then proceeded:—] If the whole history of the case is considered and the evidence of the principal parties, the truth, in my opinion, lies on the side of the plaintiff. Defendant, as he says in his affidavit already alluded to, regarded himself as entitled to receive Rs. 10,000 from plaintiff's father, and his disappointment in this matter appears to have prejudiced him against the plaintiff. Possibly it is true that she was inclined to support her father in this matter. But, whatever the provocation, he was not justified in beating her and turning her out of the house and in retaining her property as he appears to have done. I would add here, with reference to a somewhat obscure charge made by plaintiff, that defendant was anxious to explain this matter, but it appeared to me unnecessary to go into unsavoury details in the absence of any more definite statement, especially as no corroboration was possible.

After June 5, the parties lived apart. Neither took any definite action either by process of law, or by any application to the leaders of the community. In May 1922, defendant determined to marry another woman. On May 8, 1922, he wrote to Mr. Raymond setting out his version of the matter and asking for permission to marry a second wife "according to our Jewish Laws." In para. 11 of the written statement

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(8) 6 Bom. L. R. 728.

(9) 7 Bom. L. R. 684; 30 B. 122.

the defendant states that "he married another wife with the permission of the President of the Jewish Benevolent Society." In his evidence he says: "Mr. Raymond sent me oral permission to marry a second wife. His statement about that is untrue. I applied for permission in writing. It was not necessary to get a reply in writing. I only applied in order to get the loan of the canopy and other articles (articles belonging to the synagogue used at marriages). It was only a formality." Upon this point defendant called one witness Benjamin Salem, the caretaker of the synagogue. He says he took the letter to Mr. Raymond, and that defendant told him to tell Mr. Raymond that if he did not get permission he would marry outside the synagogue. Mr. Raymond said: "We cannot prevent him doing that." Mr. Raymond says: "It is false that defendant applied to me for permission to marry again and that I gave that permission. It is impossible. It would be against the wishes of the community and against our religion." This witness is independent and reliable. His memory as to the particulars of the case is not very clear, but his statement set out above depends not on memory alone, but on the stronger ground that he could not have done what is alleged. Defendant's own witness corroborates him, for what Mr. Raymond said to this witness amounts to a plain refusal of the permission applied for. I have set this matter out at some length as it illustrates the value to be attached to defendant's evidence. First, he sets out this permission as a defence; then when Mr. Raymond appears and contradicts him, he endeavours to change his ground, and to represent that it was after all only a formality and the words used by Mr. Raymond amounted to a permission. I am not now dealing with the legality of this second marriage, though on that point too the admission in the written statement is somewhat awkward, and defendant may, therefore, have been all the more ready to explain it away.

On May 16, 1922, defendant went through a form of marriage with another woman. On May 22, plaintiff wrote to the Jewish Benevolent Society (Ex. Q.) setting out her case and asking for an investigation. There is no doubt that the second marriage made the breach irreparable, and was the cause of this action on the part of the plaintiff.

A word of explanation is now necessary as to the position and functions of the Jewish Benevolent Society. This Society has been in existence for many years and is regarded as the governing body in the community. It appears that the head of the community is elected, and is President of the Committee of the Society. There are some eight or nine members of the Committee who are also elected by the community. This Committee has no legal constitution and no legal powers save such as it may possess by the custom of the community. In this case it is clear from what has already been said that both parties recognised the Society as competent to consider matrimonial disputes, but it would be impossible on the evidence in the case to hold that the Society, or its Committee, has power to divorce husband and wife. The practice is to give notice to the parties and to hear them and to refer the dispute to persons skilled in Jewish Law. That was the course followed in this case. A meeting was summoned for May 31, of which defendant had notice. The parties were heard, and the case was referred to five learned men, who were then present. On that point Mr. Raymond's memory appears to be defective. The evidence of the Secretary of the Society, Mr. Reuben, of Ibrahim Moses Samuel who signed the decision or resolution, and of plaintiff, leaves no room for doubt that the five learned men who pronounced the decision were present at the meeting of May 31. I am unable in the face of the evidence to believe defendant's statement that he did not receive fair treatment. On June 7, 1922, the decision was pronounced (Ex. F.) There appears to have been some attempt to settle matters after that date. Finally, as defendant would not accept the decision he was formally ex-communicated.

It is now necessary to consider the facts so stated in the light of the Jewish Law. At the outset a difficulty arises owing to the uncertain state of that law which is due in a measure to historical causes. The subjugation of Judaea in the reign of the Emperor Vespasian brought about the political annihilation of the Jewish nation. From that date no Jewish State has existed and there has been no Government based on Jewish Law which could secure uniformity of practice, and bring about the removal of that which has become obsolete. The Jews are now widely dispersed, and while the principles of modern Judaism have modified many provisions of the Rabbinical Code in order to make them conform to the requirements of the laws of the countries in which the Jews live, the more conservative Jews regard all the norms of the Rabbinical Code as ever binding and unchangeable. The Jews in Bombay come mainly from Baghdad, and it is improbable that they regard the Jewish Law in precisely the same light as the Jews living in England or in America. It is plain that the custom of the community must be considered on points where there is room for doubt. In the present case I have been referred to a work entitled. "The Jewish Law of Marriage and Divorce by the Revd. Dr. Mielziner." It contains, so far as can be judged, a clear and accurate account of the law based upon the original sources which are cited throughout. That law is founded on the Mosaic and Talmudic Law, and it is agreed in this case that in the sixteenth century that law was codified in a work styled "Shulchan Aruch" of which the third part "Eben Ha-Ezer" contains the Matrimonial Law. Translations of portion of this book have been put in by either party and the substance of much of it is reproduced by Mielziner. In addition to these authorities there is the evidence of witnesses as to the customs of the Jews in Bombay.

At the outset the question arises whether the proceedings which I have discussed could bring about a dissolution of the marriage. The decision of the Privy Council in *Sasson* v. *Sasson* (10) shows that there may be a Jewish body competent to give a divorce. In that case the divorce was pronounced by the Grand Rabbinat at Alexandria. But in this case I am unable to hold that there has been a divorce. The decision or award (Ex. F) does not purport to have that effect, and the one witness from among those who signed it is emphatic that there has been no divorce. In terms it directs the husband to give a bill of divorcement to his wife, which under the Rabbinical Law was essential to the dissolution of a marriage. How far that is so now I shall consider later. It is further clear that the leaders of the community treated the parties as being still husband and wife. I need not discuss the point further, for Mr. Maneksha wisely conceded that it was difficult to argue that the marriage had been dissolved. I will only point to Mr. Raymond's statement that there are no "Rabbis" in the strict sense of the word in Bombay. What is precisely necessary to constitute a Rabbi is a question which cannot be answered on the materials before me.

It is, therefore, necessary to consider whether plaintiff has made out causes which under the Jewish Law entitle her to claim a divorce. The causes alleged are two: (1) that she was beaten and turned out of the house; and (2) that her husband is living in adultery. The second of these raises the question of the legality of the second marriage, and it is here that the Rabbinical Law is undoubtedly obscure and opposed to the more enlightened practice of modern Judaism. The matter is discussed in Chap. IV of Mielziner's work. Upon that statement of the law it would be difficult to hold that the second marriage was in all times and circumstances invalid. But it is clear from the translations of the "Eben Ha-Ezer," which have been put in (Ex. Z), that this rule is recognised that in every city the custom of which prohibits marrying a second wife a man cannot marry a second wife. This appears to be an expression of the Talmudic Law. "The law of the country is the binding law" (see Mielziner, page 23). Some discussion has arisen as to the correct scope of this rule. It was argued for the defendant that "the law of the country" means the laws enacted or enforced by the Government of the country in which the Jew is for the time being living, while for plaintiff it was suggested that it means the law which the Jews follow by virtue of any local custom. I have no doubt that the former interpretation is correct. That is the light in which Mielziner interprets it. But, it is further argued that the Law of British India makes polygamy lawful, and, therefore, it is lawful to Jews. That argument is based on a fallacy. There is no such thing as "the law of the country" upon this matter in India. In this country there are in force side by side systems of law which are polygamous, monogamous, and even polyandrous. As I have already said there are two systems of law which can conceivably be applied here, the English Law and the law of this particular community. The English Law undoubtedly requires monogamy but it is in no sense the law of the country. In my opinion it is the law of the community which must prevail and that *is* "the law of the country", being the law which the Courts will apply. The question, therefore, is whether these Jews follow the Rabbinical Law upon this point or whether they are by custom monogamous. Upon that point the evidence is necessarily oral.

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(10) (1924) A. C. 1007; 94 L. J. P. C. 13

The witnesses upon the point show no signs of bias, nor have they any visible motive for favouring the plaintiff. Mr. Raymond says second marriages are not recognised in their community. I mean, of course, the taking of a second wife by a husband during the lifetime of his first wife. Mr. Reuben, the Secretary of the Jewish Benevolent Society, gives evidence to the same effect. Saleh Moses Gubbay says that the custom both in Baghdad and in Bombay forbids such marriages. He states that he himself was betrothed in Baghdad and was unable to marry in Bombay while that betrothal was undissolved. (See Mielziner, page 76 as to the binding effect of a betrothal in Jewish Law.) The evidence of Ibrahim Moses Samuel is equally emphatic. Mr. Reuben, Examiner in Hebrew in the Bombay University, states that in three cases a second wife is allowed: (1) where there has been no issue for 10 years; (2) where the first wife is in such a state of health as to prevent access; and (3) adultery. Though this witness belongs to the Beni Israel community, he is no doubt entitled to be considered an expert on Jewish Law. The exceptions which he admits are recognised in very similar terms by the other witnesses. Three cases in which Jews in Bombay have taken a second wife are mentioned in the evidence, but it is not possible to say that they do not fall within one or other of the exceptions. Indeed there is positive evidence that in one at least of these cases the first wife had become insane. In my opinion the evidence of Ibrahim Moses Samuel is correct when he says "we follow the rule laid down by Rabbi Ghersom" The explanation of this statement will be found at page 30 of Mielziner's work. The whole of the Chapter entitled "Monogamy and Polygamy" is instructive upon this matter. Reference may also be made to page 483 of "The Jewish Religion (M. Friedlander)." The author speaks of "The abolition of polygamy by Rabbenu Gershom (eleventh century)" The evidence here is in accordance with the opinion expressed by these authors, and I feel little doubt that the community, with which I am concerned, is generally speaking monogamous. It is unnecessary to consider the exceptions to the rule for this case is plainly not one of them.

The other ground is made out by the evidence in the case. Among "the wife's causes for divorce" Mielziner gives at page 123 as No. 3 "on account of repeated ill-treatment received from her husband, as for beating her, or turning her out of doors, or prohibiting her from visiting her parental home." The Eben-Ha-Ezer is cited as an authority for this proposition.

It would thus appear that under the Jewish Law the plaintiff is entitled to a divorce, and it may be noted that the result would be the same under English Law as it now stands. The question of procedure remains. Under the strict Rabbinical Code a ritual "get" or "bill of divorcement," executed by the husband, would have been necessary, but in modern times this is not insisted upon and a marriage can be dissolved by the Courts of the State. This is clearly recognised by (Friedlander, page 488) and Ch. XVI of Mielziner's work leads to the same conclusion. It will be observed that the award or decision made at the instance of the Jewish Benevolent Society in this case takes the form of a direction to the husband to divorce his wife. The only possible sanction is ex-communication. In this case that has failed and the remedies of the Rabbinical Code are ineffectual. The Court, must in the words of the Privy Council, "administer remedies as nearly approaching to them as the circumstances will allow." The plaintiff prays the Court to dissolve the marriage, and there is, in my opinion, no valid reason why the Court should refuse to do so. I do not know that the practice of the English Courts is of much assistance in determining the powers of this Court. The jurisdiction rests on a different basis, but as a guide to the appropriate order to be made in such a case, that practice is most valuable. It appears that in matrimonial causes between Jews the Courts in England apply the Jewish Laws [*Lindo* v. *Belisario* (11)], in order to determine such questions as whether a sufficient cause for divorce exists [see also *Sasson* v. *Sasson* (10)], but in granting relief the form of decree customary in cases between Christians is made

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(11) (1795) 1 Hagg. 216; 161 E. R. 530.

[*Joseph* v. *Joseph* (12)]. There must, therefore, I think be a decree *nisi* for dissolution of marriage, not to be made absolute for a period of three months from this date.

It cannot be doubted that the Court has power to order permanent alimony. The defendant is bound to make provision for his wife after divorce and for his child. Nor can it be doubted that the wife is entitled to the custody of the child. But the nature and amount of this provision cannot be determined unless and until the decree is made absolute. But there is one matter which has been fully argued which may be determined here and now, and that is the wife's claim to be paid the sum specified in the *Kethuba*. This document is invariably executed at a Jewish marriage. A bound volume is kept at the synagogue containing printed forms in Hebrew and English with blank spaces for the amounts and the names of the parties. The sum in this case is Rs. 25,555. *plus* "200 silver Zuz." The language of the document is archaic and formal. The history of the *Kethuba* is given by Mielziner at page 85 of his book. The conclusion of the matter is stated thus (page 89): "As the wife, in our days, is sufficiently protected by the civil laws of ths country, and in many cases also by special marriage settlements made in a more legal form, the *Kethuba* is generally regarded as an unnecessary, useless formality, and is almost entirely dispensed with." The same view of the *Kethuba* was taken by the Calcutta High Court in *Mozelle Joshua* v. *Sophie Arakie* (13), but the question of the wife's rights on divorce are left undecided in the judgment of the learned Chief Justice. The *Kethuba* is, however, said to be "a survival which is now a mere formality and nothing more." I have already shown that in this case the *Kethuba* does not represent any real transaction, and I do not believe that the parties intended that it should be acted upon. Therefore the claim based upon it must fail.

In concluding this judgment I must express my obligation to Counsel for the assistance I have received in dealing with a matter which is necessarily difficult in the absence of any cases bearing directly upon the questions in issue. I cannot but feel that in spite of that assistance there is much which I could have wished to deal with more fully than has been possible in the absence of authority. I would finally suggest for the consideration of the Jewish community whether they would not be well-advised to place upon a more satisfactory basis the adjustment of their matrimonial disputes. This could be done either by the establishment of a 'bethdin' such as is found in Jeruselem and Baghdad, and, I believe, in London, or by special legislation similar to the Parsi Marriage Act. The community is enlightened and progressive, and should appreciate the benefit of certainty as to the law and procedure upon these matters which must vitally affect domestic life among them.

One further question remains and that is as to the value of the plaintiff's property in the hands of the defendant. I have given my reasons for holding that defendant has retained this property and there is thus a presumption against him. The evidence of his one witness—a reliable witness no doubt—that plaintiff on one occasion was wearing a valuble ring—is plainly of no value. The plaintiff swears that her jewellery was worth Rs. 3,500. This is by no means improbable in view of the position of the parties. There is no evidence to the contrary. The details of the property not returned are shown by her in Ex. K. The total value is Rs. 4,557-12-0. I accept this figure. No order can, however, be made until the decree is made absolute.

The determination of issue No. 6 must await the confirmation of the decree.

There must be a decree *nisi* for divorce not to be made absolute until the expiry of three months from this date.

R. L. *Decree nisi.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 350 OF 1924.
October 8, 1925.
Present:—Justice Sir Charles Gordon Spencer, KT.
NATESA PATHAR—DEFENDANT NO. 1—APPELLANT
versus
GANAPATHI SUBBU PATHAR AND OTHERS—PLAINTIFFS AND DEFENDANT NO. 4—RESPONDENTS.

Hindu Law—Sale in execution of decree against

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(12) (1909) 100 L. T. 864; (1909) P. 217; 78 L. J. P. 51; 53 S. J. 400; 25 T. L. R. 439.

(13) 12 Ind. Cas. 485; 38 C. 708 on appeal 18 Ind. Cas. 132; 40 C. 266; 17 C. W. N. 472.

father—Quantum of interest purchased—Question, whether of fact or law.

The question whether a purchaser on execution of a decree against a Hindu father got the entire family property or only the father's share therein is a mixed question of law and fact. [p. 69, cols. 1 & 2.]

Gnanammal v. *Muthusami*, 13 M. 47; 4 Ind. Dec. (N. S.) 743, *Abdul Aziz Khan* v. *Appayasami Naicker*, 27 M. 131 at p. 142; 8 C. W. N. 186; 6 Bom. L. R. 7; 31 I A. 1; 8 Sar. P. C. J. 568 (P. C.), and *Samasudra Allappa Naicker* v. *Murugappa Chettiyar*, 18 Ind. Cas. 49; 36 M. 325 at p. 339; (1913) M. W. N. 86; 12 M. L. T. 571; 23 M L. J. 658, followed.

Mahabir Pershad v. *Maheshwar Nath Sahai*, 17 C. 584; 17 I. A. 11; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N. s.) 929 (P. C.) and *Abdul Aziz Khan Sahib* v. *Appayasami Naicker*, 22 M. 110 at p. 112; 8 Ind. Dec. (N. s.) 77, not followed.

The mere fact that the father might have transferred his son's interest affords no presumption that he had done so. [p. 69, col. 2.]

The fact that the sons have not been made parties to the proceedings in execution of a decree against father is a material element in considering whether the creditor aimed at the larger or was willing to limit himself to the minor remedy. [*ibid.*]

Second appeal against a decree of the Court of the Subordinate Judge, Kumbakonam, in A. S. No. 54 of 1923, preferred against that of the Court of the District Munsif, Valangiman, in O. S. No. 11 of 1921.

Mr. *C. A. Seshagiri Sastri*, for the Appellant.

Mr. *K. S. Jayarama Iyer*, for the Respondents.

JUDGMENT.—The plaintiffs brought this suit for partition of their 4/5th shares in the plaint properties which form the ancestral properties of themselves and their father, the 4th defendant. The 1st defendant brought a money suit against the 4th defendant in S C. S. No. 1165 of 1908 on the file of the Kumbakonam Sub-Court and attached the defendants' properties and purchased them in Court-auction subject to a usufructuary mortgage in favour of Swaminadha Pathar upon which Rs. 1,000 were due. The only question for decision in this case is whether the 1st defendant in the suit, purchased the interest of the 4th defendant only or that of all his sons also. Both the lower Courts have decided in favour of the former alternative and have given the plaintiffs a decree for partition of their 4/5th share. Whether what the purchaser got at the Court sale was the entire family property or only the 4th defendant's share therein is a 'mixed question of law and fact. It has been so held by this Court in *Gnanammal* v. *Muthusami* (1) and by the Privy Council in *Abdul Aziz Khan* v. *Appayasami Naicker* (2) and in *Somasundara Avalappa Nicker* v. *Murugappa Chetiyar* (3). The statement in *Mahabir Pershad* v. *Moheswar Nath Sahai* (4) and in *Abdul Aziz Khan* v. *Appayasami Naicker* (5) that it is only a question of fact in each case may be disregarded in the light of later pronouncements. As a Court of Second Appeal I have only to see that the Courts below have rightly applied the law to the facts found by them. A number of cases have been cited in which a similar question had to be decided as to the nature of the interest which passed in a sale or family property. I will not refer to them as Mayne in his Hindu Law, 9th Edition, page 433, has summed up the effect of all these decisions. He says: "The mere fact that the father might have transferred his son's interest affords no presumption that he has done so, and those who assert that he has done so must make out not only that the words in the conveyance are capable of passing the larger interest, but that they are such words as a purchaser might be reasonably expected to require." Then in r. 4 he says: "The fact that the sons have not been made parties to the proceedings in execution is a material element in considering whether the creditor aimed at the larger or was willing to limit himself to the minor remedy."

Both the District Munsif and the Subordinate Judge appear from their judgments to have been quite alive to the effect of the rulings on the subject of the sons' liability to discharge debts of their father which are not tainted by illegality or immorality from their shares of the family property.—They have considered the frame of the suit, the terms of the decree, and the sale certificate as well as the conduct of the parties and the character of the debt. The debt was a personal debt of the father due upon a promissory-note as it appears from the judgment (Ex. A) in S. C. S. No. 1165 of 1908. In other proceedings between the parties, it was found that the debt was not incurred for immoral purposes [see Ex. VIII (*a*)]. The District Munsif came to the conclusion in this suit, "There can be no doubt about the creditor's right to proceed against the family property to recover the debt." But in the present case there are the following significant facts :— At the trial of the suit the defendants were exonerated as no guardian was appointed to represent them. The decree directed payment of Rs. 110 by the 1st defendant *alone*. In the petition for transmitting the decree for execution, it was noted that the defendants Nos. 2 to 5 had been exonerated and that no relief was asked against them. In the execution petition this fact was repeated and the prayer was for attachment of the immoveable property belonging to and enjoyed by the 1st defendant. In the sale proclamation the interest of the judgment-debtor was described as certain survey numbers inherited and enjoyed by the 1st defendant. The sale certificate also contained a note that the defendants Nos. 2 to 5 had been exonerated and the Subordinate Judge also relied on the fact that the property was bought for Rs. 75 which is much below its value even after allowing for the encumbrance. The price at which the auction-purchaser managed to secure the property is not, in my opinion, so important as the low upset price, *viz*., Rs. 50 at which the sale commenced. If there is no competition, a successful bidder naturally will not give more than is sufficient to secure the sale being knocked down in his favour. As against this there is nothing but the mere fact that the sale certificate mentions the survey numbers to be sold without stating that only the interest of the 4th defendant was made the subject of the sale. Under these circumstances, I am of opinion that the lower Courts were entitled to come to the conclusion that only the father's share in the suit properties was sold and I cannot say that their findings are wrong. I, therefore, dismiss the second appeal with costs of respondents Nos. 1 to 3.

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(1) 13 M. 47; 4 Ind. Dec. (N. s.) 743.

(2) 27 M. 131 at p. 142; 8 C. W. N. 186; 6 Bom. L. R. 7; 31 I. A. 1; 8 Sar. P. C. J. 568 (P. C.)

(3) 18 Ind. Cas. 49; 36 M. 325 at p. 339; (1913) M. W. N. 86; 12 M. L. T. 571; 23 M. L. J. 658.

(4) 17 C. 584; 17 I. A. 11; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N. s.) 929 (P. C.).

(5) 22 M. 110 at p. 112; 8 Ind. Dec. (N. s.) 77.

After the sale had been concluded, one of the sons, Doraiswami, died. The Subordinate Judge found that his share must go to the plaintiffs and the 4th defendant. Although the 4th defendant was not originally a party to the suit and did not claim 1/20th share on account of the death of his son, I think that the Appellate Court had power, under O. XLI, r. 33, to make this award in his favour. Appellant will pay the 4th respondent's Vakil's fee and *vakalat* upon this item.

V. N. V.

R. L. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 37-B OF 1925.

September 30, 1925.

Present:—Mr. Prideaux, A. J. C.

SAMSHERKHAN AND OTHERS—

DEFENDANTS—APPLICANTS

versus

ABDUL SATTAR KHAN—PLAINTIFF—

NON-APPLICANT.

Specific Relief Act (I of 1877), s. 9—Mortgagee in possession—Possession through tenants—Dispossession of tenants—Suit by mortgagee, whether maintainable —Civil Procedure Code (Act V of 1908), s. 115—Wrong decision—Material irregularity or illegality—Another remedy open—Interference in revision.

A mortgagee in possession through tenants is entitled to invoke the aid of s. 9 of the Specific Relief Act on his tenants being ejected from possession by others. [p. 71, col. 2; p. 72, col. 1.]

Dinkarsha v. *Anantsha*, 16 C. P. L. R. 154, distinguished.

Sonaton Shome v. *Sheikh Helim*, 6 C. W. N. 616, not followed.

Bindubashini Chaudhurani v. *Srimati Jahnavi Chaudhurani*, 1 Ind. Cas. 150; 13 C. W. N. 303, *Nobin Das* v. *Kailash Chandra Dey*, 7 Ind. Cas. 924; 15 C. W. N. 294; 12 C. L. J. 483, *Akhil Chandra Dey* v. *Akhil Chandra Biswas*, 10 Ind Cas. 455; 15 C. W. N. 715, *Rathnasabapathi Pillai* v. *Ramasami Aiyar*, 5 Ind. Cas. 630; 33 M. 452; (1910) M. W. N. 112; 7 M. L. T. 311; 20 M. L. J. 301, *Jagannatha Charry* v. *Rama Rayer*, 28 M. 238 and *Nihal Singh* v. *Raghuraj Bahadur Singh*, 32 Ind. Cas. 202; 18 O. C. 353; 3 O. L. J. 588, followed.

A Court that has decided a suit over which it had jurisdiction cannot only on the ground that it has arrived at a wrong decision be said to have exercised its jurisdiction illegally or with material irregularity. [p. 72, col. 1.]

Amir Hassan Khan v. *Sheo Baksh Singh*, 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.), followed.

It is not the practice of the Judicial Commissioner's Court to interfere in revision where another remedy is open to the aggrieved party and where no great injustice or inconvenience would follow from their refusal to act. [*ibid.*]

Ram Krishen Das v. *Jai Kishen Das*, 11 Ind. Cas. 814; 33 A. 647; 8 A. L. J. 791, *Chidambaram Chetty* v. *Nagappa Chetty*, 16 Ind. Cas. 920; 38 M. 15; 24 M. L. J. 73, *Kashinath* v. *Nana*, 21 R. 731; 11 Ind. Dec. (N. S.) 492 and *Balaram Misar* v. *Bairagi Mali*, 12 C. P. L. R. 52, followed.

Application for revision of the decree of the Subordinate Judge, Second Class, Basim, dated the 14th January 1925, in Civil Suit No. 272 of 1924.

Mr. *D. T. Mangalmurti*, for the Applicants.

Mr. *M. B. Niyogi*, for the Non-Applicant.

ORDER.—This is an application to revise a decree passed by the Sub-Judge, Basim, under s. 9 of the Specific Relief Act, directing the defendants to put the plaintiff in possession of a house in the town of Basim, and ordering that the plaintiff's costs should be paid by the defendants. The facts of the case may be stated thus. The plaintiff has been in possession of the house as a mortgagee under a possessory mortgrge dated 26th August 1911, executed by one Mahatapkhan and his sons. Defendants are said to have dispossessed the plaintiff in the month of May 1924. The suit was filed on 6th August 1924.

The defence was that the defendants had been in possession of the house for the last 15 years with the permission of one Nasirbee, the daughter of Aslamkhan to whom the house belonged. The defendants were allowed to live free of rent, they keeping the house in good repair. Subsequently the defendants purchased the house from Nasirbee on 6th March 1924 by a registered deed of sale. Defendants contended that the suit is not maintainable as the plaintiff was not in possession of the house within 6 months from the date of the suit.

The case was tried on the following issues:—

"1. Was the plaintiff in possession of the house in suit within 6 months from the date of this suit as a mortgagee in possession under the mortgage bond, dated 26th August 1911 as alleged by him?

2. To what relief is the plaintiff entitled?"

The Court found that the plaintiff was in possession as a mortgagee through the mortgagor to whom he had leased the house under a *bhadechitthi*, dated 28th June 1911; that the plaintiff's evidence shows that he was in possession till the month of May last year, and that the defendants had failed to establish their prior possession.

The contentions raised on behalf of the applicants defendants in this Court are twofold. The first is that under the circumstances it was incumbent on the plaintiff's tenants to bring the suit, and that the plaintiff could not bring it himself. Secondly, that the evidence in the case does not show that the tenants were ejected from possession within 6 months of the filing of the suit.

As regards the first point reliance is placed on *Dinkarsha* v. *Anantsha* (1) where the Judicial Commissioner of these Provinces laid down that where a tenant has been ejected by a third party, the landlord is not competent to bring a suit for possession under s. 9 of the Specific Relief Act. A perusal of the judgment shows that the question of law involved therein was doubtful, and that the learned Judge on the facts of that particular case held that the suit was not maintainable by the landlord. In *Sonaton Shome* v. *Sheikh Helim* (2) it was laid down that where the plaintiff was in constructive possession of a plot of land through his tenant and the latter was dispossessed, the plaintiff had no right to bring a suit under s. 9 of the Specific Relief Act.

On the other hand there is authority to the contrary. In *Bindubashini Chaudharani* v. *Srimati Jahnavi Chaudhurani* (3) it was held that in the case the ouster of a tenant in actual occupation of the land amounted to the ouster of the immediate landlord to whom rent was to be paid, and that s. 9 of the Specific Relief Act is not confined in its application to cases in which the plaintiff has been deprived of actual possession. A similar view was held in *Nabin Das* v. *Kailash Chandra Dey* (4) a case of a usufructuary mortgage in favour of the plaintiff. And in *Akhil Chandra Dey* v. *Akhil Chandra Biswas* (5) it was decided that the ouster of a tenant is an ouster of the landlord for which the landlord can sue under s. 9 of the Specific Relief Act. The same view was maintained in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (6) in which the case of *Jagannatha Charry* v. *Rama Rayer* (7) was followed. The Oudh Judicial Commissioner held the same view in *Nihal Singh* v. *Raghuraj Bahadur Singh* (8). In my opinion a mortgagee in possession through tenants is entitled to invoke the aid of s. 9 of the Specific Relief Act on his tenants being ejected from possession by others.'

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(1) 16 C. P. L. R. 154.

(2) 6 C. W. N. 616.

(3) 1 Ind. Cas. 150; 13 C. W. N. 303.

(4) 7 Ind. Cas. 924; 15 C. W. N. 294; 12 C. L. J. 483.

(5) 10 Ind. Cas. 455; 15 C. W. N. 715.

(6) 5 Ind. Cas. 630; 33 M. 452; (1910) M. W. N. 112; 7 M. L. T. 311; 20 M. L. J. 301.

(7) 28 M. 238.

(8) 32 Ind. Cas. 202; 18 O. C. 353; 3 O. L. J. 588.

As to the second point in the case, it is contended for the applicant that the evidence does not show that the plaintiff's tenants were ousted within 6 months of the filing of the suit. The date of ejectment as given in the plaint is May 1894. The plaintiff examined as a witness states that he does not remember the exact month in which the ouster took place. P. W. No. 3 speaking on the 6th June last states that the tenants were ejected at the end of the rainy season, two months before *Diwali, i. e.*, in August. P. W. No. 5 states that the tenants were ejected in July 1924. I doubt if this Court should interfere in revision on a question of this nature even if wrong. The Subordinate Judge had jurisdiction to try the case, and if he has made a mistake there is a remedy open to the applicants by a regular suit. It was held in *Amir Hassan Khan* v. *Sheo Baksh Singh* (9) by their Lordships of the Privy Council that a Court that has decided a suit over which it had jurisdiction cannot, only on the ground that it has arrived at a wrong decision, be said to have exercised its jurisdiction illegally or with material irregularity. It cannot be said that there is no evidence to warrant the decision the lower Court has come to as to the time of dispossession.

There is, moreover, another principle on which I consider that this Court should decline to interfere. It is not the practice of this Court, and the practice of the Court is the law of the Court, to interfere in revision where another remedy is open to the aggrieved party and where no great injustice or inconvenience would follow from their refusal to act: see *Ram Kishen Das* v. *Jai Kishen Das* (10), *Chidambaram Chetty* v. *Nagappa Chetty* (11), *Kashinath* v. *Nana* (12). Sir Stanley Ismay applied this principle in *Balaram Misar* v. *Bairagi Mali* (13), a case in which a suit under s. 9 of the Specific Relief Act had been wrongly dismissed. I must, therefore, decline to find in the applicants' favour on the second contention urged in this application.

The result is that this Rule is discharged with costs. The applicants will pay the non-applicant's costs. I fix Pleader's fees at Rs. 15.

G. R. D.

Rule discharged.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 213 OF 1924.

August 25, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

RUPCHAND GANESH SHET—APPELLANT

versus

BHOGILAL RATANCHAND—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 97—Finding as to status of agriculturist under Dekkhan Agriculturists' Relief Act—Preliminary decree—Appeal.

A finding on the question whether a party to the suit is or is not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act is not appealable as a preliminary decree. [p. 73, col. 1.]

Dattatraya v. *Radhabai*, 60 Ind. Cas. 885; 23 Bom. L. R. 92; 45 B. 627, relied on.

Vamanacharya v. *Govind*, 76 Ind. Cas. 1014; 25 Bom. L. R. 826; A. I. R. 1924 Bom. 33, explained.

First appeal from the decision of the First Class Subordinate Judge, Dhulia, in Suit No. 542 of 1921.

Mr. *A. G. Desai*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

Macleod, C. J.—In this case an issue was framed: "Are defendants or any of them agriculturists?" After considering the evidence which was led before him on that question at great length, the Judge held that defendants were not agriculturists. He then said: "I must now proceed and frame the remaining issues, and as the case is a complicated one and the Pleaders are not ready I put the case down for framing issues on March 1, 1924."

It appears, however, that the finding on the issue, "Whether the defendants or any of them were agriculturists," was recorded in the form of a decree. Against that an appeal was admitted by this Court. On the face of it the case was covered by the decision of this Court in *Dattatraya* v. *Radhabai* (1). The learned Judges, who admitted the appeal, appear to have considered it arguable that the decision in *Vamanacharya* v. *Govind* (2) was opposed to the decision in *Dattatraya* v. *Radhabai* (1).

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(9) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

(10) 11 Ind. Cas. 814; 33 A. 647; 8 A. L. J. 791.

(11) 16 Ind. Cas. 820; 38 M. 15; 24 M. L. J. 73.

(12) 21 B. 731; 11 Ind. Dec. (N. S.) 492.

(13) 12 C. P. L. R. 52.

(1) 60 Ind. Cas. 885; 23 Bom. L. R. 92; 45 B. 627.

We must, therefore, proceed to consider what was decided in each of those cases. In the first case an issue was raised whether the defendant was an agriculturist. The Judge found that the defendant was an agriculturist, and on the plaintiff's application the Court drew up a preliminary decree in terms of the finding on that issue, and against what he called a preliminary decree he appealed to the District Court. The District Judge came to the conclusion that an appeal properly lay from the decree. The appeal came before Mr. Justice Fawcett and myself, when we held that no appeal lay from a finding of the Judge in the Trial Court that the defendant was an agriculturist, and the case would have to go back to the Trial Court to continue the hearing from the point at which it was left off. In the course of my judgment I said: (page 98*):

"The Judge should never accede to an application to draw up in the form of a decree a finding on the question whether a party is an agriculturist or not. Undoubtedly that is an issue which is the first issue to be tried in the case, and a decision may be given on it; but it by no means follows that because that is the first issue to be tried, therefore, it is a preliminary issue on which a decree can be drawn up. The whole case must be decided first before the judgment can be pronounced. There will be then a judgment deciding the rights of the parties with regard to all or any of the matters in controversy in suit, and then it will rightly be the subject of a decree."

In *Vamanacharya* v. *Govind* (2) the Court found the plaintiff to be an agriculturist and ordered accounts to be taken of the suit mortgage. No preliminary decree was drawn up, and it was held that there was no obligation on the unsuccessful party to appeal at that stage. The question before the Appellate Court was an entirely different one from the question now before us. It is true that the Court said that the drawing up of a decree or the omission to do so was conclusive on the question whether the Court had in fact passed a preliminary decree, and apparently the Judges who admitted this appeal thought that it might be argued from those words that provided a decree was drawn up, rightly or wrongly, there was a decree from which an appeal would lie. But in that case the question for decision was whether there had been a preliminary decree when a decree had not been actually drawn up. Mr. Justice Pratt said (page 836*):—

"The finding on the issues as to status and the order of reference to the Commissioner are not a judgment which could be the basis of a decree. A decree involves a *conclusive determination* of the rights of parties, but it is preliminary when in spite of that conclusive determination the suit is not completely disposed of."

Clearly in the mind of Mr. Justice Pratt that was the test, whether there was a decree or not.

We think then that there could be no appeal against the finding that defendants were not agriculturists, and the case must go back for the trial to continue from the point at which it was left off. It will be open, when there is a proper judgment followed by a decree, for a party dissatisfied with any of the findings of the lower Court to appeal against them.

The appeal will be dismissed with costs.

Coyajee, J.—I agree.

R. L. *Appeal dismissed.*

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(2) 76 Ind. Cas. 1014; 25 Bom. L. R. 826; A. I. R. 1924 Bom. 33.

*Page of 23 Bom. L. R.—[*Ed.*]

*Page of 25 Bom. L. R.—[*Ed.*]

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 200 OF 1923.
November 13, 1925.
Present:—Mr. Justice Wallace and
Mr. Justice Madhavan Nair.
THOPPAI VENKATARAMIER—
DEFENDANT No. 1 AND RESPONDENT No. 1—
APPELLANT
versus
A. GOVINDARAYALIER—PLAINTIFF—
PETITIONER—RESPONDENT.

Probate and Administration Act (V of 1881), s. 77—Executor doubting genuineness of Will—Renunciation—Executorship, when may be accepted or renounced—Court's powers to refuse Probate on ground of executor's incapacity.

Until the validity of a Will is established, an executor appointed thereunder is not bound to accept or renounce the executorship.

Where in proceedings for grant of Probate, a person appointed as executor filed a statement doubting the genuineness of the Will but expressed his willingness to act as executor if the Court considered the Will genuine and granted Probate, it cannot be said that he renounced the office of executor.

In the goods of Manick Lall Seal, 35 C. 156 and *Sarojini Dasi* v. *Rajlakshmi Dasi*, 60 Ind. Cas. 974; 47 C. 838, relied on.

A Court cannot refuse an executor Probate because it considers him unfit to be executor unless the unfitness is of the nature of legal incapacity, that is, minority or unsoundness of mind.

Hara Coomar Sircar v. *Doorgamoni Dasi*, 21 C. 195; 10 Ind. Dec. (N. S.) 762 and *Pran Nath Ghose* v. *Jado Nath Bhattacharji*, 20 A. 189; A. W. N. (1898) 14; 9 Ind. Dec. (N S.) 483, relied on.

Appeal against an order of the District Judge, Madura, in O. S. No. 1 of 1922, (O. P. No. 56 of 1921) dated the 12th December 1922.

Mr. *K. Rajah Iyer*, for the Appellant.

Mr. *K. S. Jayarama Iyer*, for the Respondent.

JUDGMENT.

Wallace, J.—This is an appeal against the order of the District Judge of Madura refusing to grant to the appellant Probate of a Will. The testator named two executors of whom the appellant is one. The other, the respondent, applied for Probate and the ordinary notice went to the appellant who appeared and challenged the genuineness of the Will. The District Judge found the Will genuine, granted Probate to the respondent, but refused it to the appellant, on the ground that by his action in denying the genuineness of the Will, he had to all intents and purposes, renounced his position as executor.

Now, although prior to the Probate proceedings, the appellant had indulged in wild statements that the Will was a forgery, that he was never appointed executor, that the testator had never signed it, that his own attestation which appears on the Will was obtained by fraud, the statement he put into the Probate Court when the proceedings came on was of a milder tenour, and it is that statement alone that the Probate Court was, in our view, entitled to consider. It is open, for example, to an executor to openly assert outside the Court that he is renouncing his executorship; but it is by his statement in the Court that he will stand or fall. See *In the goods of Manick Lal Seal* (1). Now, in his statement to the Court the appellant merely said that he did not admit the execution and validity of the Will, that it was spurious document brought about by the exercise of undue influence, that, so far as he (appellant) knew, the testator never put his signature to the Will, and that his own attestation was due to his having been deceived by the respondent as to the nature of the document. And he ended up by saying that, if the Court considers the Will genuine and is prepared to grant Probate, he is willing to act as executor. We do not find that this statement is an assertion that the Will is a pure concoction. Whether such a statement would amount to a renunciation we need not here consider. We do not think that the statement amounts to more than this: "I have the gravest reasons for doubting if the Will was a voluntary act of the testator while in a sound disposing state of mind; and, before I accept or renounce, I will wait until the Court decides on its genuineness." It is quite open to an executor to take up such a position. There is direct authority for it in a case of application for letters of administration. See *Srojini Dasi* v. *Rajlakshmi Dasi* (2). We are not prepared, therefore, to hold that in this case there was a renunciation.

It is, of course, well settled law that a Court cannot refuse an executor Probate because it considers him unfit to be executor [See *Hara Coomar Sircar* v. *Doorgamani Dasi* (3) and *Pran Nath Ghose* v. *Jado Nath Bhattacharji* (4)] unles the unfitness is of the nature of legal incapacity, that is, minority or unsoundness of mind.

The District Judge is, therefore, wrong. The testator's wishes must be carried out. The District Judge's order is, therefore, reversed and Probate will be given to the appellant jointly with the respondent. Costs may come out of the estate.

Madhavan Nair, J.—I agree.

V. N. V.

R. L. *Appeal allowed.*

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(1) 35 C. 156.

(2) 60 Ind. Cas. 974; 47 C. 838.

(3) 21 C. 195; 10 Ind. Dec. (N. S.) 762.

(4) 20 A. 189; A. W. N. (1898) 14; 9 Ind. Dec. (N. S.) 483.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1611 OF 1924.
February 23, 1926.
Present:—Mr. Justice Campbell.
JHANDA SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
HARNAMSINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel—Attachment and sale of property in execution—Vendee from judgment-debtor standing by—Denial of judgment-debtor's title—Estoppel—Acquiescence, principle of, in admission of evidence—Registration, whether notice.

Where a purchaser from a judgment-debtor sees the property, the subject-matter of his purchase, being attached and sold in execution of a decree against his vendor and keeps silent, he is estopped from denying the title of the judgment-debtor at the time of execution sale as against the auction-purchaser. [p. 76, col. 2.]

It is a well-known rule of practice that when a fact relevant in itself has been wrongly allowed to be proved in a manner not permitted by law unless the opposite party objects to the evidence at the time when it is offered, he cannot object afterwards. But this principle of acquiescence can only be applied when the secondary evidence has been of the contents of a document which if produced itself could have been admitted under the provisions of the law. [p. 75, col. 2; p. 76, col. 1.]

The mere registration of a deed under Registration Act is not *per se* constructive notice of the transaction. [p. 76, col. 1.]

Tilakdhari Lal v. *Khedan Lal*, 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101 (P. C.), followed.

Second appeal from a decree of the Additional Judge, Amritsar, dated the 15th March 1924, affirming that of the Munsif, First Class, Amritsar, dated the 12th December 1922.

Lala *Badri Das*, R. B., for the Appellant.

Mr. *Gulzarilal Sahgal* and Lala *Fakirchand*, for the Respondents.

JUDGMENT.—This is a second appeal against the dismissal of a suit for possession of a certain house.

The facts found by the lower Appellate Court are as follows:—On 30th January 1912 a sale-deed was drawn up and registered by which Wasawasingh, father of the first four defendants, purported to sell to Narainsingh, the father of the plaintiff, the house in suit. On the 11th May 1912 Narainsingh executed a document, the contents of which were wrongly held by the lower Appellate Court to be provable, as will be explained presently. In 1917 the house was openly sold in execution of a decree against Wasawasingh and was purchased by Ram Gopal, defendant No. 5. Narainsingh did not raise any objection to the attachment of the house and took no action to assert his own title. The lower Appellate Court holds that he had full knowledge of the execution and sale. The decision of the lower Appellate Court was that although the sale-deed was executed, there was no intention that the title should pass to Narainsingh, that consequently there was no sale, and that, in any case, since Wásawasingh was allowed by Narainsingh to continue as ostensible owner, the execution sale was binding upon Narainsingh on the principles contained in s. 41 of the Transfer of Property Act.

The finding that there was no intention to transfer the house is based upon several grounds, but the principal one is the contents of the document of the 11th May 1912 already referred to. This document was not produced but secondary evidence of its contents was offered without objection in the shape of a copy of the entry in the deed writers register and the statement of an alleged marginal witness Gurditsingh. I may observe that what is alleged to be the copy is not endorsed as admitted in evide[illegible] the Court below. The copy furthermore has been misread by the learned Additional Judge because it contained a great deal more than a mere statement by Narainsingh that he had no right in the house which had been sold to him by the deed. It stated in fact that Narainsingh, with effect from the date of the document, relinquished or handed back the house to Wasawasingh. This, however, is of no real significance since the secondary evidence could not legally have been admitted at all. It is true that no objection was raised in the Trial Court and that according to a well-known rule of practice when a fact relevant in itself has been wrongly allowed to be proved in a manner not permitted by law, unless the opposite party objects to the evidence at the time when it is offered, he cannot object afterwards. One of the objections, however, raised in appeal to the admission of the secondary evidence was that the document was not shown to have been properly stamped and that under s. 35 of the Stamp Act it was wholly inadmissible. The learned Additional Judge has disposed of this objection by saying that the document had already been admitted in evidence without objection and, therefore, the objection could not be raised in appeal under s. 36 of the Indian Stamp Act. But the document was not admitted in evidence in the Trial Court, it was never produced and has never been produced. Therefore, the reception of secondary evidence was in direct contravention of an imperative prohibition of the law and the fact that there was no objection cannot convert irrelevant evidence into relevant evidence. The principle of acquiescence can only be applied when the secondary evidence has been given of the contents of a document which, if produced itself, could have been admitted under the provisions of the law.

It is unnecessary to remit the case to the lower Appellate Court for a fresh decision after excluding all consideration of the document dated 11th May 1912 since the dismissal of the suit must be upheld on the alternative ground, namely, that the plaintiff's father Narainsingh stood by and permitted Ramgopal to purchase the house in execution sale. The only argument put forward for the appellants against the contention of estoppel is that the registration of the sale-deed of 1912 was constructive notice to Ram Gopal and hence neither the principles of s. 41 of the Trans[illegible] Property Act nor the provisions of [illegible] of the Indian Evidence Act were of any assistance to him. Their Lordships of the Privy Council, however, have laid it down in *Tilakdhari Lal* v. *Khedan Lal* (1) that the mere registration of a deed under the Registration Act is not *per se* constructive notice of the transaction and that constructive notice is a question of fact, to be determined as each case arises, whether in that individual case the omission to search the register taken together with the other facts amounts to such gross negligence as to attract the consequences which result from notice. In the present case we have the facts that Ram Gopal was a purchaser in an execution sale, and that the law provides means by which the public shall be aware of attachment and intention to sell, and also for an inquiry before sale into the absolute title of the judgment-debtor and for public advertisement of the sale. Facilities are also given for third persons to come forward and lodge objections, not only before sale, but also after sale and before confirmation. There is the further fact found by the lower Appellate Court that Narainsingh knew all about attachment and sale and abstained from making any objection. In these circumstances it has been rightly held by the lower Appellate Court that his heirs shall not be permitted to deny against Ram Gopal that Wasawasingh was the owner of the house at the time of the execution sale.

I dismiss the appeal with costs.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 265 OF 1924.
August 18, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.
NARAYAN GOVIND DESHPANDE—
DEFENDANT—APPELLANT
versus
DHONDO KRISHNA TATHE—
PLAINTIFF—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15B—Ex parte *decree—Execution—Instalments.*

Where a decree is passed *ex parte*, the defendant can, at any stage in the execution proceedings, show that he was an agriculturist at the date of the decree and claim instalments

Rudrappa v. *Chanbasappa*, 80 Ind. Cas. 162; 26 Bom. L. R. 153; A. I. R. 1924 Bom. 305, relied on.

First appeal from the decision of the First Class Subordinate Judge at Poona, in Darkhast No. 398 of 1924.

Mr. *S. Y. Abhyankar*, for the Appellant.

Mr. *L. B. Petkar*, (with him Mr. *T. N. Walavalkar*), for the Respondent.

JUDGMENT.—In this Darkhast the defendant pleaded that he was entitled to the status of an agriculturist. The Subordinate Judge said: "The contention comes too late and it cannot be recognized in execution now." It has been held by this Court in *Rudrappa* v. *Chanbasappa* (1) that where a decree is passed *ex parte*, the defendant can, in execution proceedings, show that he was an agriculturist at the date of the decree and claim instalments under s. 15B of the Dekkhan Agriculturists' Relief Act. The defendant is, therefore, entitled to prove that he was an agriculturist at the date of the decree. Seeing that he is able to rely on that authority the only question we have to decide at present is whether the defendant should be allowed to prove that he was an agriculturist at the date of the decree. It is argued that there is a bar to his doing that owing to the fact that there were previous Darkhasts in which the defendant had not claimed that he was an agriculturist. But as far as we know there is no rule of limitation which prevents an agriculturist from claiming to be allowed to prove his status at any stage of the proceedings so that if successful he may ask the Court to apply the provisions of the Act in his favour.

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(1) 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101 (P. C.).

(1) 80 Ind. Cas. 162; 26 Bom. L. R. 153; A. I. R. 1924 Bom. 305.

The appeal, therefore, must be allowed and the case must go back to the Executing Court to decide whether the defendant was an agriculturist at the date of the decree.

The defendant is entitled to his costs.

R. L. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 444 OF 1923.
November 6, 1925.
Present:—Mr. Justice Wallace and
Mr. Justice Madhavan Nair.

MIKKILI ANKAYA—DEFENDANT No. 1—
APPELLANT
versus
ALLAPARTI RATHAMMA—PLAINTIFF—
RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 23, Sch. II, Art. 31—Suit for damages for use and occupation, nature of—Transfer of suit under s. 23 to original side—Civil Procedure Code (Act V of 1908), ss. 96, 102—Appeal—Second appeal.

A suit for damages for use and occupation based on an allegation of permissive occupation is a suit of small cause nature and does not come under Art. 31, Sch. II, of the Provincial Small Cause Courts Act.

A small cause suit when transferred to the original side under s. 23 does not remain a small cause suit though it remains of a small cause nature. An appeal, therefore, lies against the decree in such a case, but where the subject-matter of the suit does not exceed Rs. 500, a second appeal is incompetent.

Koollipara Seetapaty v. *Kankipaty Subbaya*, 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718; 6 M. L. T. 121 and *Abdul Majid* v. *Bedyadhar Saran Das*, 37 Ind. Cas. 92; 39 A. 101 at p. 102; 14 A. L. J. 984, distinguished.

Appeal against an order of the District Court, Guntur, dated the 1st August 1923, in A. S. No. 13 of 1923, preferred against a decree of the Court of the District Munsif, Repalli at Tenali, in O. S. No. 97 of 1921.

Mr. *P. Satyanarayana Rao*, for the Appellant.

Mr. *Ch. Raghava Rao*, for the Respondent.

JUDGMENT.—The first point for decision is whether on the plaint as laid, this appeal against order lies. We think the claim is founded on an allegation of permissive occupation and is a claim for damages for use and occupation. We do not think the suit comes under Art. 31 of the Second Schedule of the Provincial Small Cause Courts Act, and, therefore, it is a suit of a small cause nature.

The next point taken by appellant is that the transfer of the suit to the original side under s. 23 of the Act, constituted it an original suit and that, therefore, a second appeal lies as if the suit was an ordinary original suit. The answer to that is that the transfer under s. 23 does not and cannot change the nature of the suit and it is the nature of the suit which is the test under s. 102, C. P. C., and O. XLIII, r. (1) and (*v*). The last point urged is that, if the suit though transferred remains a small cause suit, no first appeal lies. The answer to that is that the suit does not remain a small cause suit though it remains of a small cause nature.

A first appeal is, therefore, valid but under s. 102, a second appeal is barred. In *Kollipara Seetapaty* v. *Kankipaty Subbaya* (1) and *Abdul Majid* v. *Bedyadhar Saran Das* (2), the suit had not been transferred under s. 23. It was from the beginning a small cause suit, tried on the original side. The decision of the District Munsif was, therefore, the decision of a Court of Small Causes and final under s. 27 and no appeal lay.

We hold that no second appeal lies and dismiss the appeal with costs.

V. N. V. *Appeal dismissed.*

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(1) 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718; 6 M. L. T. 121.

(2) 37 Ind. Cas. 92; 39 A. 101 at p. 102; 14 A. L. J. 984.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 97 OF 1925.
March 4, 1926.
Present :—Mr. Justice Walsh and Mr. Justice Dalal.
SHAUKAT ALI—DEFENDANT—APPELLANT
versus
Musammat SHAKILA BANO—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 4, 7—Appeal—Error apparent in face of record, Court incorrectly thinking, whether good ground—Contravention of r. 4, ground of appeal—Court, what to consider.

An appeal against an order granting a review does not lie on the ground that the lower Court was incorrect in thinking that there was a mistake or error apparent on the face of record. Again, an appeal against an order passed in review on the ground that the provisions of r. 4, O. XLVII, C. P. C., had been contravened by the lower Court must be confined to a disregard of those provisions only and not to any other matter on which the granting of review is based.

First appeal from an order of the Subordinate Judge, Budaun, dated the 3rd March 1925.

Mr. *M. A. Aziz*, for the Appellant.

Mr. *S. A. Haider*, for the Respondent.

JUDGMENT.—We are of opinion that no appeal lies in this case. On the 3rd of March 1925 the learned Subordinate Judge of Budaun reviewed an order of his passed a month earlier. An application was made by a lady to sue as a pauper, and by the first order the lower Court dismissed the application. Subsequently there was an application for review in which it was pointed out that there had been a mistake apparent on the face of the record. The lower Appellate Court accepted this view of the matter, revised its previous order, granted the application for review, and allowed the applicant to sue as a pauper. Under O. XLVII an appeal is strictly limited under r. 7. An order granting an application for review may be objected to only on the ground that it was in contravention of the provisions of r. 2, or in contravention of the provisions of r. 4. There is a third ground of appeal regarding limitation, with which we are not concerned here. The provisions of r. 2 relate to the Court to whom applications for review must be made when the grounds of review show the existence of an error apparent on the face of a decree. Under r. 4 an application for review shall not be granted without previous notice to the opposite party, and when the applicant alleges the discovery of new matter or evidence, the Court must see that there is strict proof of such allegation. In the present case the ground of attack is that the lower Court was incorrect in thinking that there was a mistake or error apparent on the face of the record. In such a case no appeal is provided for under O. XLVII. The learned Counsel for the applicant argues that the lower Court had acted in contravention of the provisions of r. 4 by granting the review. In r 4, cl. (2) there are certain provisions with which the Court has to comply on granting a review. In our opinion, the appeal will be confined to a disregard of these provisions only and not to any matter on which the granting of the review is based. In the present case there has been no breach of the provisions of r. 2 or r. 4.

We dismiss this appeal with costs including in this Court fees on the higher scale.

F. Q. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 382 OF 1925.
February 1, 1926.
Present :—Mr. Justice LeRossignol.
HIRA LAL—DEFENDANT—PETITIONER
versus
DARBARI LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 35-A—False defence—Compensation.

No compensation for a false defence can be awarded unless objection has been taken by the party against whom the defence was set up.

Petition for revision of a decree of the Small Cause Court, Delhi, dated the 14th March 1925.

Mr. *Brij Lal*, for the Petitioner.

Mr. *Bishen Narain* for Lala *Sardha Ram*, R. S., for the Respondents.

JUDGMENT.—The learned Judge of the Court below has awarded costs of Rs. 50 by way of compensation for a false defence, but his order is illegal as no objection was taken by the other side. He should study Act IX of 1922 carefully.

I accept the petition and modify the lower Court's decree, by striking out the award of Rs. 50 compensation and the direction that petitioner shall be prosecuted. No costs for this hearing.

R. L. *Petition accepted.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 269 OF 1925.

November 5, 1925.

Present:—Mr. Justice Wallace and
Mr. Justice Madhavan Nair.

RAMANUJULU REDDY—PETITIONER
—APPELLANT

versus

RANGIAH REDDIAR—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 34 (d), *45—Moneys invested in unapproved security—Realisation from guardian on pain of punishment.*

Section 34 (*d*), Guardians and Wards Act, does not apply to moneys invested . whether in approved or unapproved securities but is limited to such a balance of cash as the accounts show to be in the hands of the guardian and it is only such cash that he can be compelled to produce on pain of punishment under s. 45 of the Act. [p. 79, col. 2.]

Where the guardian in defiance of the order of Court invests moneys belonging to the minor in an unapproved instead of an approved security, it is such cash only that he would have had if he had followed the directions of the Court that he can be compelled to produce. [*ibid.*]

Jagannath Panja v. *Mahesh Chandra*, 36 Ind. Cas. 286; 25 C. L. J. 149; 21 C. W. N: 688 and *In re Nikhrannessa Bibi*, 33 Ind. Cas. 918; 20 C. W. N. 663, referred to.

Sita Ram v. *Gobindi*, 80 Ind. Cas. 592; 46 A. 458; 22 A. L. J. 585; A. I. R. 1924 All. 593, distinguished.

Appeal against an order of the District Court, Chingleput, dated the 2nd May 1925, and made in M. P. No. 157 of 1925, in O. P. No. 64 of 1922.

Mr. *K. Rajah Iyer*, for the Appellant.

Mr. *T. K. Ramaswami Iyenger*, for the Respondent.

JUDGMENT.—There can be no doubt that appellant has wilfully disobeyed the orders of the District Court On 10th October 1922 he was directed to invest the minor's money in approved securities. Instead of doing so, he lent it out on pro-notes and did not inform the Court that he has done so until he was called to account over a year later. The excuse that on 11th October 1922 he was not a proper guardian, as he had not given security, carries no weight. The Court then pointed out to him his duty, whether as guardian *de facto* or as guardian *de jure* and he has not done his duty. Since then, he has at various times been ordered by the District Court to realise and deposit those moneys in that Court. The earliest of these orders was on 29th October 1924. Admittedly he has taken no steps to realise the money on the pro-notes and is now no nearer doing so than he was then. He pleads that owing to tightness in the money market his promisors cannot pay at present. He has taken no steps to compel them to pay.

Nor is the appropriate remedy for such conduct action under s. 45 (1) which the lower Court has taken. Is it a case to which that section is applicable? The lower Court has brought the case under s. 45 (1) (*b*) as failure to exhibit accounts in compliance with a requisition under s. 34 (*e*) and to pay into Court the balance due on those accounts in compliance with a requisition under s. 34 (*d*) (3). The appellant's contention is that s. 34 (*d*) is limited to such balance as his accounts show to be in his hands and not moneys invested and in the hands of others. The respondent does not go so far as to contend that s. 34 (*d*) authorises a Court to compel a guardian peremptorily to realise all investments of the minor's money and produce the cash but he does contend that it authorises the Court to compel such immediate realisation and production of cash or production of the whole cash anyhow by the guardian, whether or no he can at once realise the investments in cases where the investments have been made in defiance of the orders of the Court.

It is clear to our minds that when, say, a guardian's accounts are in the shape of so much invested in approved securities and so much in cash, the balance due from him on those accounts would naturally be the amount of cash in his hands. We are unable to see that the interpretation of that phrase should mean anything different when the investments are in securities but not in approved securities even when the investment was in defiance of the orders of the Court. No more cash than is in the hands of the guardian would have been in his hands if he had obeyed the orders of the Court, and it is only that cash that ought to be in his hands that the Court can at most under s. 34 compel him, on pain of punishment under s. 45 to produce. In other words the Court cannot in this case say to him "if you had obeyed my orders you would have had more cash to produce," because that would not be true. The test, to our minds, is what cash should the guardian have had, if he had followed the Court's directions and it is such cash and such only that the Court can under s. 34 compel him to produce.

Authority on this point is scanty. Our attention has been called to two rulings of the Calcutta High Court *Jagannath Panja* v. *Mahesh Chandra* (1) and *In re, Nikhrannessa Bibi* (2). In both cases the Court proceeded on the accounts filed by the guardians, and called on them to produce only such cash as those accounts showed to be in their hands.

A Bench of the Allahabad High Court has dissented from the Calcutta view in *Sita Ram* v. *Gobindi* (3) and laid down that the Court is not bound to accept the balance shown on the guardian's accounts, but may revise it by striking out payments which appear to it improper. The finding of fact in that case was that a sum of Rs. 900 alleged by the guardian to have been spent had not been spent on behalf of the minors, and the High Court, in arriving at the balance of cash which the guardian ought to have had, added that item. The case is not on all fours with the present. Here the investments attacked are for the minor and enure from him. It was the guardian's duty in obedience to the order of the Court dated 11th October 1922 to invest the money now tied up in the pro-notes in approved securities. For this purpose it was unnecessary for the Court to order him on 27th October 1924 to realise the investments and deposit the actual cash, and that order, we have already held, was not an order under s. 34 (*e*) and (*d*).

We are given to understand that the promisors of the pro-notes are willing to convert their obligations into first mortgages on immoveable property. If this is true, the intention of the District Court in its order of 11th October 1922 is fulfilled.

We are of opinion that the order under appeal is *ultra vires*. We, therefore, set it aside. Two months' time from to-day will be given to appellant to have the pro-note replaced by first mortgages. If this is not done the District Court will take steps to remove the appellant from his guardianship and to have the security bond enforced against him and the sureties. We make no order as to costs.

The fine, if paid, should be refunded.

V. N. V.

R. L. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 295 OF 1924.

November 10, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Panton.

AKSHOY KUMAR DE PATWARI—
JUDGMENT-DEBTOR—APPELLANT
versus
NALINI KUMAR MAJUMDAR AND
ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Execution—Original application pending—Further application, if necessary.

Where there has been no dismissal of the original application for execution, no special application is necessary to revive the first application which remains pending before the Court. [p. 81, col. 2.]

Appeal against an order of the District Judge, Noakhali, dated the 9th of April 1924, affirming that of the Munsif, Second Court, Lakhimpur, dated the 1st of September 1923.

Mr. *Brojendra Nath Chatterjee* and Babu *Mohendra Kumar Ghose*, for the Appellant.

Dr. *Radhabenode Pal* and Babu *Bhupendra Kishore Bose*, for the Respondents.

JUDGMENT.—This is an appeal by the judgment-debtor against a decision of the District Judge of Noakhali, dated the 9th April 1921, dismissing an appeal preferred by the judgment-debtor to him and confirming a decision of the Munsif.

The facts are as follows. A rent decree was obtained against the judgment-debtor on the 24th of May 1916. The decree-holder in execution of the decree brought the tenancy to sale on the 7th September 1918. The sale was set aside at the instance of the judgment-debtor on the 1st October 1920 the ground for setting aside the sale being that the sale proclamation had been suppressed. Although the sale had been set aside the decree-holder did not refund the purchase-money paid by the auction-purchaser. No order to this effect was made at this date. Then the decree-holder made a second application on the 20th April 1921 for execution of the rent-decree. It was urged by the judgment-debtor that the application was barred by limitation. But this contention was overruled. On appeal it was held that limitation was no bar but that the application for execution was not maintainable inasmuch as the money had not been refunded by the decree-holder and in the result the application of the 20th April 1921 was dismissed. The learned Judge states, "The execution case is dismissed." But this must clearly apply to the application of the 20th April 1921, alone for in an earlier part of his judgment the learned Judge expressly states that the applicant, that is, the decree-holder, may apply for execution in continuation of his previous application, that is to say, the application of 1918 which, it seems to me by virtue of this order of the District Judge is clearly treated as then pending and undisposed of. On the 5th September 1921 the auction-purchaser applied for refund of the purchase-money paid by him and an order for such a refund was made on the 26th November 1921. But in fact the money was not refunded until the 23rd February 1923. Subsequent to the refund, namely, on the 27th February 1923, the decree-holder again applied for sale of the property in continuation of the previous execution case. It is stated that before the 10th of August 1921 the property was brought to sale by the same decree-holder in execution of another decree and that he purchased it himself. But the facts on this point are not clear and we do not think that we can attach any importance to this sale in the present application.

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(1) 36 Ind. Cas. 286; 25 C. L. J. 149; 21 C. W. N. 688.

(2) 33 Ind. Cas. 918; 20 C. W. N. 663.

(2) 80 Ind. Cas. 592; 46 A. 458; 22 A. L. J. 585; A. I. R. 1924 All. 593.

Then to return to the application of the 27th February 1923 the first Court held that it was not barred by limitation, holding that time ran from the date of the refund, that it to say, 23rd February 1923. The lower Appellate Court confirmed this decision and held that the application of the 27th February 1923 was merely in continuation of the first application for execution and that accordingly, it was not time-barred.

Now the case is governed by the special rule of limitation applicable by virtue of Art. 6 of Sch. (III) of the Bengal Tenancy Act which provides that the period of limitation for execution of a decree made between a landlord and a tenant is a period of three years unless the judgment-debtor has prevented the execution by fraud or force. It is accordingly contended before us that the present application is time-barred by virtue of the provisions of Art. 6, more than three years having elapsed since the date of decree now sought to be put into execution. It seems to me, however, that the only question that really arises is whether the present application, that is to say, that of February 1923 can be treated as a continuation of the first application for execution made in 1918. If it can be so treated, then clearly, no question of limitation arises. We have been referred to several cases in support of the contention urged by the learned Vakil for the appellant and noteably to the case of *Midnapore Zemindary Company, Limited* v. *Dina Nath Saha* (1). But it seems to me that the ground of that decision was that there had been actual dismissal of the execution case and in the judgment of the Court this is expressly insisted on and it is stated that but for this the application which was held to be barred might have been treated as a contiuation of the original application for execution. Now in the case before us, as I have already indicated, there was apparently no dismissal of the original application for execution. Satisfaction, it is true, was entered after the sale had taken place but the matter was subsequently re-opened and satisfaction was set aside by reason of the application of the judgment-debtor of the 1st October 1920 and accordingly, it seems to me that no special application was necessary to revive the first application which was still pending before the Court until it was finally disposed of and as I have already pointed out the District Judge in passing the order of the 10th August 1921 expressly states that this application is still pending and that an application in continuation thereof could still be made if the money which had been paid was refunded by the decree-holder. For these reasons, therefore, we think that the case is not barred by the provisions of Art. 6 of the Bengal Tenancy Act and that the lower Appellate Court has rightly held that the application was in continuation of the original application for execution.

The result, therefore, is that the appeal fails and is dismissed with costs, hearing fee two gold *mohurs*.

R. L. *Appeal dismissed.*

(1) 45 Ind. Cas. 712; 22 C. W. N. 766.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Re SECOND CIVIL APPEAL No. 282 OF 1925.

February 5, 1926.

Present:—Mr. Findlay, Offg. J. C.

In re DEONATH—APPLICANT.

Practice—Reference to Bench—Appeal heard and closed for judgment—Legality.

Though it is open to the Judicial Commissioner under the Bench Rules of the Nagpur Judicial Commissioner's Court to order that a particular case be heard by a Bench, such orders will be passed in exceptional circumstances only unless the Additional Judicial Commissioner concerned is of opinion that reference to a Bench is necessary or desirable in the case.

An application for reference to a Bench which is filed after an appeal is heard and closed for judgment, should not be granted as the granting thereof would amount to an expression of opinion of a Judge of co-extensive jurisdiction that the view the Additional Judicial Commissioner might take in the appeal in question is likely to be doubtful or erroneous one, and, therefore, he should desist from passing a judgment.

Application for referring to Bench question of law in Second Appeal No. 282 of 1925 (Bhairo Prasad *v.* Deonath).

Mr. *M. B. Kinkhede*, R. B. and Mr. *G. R. Deo*, for the Applicant.

ORDER.—This is an application by the respondent Deonath in Second Appeal No. 282 of 1925 before Hallifax, A. J. C. (Bhairao Prasad appellant v. Deonath respondent). The appeal was apparently heard by the learned Additional Judicial Commissioner on the 26th of January last and on the same date the present application was lodged.

In this application it is alleged that a certain question of law arises in the said appeal, which makes it advisable that the matter involved should be referred to a Bench. I am also asked to make measures which would lead to the deferring of the delivery of judgment by the Additional Judicial Commissioner in question.

I may at once say that, even if, on the merits, there had been involved in the appeal in question any matter which *prima facie* would render the constitution of a Bench advisable for its consideration, the present application obviously comes too late. I have been referred by the learned Counsel for the applicant to the decision in *Hukum Chand Boid* v. *Kamalanand Singh* (1) where the inherent power of the Court to stay the drawing up of its own order was recognised. Again, in *Nand Kishore Singh* v. *Ram Golam Sahu* (2) Mookerjee and Holmwood, JJ., were of opinion that they were competent to make an order for stay of proceedings in execution in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council. In *Padmabati Dasi* v. *Rasik Lal Dhar* (3) Jenkins, C. J., and Woodroffe, J., held that the Court has inherent jurisdiction to re-hear a matter before the order passed by the Court at a previous hearing has been perfected.

I am unable to see that any of these decisions have any real bearing on the matter in issue. Once the individual case or appeal is allotted to the file of any one of the Judges of this Court, such Judge has absolutely equal and co-extensive power with the Judicial Commissioner for the disposal of the case before him. It is, no doubt, true that under the Bench Rules of this Court, it is open to the Judicial Commissioner, in any particular case to order that it should be tried by a Bench. But I may say in this connection that I should, only in a very exceptional case, pass such an order unless the individual Additional Judicial Commissioner concerned was of opinion that reference to a Bench was necessary or desirable.

In the present case, however, the general principles on which I should exercise the power of ordering a Bench, need not be considered, for the present application obviously comes too late. Had this application been made before the appeal had been heard, a different set of considerations would have arisen in connection with its disposal. As the case stands, the appeal in question has already been heard and, for all I know, the learned Additional Judicial Commissioner may have delivered judgment before this order is pronounced. Whether he has done so or not, is, however, immaterial. My own view is that I have no power whatever to make the order I am asked to pass in the present case. Were it conceivable that I should pass any such order, the latter would amount to an expression of opinion by myself, sitting as a Single Judge, that the view the Additional Judicial Commissioner might take in the second appeal in question, was likely to be a doubtful or erroneous one and that, therefore, he should desist from passing judgment in the case in order that it might be referred to a Bench.

It seems to me perfectly obvious that I have no such power and that any such order, if passed, would constitute a gross excess of the jurisdiction or powers vested in me. The application is accordingly dismissed without notice to non-applicant.

G. R. D. *Application dismissed.*

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(1) 33 C. 927 at p. 932; 3 C. L. J. 67.

(2) 18 Ind. Cas. 207; 40 C. 955 at p. 960; 16 C. L. J. 508.

(3) 6 Ind. Cas. 666; 37 C. 259.

MADRAS HIGH COURT.
FULL BENCH.

Civil Appeal No. 70 of 1921.
March 31, 1925.

Present:—Sir Victor Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Phillips and Justice Sir Kumaraswami Sastri, Kt.

KATREDDI RAMIAH and another—Defendants Nos. 2 and 15—Appellants
versus
KADIYALA VENKATA SUBBAMMA and others—Plaintiff and Defendants Nos. 1, 3 to 14 and 16—Respondents.

Probate and Administration Act (V of 1881), applicability of, to unprobated mufassal *Will.*

An executor appointed by a Will in the *mufassal* of the Madras Presidency to which the Hindu Wills Act does not apply, has vested in him the estate of the testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain Probate of the Will. [p. 90, col. 1; p. 95, col. 2.]

[Case-law reviewed.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Ellore, in Original Suit No. 35 of 1920 (O. S. No. 100 of 1919 on the file of the Sub-Court, Ellore).

This appeal and the memorandum of cross-objections filed by the 3rd respondent came on for hearing on the 30th and 31st October 1924, upon perusing the grounds of appeal, the judgment and decree of the lower Court and the material papers in the case and upon hearing the arguments of Mr. *A. Krishnaswami Ayyar*, for the Appellants and of the Advocate-General for the 16th Respondent, and of Mr. *G. Lakshmanna* and Mr. *V. Suryanarayana*, for the Respondents Nos. 1 and 2, and of Messrs. *A. Satyanarayana* and *P. Bapiraju*, for the 3rd Respondent, and of Mr. *Ch. Raghava Rao*, for the 7th Respondent, and the appellants having given up Respondents Nos. 4, 8, 9, 13 and 14 and elected to proceed without them (*vide* order of Court, dated the 25th August 1921) and the other Respondents Nos. 5, 6, 10, 11, 12 and 15 not appearing in person or by Pleader, and the case having stood over for consideration till 13th November 1924, the Court (Spencer and Srinivasa Ayyangar, JJ.,) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Spencer, J.—M. Subbanna executed a Will on September 22, 1914, and died more than two years afterwards on January 5, 1917, leaving no sons but a daughter, a daughter's son and a widow.

He appointed his wife executrix of his Will authorizing her to pay his debts out of the proceeds of 1,000 bags of paddy that he had in store in 1914, to recover sums owed to him by others to sell a certain house and site, to carry out certain charitable and religious dispositions to adopt a son and to manage the adopted son's one-third share of immovable property till he attained majority, etc,, and then follows a generel clause:—"I authorize my wife to conduct all the remaining affairs in my stead." Respondent's Vakil attempted to argue that 1st defendant was only an executrix for a limited purpose (compare s. 35 of Probate and Administration Act) and that the intention of the testator was to empower her to transact only those affairs which he specifically mentioned in the Will. The use of the Telugu words (*yavttu*) and (*tatimma*) in this passage is to my mind consistent only with one meaning and that is that the testator intended his wife to be his general executrix. He provided in his Will that his entire immovable property (excluding certain purchases of land which he had dedicated to temple worship) should be divided into three shares and one share given to his daughter's son (2nd plaintiff), one to his adopted son (16th defendant) and one to his widow (1st defendant) for life, and that after her death her share should be divided between his daughter's son and the son adopted by his widow. The genuineness of the Will is not disputed. Owing to the lapse of time between the making of the Will and the testator's death, and the expense of law suits which he engaged in during his life, the paddy mentioned in the Will as a fund for discharging debts was not available to the executrix and she consequently had to sell 23 acres 68 cents. of wet land under Ex. 1 to the 2nd defendant for the purpose of paying certain promissory notes and decree debts left owing by her husband when he died in 1917 and she further entered into a mortgage in favour of the 15th defendant for a similar purpose during the pendency of the present suit which was instituted by deceased's daughter and daughter's son to obtain possession of the properties allotted to them under a family settlement alleged to have been arranged 13 days after the testator's death, or in the alternative to recover their legacies under the Will, unencumbered by the sale, leases and mortgages to 2nd, 3rd, 6th and 15th defendants, respectively, and mesne profits for two years. The Subordinate Judge found for the plaintiffs and accordingly granted them a preliminary decree subject to the condition of their paying to 1st defendant Rs. 1,946 as their share of the debts amounting to Rs, 5,000 for which the testator was liable at the date of his death. The purchaser and the mortgagee (defendants Nos. 2 and 15) from the widow appeal. The argument put forward on their behalf was that, as the estate vested in the executrix from the date of the testator's death by virtue of the Will she could sell or mortgage his property to pay off his debts and could give the purchaser or mortgagee a good title.

As the Will, with which we are concerned, was not executed by a Hindu within the City of Madras and does not relate to immovable property situate within this Court's Original Side jurisdiction, the Hindu Wills Act has no application to it, and consequently it was not made imperative by s. 187 of the Succession Act that the executrix should take out Probate, in order to establish her right to deal with the deceased's estate. Section 179 which speaks of vesting does not apply to the Will of a Hindu but s. 4, which is the corresponding provision of the Probate and Administration Act, applies. Section 12 of that Act states that Probate of a Will when granted establishes the Will from the death of the testator and renders valid all intermediate acts of the executor as such, thus implying that they are not valid until Probate is granted. I take this to mean that the executor of a Hindu Will may do all acts which the Will enjoins or permits him to do without any risk of having his authority to act *qua* executor questioned, but that if he exceeds his authority and does acts which the Will does not expressly authorize him to do, such as the disposal of immoveable property requiring the permission of Court which can only be given under s. 90 (2), such acts are voidable at the instance of any person interested unless and until the executor obtains Probate or Letters of Administration and gets an order of Court to validate what he has done in the interval between the testator's death and the issue of Probate or Letters of Administration. What acts an executor can under English Law do before obtaining probate are set out in Williams on Executors, Vol. I, at pages 213 to 215. They include the payment of debts owing by the deceased and the disposal of the testator's goods and chattels and real estate. An executor could always sell personalty in order to pay debts, and since 1897 he can sell, lease, or mortgage reality for that purpose (*vide* pages 693 to 704). His power of disposal is absolute, but as he cannot maintain an action before Probate though he can be sued if he has intermeddled with the estate, it becomes necessary for Probate or Letters of Administration (if he dies first) to be obtained in order to justify his actions as executor.

There appears to be some divergence of opinion between the Calcutta and Bombay High Courts in the view taken by them as to the position of the executor of a Hindu or Muhammadan Will who does not take out Probate, Mr. Justice Pugh in Calcutta regarding him as a mere manager for the purpose of paying the debts and distributing the estate [*Sakina Bibee* v. *Mahomed Ishak* (1)], and Mr Justice Russell and Mr. Justice Marten in Bombay treating him as an executor in whom the estate vests by virtue of s. 4 of the Probate and Administration Act [*Narrondas Ramji* v. *Narrondas Ramji* (2) and *Mahomed Yusuf* v. *Hargovandas Jivan* (3).]

So far back as 1878 Markby, J., in *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (4), and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5) held that the executor of a Hindu Will did not represent the deceased by virtue of the Will until he had obtained probate and the property did not vest in him by his mere appointment as executor in the Will, and Maclean, C. J., in *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), expressed an opinion that the inclusion of the vesting section under the Chapter relating to the grant of Probate and Letters of Administration was an indication that the vesting followed from the grant of Probate and that till then the executor held the property only as manager. There is also an observation of the Judicial Committee in *Administrator General of Bengal* v. *Premlal Mullick* (7); that prior to the Hindu Wills Act (the case before them being one of a Will made in 1889 by a Hindu resident of Calcutta City) the powers and functions of the executor of a Hindu estate were those of a manager rather than those of an executor of an English Will, that he did not require probate and that probate if obtained would not have vested him with any title to the estate, either real or personal, which he administered. The decision of the same Tribunal in *Kurrutulain Bahadur* v. *Nuzbat-ud dowla Abbas Hossein Khan* (8), which by referring to ss. 4, 59 and 90 of the Probate and Administration Act draws a distinction between executors under the Act and other executors who fail to take out probate throws light on this debated question. The Courts of Madras, Bombay and Calcutta seem to be all agreed that the executor of a Hindu Will made in the *mofussil* derives his title from the Will and that he can perform any of the duties cast on him by the Will without taking out probate [*vide Ganapathi Aiyar* v. *Sivamalai* (9), *Balakrishnudu* v. *Narayanasawmy Chetty* (10) and *Zemindar of Bhadrachalam and Palavancha* v. *Venkatadri Appa Rao* (11)]. Even the learned Judges who decided *Mahomed Yusuf* v. *Hargovandas Jivan* (3), were agreed in thinking that an executor who did not take out probate would be subject to any restriction in the Will as to the disposal of immoveable property. Such a disposal as would interfere with the literal performance of the trusts imposed by the Will on the executor in respect of the specific bequests of immoveable property would not be valid unless the executor obtained probate and obtained the directions of the Court under s. 90 (2). The executor of a Hindu Will has not, in my opinion, the general powers of an executor of an English Will, as there is no section in the Probate and Administration Act giving an executor the wide powers conferred by s. 269 of the Succession Act. In *Ganapathi Aiyar* v. *Sivamalai* (9), Sundara Ayyar and Sadasiva Ayyar, JJ., observed, "We can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate." My learned brother, whose judgment I have had the advantage of reading, apparently thinks that this observation goes too far and that an executor of a Hindu Will in the *mofussil* has none of the powers of an executor under the Probate and Administration Act, unless he first takes out probate. This is in effect the Calcutta view. I would not go so far as to say that an executor appointed by Will who does not take out probate is not an executor within the Act, as I think that s. 90, cl. (2), recognizes the existence of two classes of executors (1) those executors who get probate and obtain orders of Court for disposing of immoveable property and (2) those executors who do not do so and are restricted to the terms of the Will. The section speaks of even the former class as having the property vested in them, although probate has not been granted to them.

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(1) 8 Ind. Cas. 655; 37 C. 839 at p. 842; 15 C. W. N. 185.

(2) 31 B. 418 at p 428; 9 Bom. L. R. 287.

(3) 70 Ind. Cas. 268; 47 B. 231 at pp. 240, 241; 24 Bom. L. R 753; A. I. R. 1922 Bom. 392.

(4) 4 C. 342; 3 C. L. R. 154; 2 Ind. Dec. (N. S.) 217.

(5) 4 C. 455 at p. 468; 3 C. L. R. 315; 2 Shome L. R. 153; 2 Ind. Dec. (N. S.) 289.

(6) 25 C. 103; 13 Ind. Dec. (N. S.) 70.

As the 1st defendant by disposing of 23 acres 68 cents of wet land under Ex. I in favour of the 2nd defendant for a price of Rs 4,500 disabled herself from carrying out the testator's wishes in their entirety as to the division of his immoveable property among his heirs in the manner set out in the Will, and as she did not either before or after the sale validate her act by taking out probate and obtaining permission of the Court to dispose of the testator's immoveable property for discharging his debts, the learned Subordinate Judge was right, in my opinion, in declaring the sale-deed in favour of the 2nd defendant to be not valid and binding on the heirs under the Will. Similarly the mortgage must also have been invalid so far as it interfered with their obtaining a distribution of their shares, but being executed *pendente lite* the plaintiffs were entitled to ignore it.

I am inclined to treat the 1st defendant as an executrix who has exceeded the limited authority given to her under the Will as regards the disposal of immoveable property and has failed to invest herself with the power that she might have got by taking out probate and applying to the Court to permit her to dispose of that property in a manner not authorized by the Will.

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(7) 22 C. 788; 22 I. A. 107; 6 Sar. C. J. 603; 11 Ind. Dec. (N. S.) 522 (P. C.).

(8) 33 C. 116; 9 C. W. N. 938; 1 C. L. J. 594; 2 A. L. J. 758; 15 M. L. J. 336; 7 Bom. L. R. 876; 32 I. A. 244; 8 Sar. P. C. J. 839 P. C.).

(9) 17 Ind Cas. 4; 36 M 575; 12 M. L. T. 207; 23 M. L. J. 306; (1912) M. W N 1112.

(10) 24 Ind Cas 852; 37 M. 175.

(11) 70 Ind Cas 689; 46 M 190 at p. 224; (1922) M. W N. 532; 16 L. W. 369; 43 M. L. J. 486; A. I. R. 1922 Mad. 457; 31 M. L. T. 221 (F. B.).

Whether when the assets set apart under the Will were not available for discharging the testator's debt, the 1st defendant, either as executrix without probate or as the manager or person in actual possession of the estate, would have power to sell any portion of it for the necessary purpose of discharging the deceased's debts and could give a good title to the purchaser is a question that has not been argued before us. As the determination of this question will largely depend on the answer to be given to the question of law formulated by my learned brother, I agree to the reference to a Full Bench in the terms proposed in his judgment.

Srinivasa Ayyangar, J.—The main question that arises in this appeal is one of considerable difficulty and at the same time of great general importance. The difficulty of the question, has been immensely increased by the wide divergence in the views, with regard to the question, of the various High Courts in this country.

The daughter and the daughter's son of one Venkatasubbanna, the testator, instituted the suit from which this appeal has arisen. The 1st defendant is the widow of the testator and the 16th defendant is the son adopted by the 1st defendant to her deceased husband, the testator, under a power given to her by his Will. Defendants Nos. 2 to 15 may all be regarded as alienees claiming through the 1st defendant.

The plaintiff's claim was for having these alienations set aside and delivery over to the plaintiffs of certain lands alleged to have been agreed to be given to them under a family arrangement entered into by the 1st defendant, subsequent to the death of the testator, or, in the alternative, for a partition and delivery over to them of their shares in the estate of the deceased according to the terms of the Will. On behalf of the contesting defendants, namely, defendants Nos 1 to 15, it was *inter alia* pleaded that the 1st defendant was the executrix appointed by the testator and that as such she was entitled to sell and dispose of the property of the deceased testator and that, therefore, the alienations could not be set aside. The learned Subordinate Judge in the Court below found on a construction of the Will that there was no appointment of the 1st defendant in the Will as general executrix either expressly or by necessary implication. On this finding the lower Court set aside the alienations and holding that the family arrangement set up by the plaintiffs was not proved, gave a decree in their favour for their shares of the properties bequeathed to them under the Will subject, however, to a direction that the plaintiffs should pay to the 1st defendant a fifth share of the total amount of the debts of the testator discharged by the 1st defendant.

The first question, therefore, that arises is whether there is in the Will an appointment of the 1st defendant as executrix by necessary implication. The learned Vakil for the appellants has addressed to us a lengthy argument to show that the lower Court was wrong in holding that there was no such appointment. It seems to me that on a perusal of the entire Will and all its various clauses there can be no doubt whatever of the appointment of the 1st defendant as executrix by the necessary implication. There is no other person to whom the execution of the Will is confided. Wherever the testator thought there was anything to be done by way of carrying out his intentions, he has directed that the same should be done or carried out by the 1st defendant. Thus the debts due to him are directed to be recovered by her. It is she that is authorized to obtain proper documents in respect of lands purchased by him, but the sale-deeds for which had not been obtained by him during his lifetime, and she it is also that is directed to execute deeds of gifts and other documents in respect of certain grants made by him. She is also directed to sell certain properties and utilize the sale-proceeds for the purpose of certain charities. She is also the person that is directed to get the Will registered within three months of his death. Over and above all these, there is about the end of the Will the following sentence: "I authorize my wife to conduct all other affairs in my stead." The other affairs referred to there should necessarily signify and include affairs other than those in respect of which he has given particular directions. It is impossible to regard this sentence as not amounting to a constitution of the 1st defendant as his legal representative and the authority to conduct all other affairs undoubtedly amounts to confiding the execution of the Will to her within the meaning of the definition of "executor." It almost seems to me that even apart from this sentence, the intention may be clearly gathered that she was the person to whom it was the intention of the testator that the execution of the Will should be confided. But this sentence amounts almost to an express appointment. The lower Court was, therefore, clearly wrong in coming to the conclusion that the 1st defendant was not the general executrix appointed by the Will. There was no reason whatever to suppose, as the Subordinate Court seems to have done, that the 1st defendant was appointed an executrix only for certain limited purposes.

The lower Court having arrived at the conclusion that the 1st defendant was not the executrix at all, it became unnecessary for that Court to discuss the question whether if she were executrix what her powers were as such executrix to make the alienations sought to be set aside. This leads me to the consideration of the main question in this appeal, namely, whether an executor appointed by a Will made in the *mufassil* of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain Probate of the Will or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act. It was unnecessary for the learned Subordinate Judge in the Court below to consider this question because on his finding that the 1st defendant was not appointed as executrix at all, no such question arises for decision by him. As we have however found that there is an appointment of the 1st defendant as executrix if only by necessary implication, it has become necessary to determine the nature and extent of her powers over the estate of the deceased. If it should be found that even though no probate may be obtained by the executor the estate becomes vested in him from the moment of the death of the testator as indicated in s. 4 of the Probate and Administration Act and that he has all the powers of an executor as set out in that Act, then the tests to be applied for the purpose of determining whether or not the alienations made by him would be valid and binding would be entirely different to the tests applicable if the correct view should be that unless and until an executor obtains probate his powers are only those of a mere manager. The present appeal, it seems to me cannot be properly determined without coming to a decision with regard to this main question. If ultimately the view should prevail that the Probate and Administration Act, is merely an enabling Act laying down the procedure for applications for Probate and Letters of Administration and their grant and setting out the consequences that would follow on such grant being made or obtained and that, therefore, an executor of a Will made in the *mufassil*, of the Presidency has, till he obtains the probate, the powers only of a mere manager as though the Probate and Administration Act had not been passed, then in the view we have taken that the 1st defendant is the properly appointed executrix of the Will the case will have to be remanded to the lower Court for the purpose of determining the question what the powers are of such a mere manager with regard to the disposal of the property of the testator and whether having regard to the nature and extent of such power the particular alienations in this case were within or beyond such powers. If, however, the true view should be held to be that in the case of Wills made in the *mufassil* the executors have, whether they obtain probate or not, all the powers of the executors as set out in the Act, then the question of the validity of the alienations might require to be determined with reference to the various sections of that Act and the provisions of the Will in question. I may at once state that the case of *Ganapathi Aiyar* v. *Sivamalai* (9) is a direct authority for the position contended for by the appellants with regard to the main question of the powers of an executor under the Probate and Administration Act. The learned Judges, Sundara Ayyar and Sadasiva Ayyar, JJ., say at page 578* as follows: "But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate." The reasoning on which the learned Judges proceeded to arrive at that conclusion may be summed up as follows:—(1) There is no provision in the Probate and Administration Act which compels a person appointed as executor under a Will to take out Probate or Letters of Administration; whereas there is such a provision in the Indian Succession Act as incorporated in the Hindu Wills Act. (2) Under s. 4 of the Act, all the property of the deceased vests in the executor as such. (3) Neither the preamble nor the heading of Ch. II in the Act nor s. 12 requires that a different construction should be placed on s. 4. (4) Probate is not necessary to make a person an executor as his title as executor is derived under the Will. (5) Probate is merely the authentic evidence of the Will and not the source of the title of the executor. The learned Judges in coming to that conclusion followed the decisions of the Bombay High Court in the case of *Shaik Moosa* v. *Shaik Essa* (12) and the case of *Mathuradas Lowji* v. *Goculdas Madhowji* (13). The case of *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6) was also cited to their Lordships but has been attempted to be distinguished on a ground which I shall advert to later. It may be convenient here to observe that the view of the Bombay High Court in the said two Bombay cases has been maintained in several recent decisions of that Court. In *Narrondas Ramji* v. *Narrondas Ramji* (2). Mr Justice Russell merely follows the earlier Bombay view citing the earlier decisions. In the case of *Mahomed Yusuf* v. *Hargovandas Jivan* (3), two Judges of the Bombay High Court after considering a great deal of the case law on the point reiterate the Bombay view and follow it. In the case of *Narrondas Ramji* v. *Narrondas Ramji* (2) Mr. Justice Russell referred to certain observations of Mr. Justice Markby, in the case of *Komollochun Dutt* v. *Nilruttun Mundle* (14). Those observations are as follows: "The property vests in the executor by virtue of the Will, not of the probate. The Will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the Will." That same learned Judge, Mr. Justice Markby, in the case of *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (4) states as follows at page 345*: "The executor does not represent the deceased by virtue of the Will until he has obtained probate." In the case of *Administrator-General of Bengal* v. *Premlal Mullick* (7), their Lordships of the Judicial Committee state as follows: "It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo Indian testator, in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased. The Will of the late Nundo Lal Mullick was executed in August 1889, and his executors, therefore, *on their obtaining probate*, became immediately vested, by force of Statute, with the whole estates which belonged to him at the time of his decease." Though in that case their Lordships were not referring to the Probate and Administration Act, they were considering the terms of s. 179 of the Succession Act, which is identical with s. 4 of the Probate and Administration Act. In the case of *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), Chief Justice Maclean and Justice Banerjee, while holding that an executor under a Hindu Will, before the Hindu Wills Act came into force, is not in the same position as an English executor under an English Will, decide that the property does not vest in him, and that he holds it only as manager. The learned Judges referring to the preamble of the Act and the heading of Ch. II of the Act state as follows: "Where the estate is unadministered, if any one desire to come in and prove the Will and get the benefit of the Act in that sense, he may have the opportunity of doing so, and the effect would be that the estate from that time would vest in such executor under s. 4." Again in the case of *Sakina Bibee* v. *Mahomed Ishak* (1) Mr. Justice Pugh concludes his discussion of the subject as follows: "It appears to me that in case of a non-probated Will, if I may use the expression, the position must be as it was before the legislation, that is, the Will is a gift from the testator to the legatees, and the executor is merely a manager to carry out the intentions of his testator . . . . In my judgment, therefore, the position of an executor who does not take probate is the same as that of a Hindu or Muhammadan executor before the Succession Act."

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*Page of 36 M.—[Ed.]

In this conflict of view between the various Courts, I am personally inclined to consider that the view taken by the learned Judges in the Calcutta High Court is the correct view. That view is, to my mind, really in accordance with the view of their Lordships of the Judicial Committee in the case of *Administrator-General of Bengal* v. *Premlal Mullick* (7). Considering the ques-

(12) 8 B. 241; 8 Ind. Jur 571; 4 Ind. Dec. (N. s.) 534.

(1.) 10 B. 468; 5 Ind. Dec. (N. s.) 700.

(14) 4 C. 360 at p. 362; 4 C. L. R. 175; 2 Shome L. R. 126; 2 Ind. Dec. (N. s.) 228.

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*Page of 4 C.—[*Ed.*]

tion, however, not on the authorities but with reference to the Probate and Administration Act, it has to be noticed that the Act is called "An Act to provide for the grant of Probates of Wills and Letters of Administration to the estates of certain deceased persons." And the preamble runs as follows: "Whereas it is expedient to provide for the grant of Probate of Wills and Letters of Administration to the estates of deceased persons in cases to which the Indian Succession Act of 1865 does not apply, etc." It is significant that the object of the Act is not stated to be to legislate about Wills or to codify or modify the law relating to Wills. Section 4 of the Act is as follows: "The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." It is true that, reading the section by itself it would rather seem to indicate that on the death of the testator the executor becomes his legal representative for all purposes and that the property of the deceased person vests in him as such. But it must be remembered that this section refers also to an administrator, and it cannot possibly be pretended that there can be any administrator till Letters of Administration are obtained though the Letters when obtained relate back to the date of the death of the intestate deceased. There is, therefore, no reason to suppose why, in the case of an executor, a similar result should not have been intended. It is, however, significant that s. 4 appears in Ch. II entitled "Of Grant of Probate and Letters of Administration." This heading of the Chapter, therefore, further strengthens the view that both the representative character and the vesting accrue only on probate being taken. Then, we have s 12 which is as follows: "Probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such." This makes the meaning of the Legislature, it seems to me, quite clear. It is only the Probate of Will when granted that is said to establish the Will from the death of the testator and renders valid all intermediate acts. The clear implication is that if the probate is not granted or obtained, the Will is not established from the death of the testator and all intermediate acts of the testator will not be rendered valid. In s. 59, it is provided that Probate or Letters of Administration shall have effect over all the property, moveable or immoveable, of the deceased throughout the Province in which the same is (or are) granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him. The Legislature after providing in Ch. V regarding the practice in granting and revoking Probates and Letters of Administration proceeds in Ch. VI to enumerate the powers of an executor or administrator. Section 90 of the Act runs as follows: "(1) An executor or administrator has subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under s. 4. (2) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the Will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order." There is no doubt that the clause in sub-s. (2) "unless probate has been granted to him and the Court which granted the probate permits him by an order in writing notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order" would seem to suggest that even in the absence of probate, the property vests in the executor and that he has power to dispose of immoveable property subject only to any restrictions which may be imposed in that behalf by the Will. There is real difficulty in construing this clause consistently with the other parts of the Act, and for my part, I am inclined to think that it was a case of mere confused expression and that what the Legislature meant to lay down was that if a person appointed executor by a Will should wish to dispose of property contrary to the directions contained in the Will, he should first obtain probate and then apply to the Court and obtain an order from it authorizing him to do so

I am, therefore, of the opinion that the Probate and Administration Act is a mere enabling Act and that persons desirous of obtaining the rights created by that

Act should first proceed under the Act and clothe themselves with the right by obtaining either Probate or Letters of Administration.

I am confirmed in this view all the more because I cannot possibly imagine that the Legislature virtually altered the law of Wills in the *mufassil* without expressly saying so or that the Legislature meant to place an executor in the *mufassil* without probate practically for all purposes in the same position as an executor with probate in Presidency towns.

None of the learned Judges either of this Court or of the Bombay Court who have decided to the contrary have really given any satisfactory explanation either with regard to the preamble of the Act or the heading of Ch. II or the very clear terms of s. 12.

In view, therefore, of the decision in the case of *Ganapathi Aiyar* v. *Sivamalai* (9), and the conflict of judicial opinion between the Bombay and the Calcutta High Courts in the same matter, I deem it necessary to refer to a Full Bench the question already propounded, namely, the main question in this appeal, "whether an executor appointed by a Will made in the *mufassal* of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain Probate of the Will, or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act."

Mr. *A. Krishnaswami Ayyar*, for the Appellants.

Mr. *V. Viyyanna*, for Respondent No. 16, Mr. *G. Lakshmanna*, for the Respondents Nos. 1 and 2, Messrs. *A. Satyanarayana* and Mr. *P. Bapiraju*, for Respondent No. 3 and Mr. *Ch. Raghava Rao*, for Respondent No. 7.

OPINION OF THE FULL BENCH.

Kumaraswami Sastri, J.—The question raised in this reference is "Whether an executor appointed by a Hindu Will made in the *mufassal* of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain Probate of the Will or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act."

Before the passing of the Hindu Wills Act of 1870, the estate of a deceased Hindu did not vest in the executor even though he obtained probate, and in cases not governed by the Act, the right of the executor or legatee could be established either by production of probate or by other proof of the Will, probate being only treated as one of the modes by which a Will can be proved in Court, and District Courts had no power to grant Probate or Letters of Administration to Hindu Wills which were not governed by the Hindu Wills Act. Supreme Courts, however, reserved to themselves the power to grant probate but it was recognized that the grant of probate did not of itself confer any additional powers on executors not governed by the Hindu Wills Act. The position of such an executor was merely that of a manager in so far as the powers which were not expressly conferred on him. In *Administrator General of Bengal* v. *Premlal Mullick* (7), their Lordships of the Privy Council in dealing with rights of Hindu executors prior to the passing of the Administrator-General's Act of 1867 observe. "His powers and functions were not those of an English executor, but rather those of a manager; but he did not require probate, and probate, if obtained, would not have vested him with any title to the estate, either real or personal, which he administered". In view of these observations it is unnecessary to refer in detail to the decisions of the High Courts on the subject. I need only refer to *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5), *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), *Amulya Charan Seal* v. *Kali Das Sen* (15), and *Maniklal Atmaram* v. *Manchershi Dinsha Coachman* (16).

As regards grants of probate and the proof required of a Will not governed by the Hindu Wills Act it was held in *Luchmun Bharti* v. *Dukharam Bharti* (17), that before the passing of the Probate and Administration Act, it was not competent to District Courts to grant Probate or Letters of Administration but as pointed out in *Krishna Kinkur Roy* v. *Rai Mohun Roy* (18), the passing of the Probate and Administration Act has altered this. It has however been held that there is no obligation cast on a Hindu or Muhammadan executor of Wills not coming under the Hindu Wills Act to take out probate and that he can prove the Will during the course of the suit just as if he was proving any other document requiring proof. Probate was regarded only as one mode of proving a Will. I need only refer to *Krishna Kinkur Roy* v. *Rai Mohon Roy* (18), *Krishna Kinkur Roy* v. *Panchuram Mundul* (19), *Bhagvansang Bharaji* v. *Bechardas Harjivandas* (20), *Shaik Moosa* v. *Shaik Essa* (12), *Sakina Bibee* v. *Mahomed Ishak* (1). The Probate and Administration Bill as originally drafted and introduced in the Council proposed to make the production of Probate or Letters of Administration necessary in all cases where the property exceeded Rs. 1,000; but when the Bill was in the Select Committee this provision was deleted. The result is that the Probate and Administration Act is as it stands a measure purely permissive so far as the necessity for taking out probate is concerned.

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(15) 32 C. 861; 1 C. L. J. 270.

(16) 1 B. 269; 1 Ind. Dec. (N. S.) 179.

(17) 6 C. L. R. 138.

(18) 14 C. 37; 11 Ind. Jur. 141; 7 Ind. Dec. (N. S.) 25.

The question is whether the Probate and Administration Act is only confined to cases where such permission is availed of and a person applies for Probate or Letters of Administration or whether it applies to all cases. So far as the decided cases are concerned, there is a difference of opinion between the view taken by the Madras and Bombay High Courts on one side and the Calcutta High Court on the other. In *Fatma* v. *Shaik Essa* (21), West, J., held that the executor of a Will of a deceased Muhammadan executed after the Probate and Administration Act had come into force could not claim to represent the estate of his testator until he had taken out probate. His view was that all classes of executors with regard to the necessity of taking out probate were on the some footing, that s. 12 of the Act showed clearly that the idea at the bottom of the scheme of the Act was that a Will was not to be considered established until probate had been taken out and that till probate there was no Will "established," that is there was no "Will" at all, exacting recognition of the dispositions made and the authority conferred by it. He held that the Act read as a whole established that probate was necessary in all cases. This view of West, J., was however overruled by Sir Charles Sargent, C J., and Bayley, J. in *Shaik Moosa* v. *Shaik Essa* (12), and it was held that by reason of the omission from the Probate and Administration Act which applies to Hindus and Muhammadans of any section corresponding to s. 187 of the Succession Act which requires the production of Probate or Letters of Administration, a right of suit may be established by a Hindu or Muhammadan without taking out probate. Sir Charles Sargent, C. J., was of opinion that s. 12 of the Probate and Administration Act was merely intended to be a condensed statement of the English Law which regards probate as the authenticated evidence of the Will itself from which the executor derives his title and by virtue of which the property of the testator vests in him from the death of the testator and not as a condition precedent to establishing his claim. In *Mathuradas Lowji* v. *Goculdas Madhowji* (13), it was held following the decision in *Shaik Moosa* v. *Shaik Essa* (12), that an executor who has not taken out probate has the powers of alienation which the English Law confers on executors. In *Narrondas Ramji* v. *Narrondas Ramji* (2), it was held that the estate of a deceased vested in the executor appointed under the Will even though he did not obtain probate. Russell, J., observed as follows:—"The plaintiffs were his executors and by s. 4 of the Probate and Administration Act all his estate vested in the plaintiffs as such." This Court has held s. 4 applicable before probate. [See *Shaik Moosa* v. *Shaik Essa* (12) approved in *Muthuradas Lowji* v. *Gaculdas Madhowji* (13) and in *Bai Harkor* v. *Maneklal Rasikdas* (22).] It seems to have been assumed that the effect of s. 4 would have been to vest the property in the executor of a Will made before the passing of the Act, and not governed by the Hindu Law, although probate had not been granted. In *Mahomed Yusuf* v. *Hargovandas Jivan* (3), Marten and Fawcett, JJ., after reviewing the case law on the subject held that the estate vests in the executor under s. 4 of the Probate and Administration Act and that he can convey the property by virtue of the power conferred upon him by s. 90 of the Act even though he has not obtained probate. All the authorities are reviewed by the learned Judges in their judgment.

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(19) 17 C. 272; 8 Ind. Dec. (N. S.) 720.

(20) 6 B. 73; 6 Ind. Jur. 259; 3 Ind. Dec. (N. S.) 505.

(21) 7 B. 266; 7 Ind. Jur. 535; 4 Ind. Dec. (N. S.) 179.

(22) 12 B. 621; 6 Ind. Dec. (N. S.) 898.

So far as Madras is concerned the view of the Bombay High Court has been accepted as correct. In *Ganapati Aiyar* v *Sivamalai* (9), Sundara Ayyar and Sadasiva Ayyar, JJ., held that an executor under the Will of a Hindu who has not obtained probate is governed by the provisions of the Probate and Administration Act and can clothe a vendee with full title. Dealing with the argument that the property of the testator would vest in the executor only if he took Probate or Letters of Administration the learned Judges observe "We are unable to uphold this contention. There is no provision in the Probate and Administration Act which requires a person appointed as executor under a Will to take out Probate or Letters of Administration. Section 187 of the Indian Succession Act which provides that no right as legatee or executor under a Will can be enforced unless Probate or Letters of Administration have been taken out has not been enacted in the Probate and Administration Act. It was imported into the Hindu Wills Act, but it was apparently for very good reasons considered undesirable to embody it in the Probate and Administration Act. Under s. 4 of the Act all the property of the deceased vests in the executor as such. Probate is not necessary to make a person an executor. His title is derived under the Will. If s. 187 of the Succession Act had been imported into the Probate and Administration Act, then neither the executor nor any persons claiming as alienees under him would be entitled to enforce any right as executor or alienee. But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate. This was the view taken in *Shaik Moosa* v. *Shaik Essa* (12) and *Mathuradas Lowji* v. *Goculdas Madhowji* (13)." The learned Judges distinguish *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), on the ground that it related to the validity of a sale made by an executor under a Hindu Will in the year 1854 long before the Probate and Administration Act was passed and they observed that they could not assume that the learned Judges would have taken the same view in respect to Wills made by a person who died after 1881. In *Bala Krishnudu* v. *Narayanaswamy Chetty* (10) Wallis, C. J., held that the estate of a deceased vests in the executor even though probate has not been taken out, and observed as follows:—"The Will is not governed by the Hindu Wills Act and s. 187 of the Indian Succession Act is, therefore, not applicable. Under s. 4 of the Probate and Administration Act the estate of the deceased vested in the plaintiff as her executor on her death in January 1914 and there is nothing in that Act to prevent him suing the defendant at once. No doubt if he had omitted to take out probate he could not have obtained a decree without producing a succession certificate, but there is nothing in that Act to prevent his instituting the suit and afterwards obtaining the certificate before decree." In *Zemindar of Bhadrachalam & Palavancha* v. *Venkatadri Appa Rao* (11), it was assumed both by Sadasiva Ayyar, and Phillips, JJ., who originally heard the appeal and by the Full Bench that the Probate and Administration Act applied to unprobated Wills in the *mufassil* to which the Hindu Wills Act did not apply.

A different view has been taken by the Calcutta High Court. In *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6) it was held that an executor under a Hindu Will executed before the Hindu Wills Act came into force is not in the same position, as an English executor under an English Will and that the property does not vest in him but that he holds it only as manager. As pointed out by Sundara Ayyar and Sadasiva Ayyar, JJ, in *Ganapathi Aiyar* v. *Sivamalai* (9) the Will in question was executed before the passing of the Hindu Wills Act and the Probate and Administration Act; but I have little doubt that there are observations in the judgment which support the view taken that the Probate and Administration Act does not apply to cases where probate has not been granted to the executor. Sir William Maclean, C. J., refers to the preamble of the Act and the fact that s. 4 comes in under Ch. 11 of the Act headed "Of Grant of Probate and Letters of Administration" and observes that this indicates that the vesting was only to follow upon the grant of Probate of the Will in the one case, or grant of Letters of Administration in the other and that the section applies not only to executors but to administrators who obtain Letters of Administration under the Act Banerjee, J., thinks that the provisions of the Act must be taken to be controlled by the preamble of the Act and states that where probate has not been obtained the provisions of the Act would not apply. In *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (4), a decree was obtained against a person who was not the proper legal representative. Subsequent to the decree under the Will of the deceased he took out probate and he filed a claim to the property attached in execution of the decree against the defendant in that suit who was only the concubine of the deceased. Markby, J., held that a person who took possession of the estate of a deceased Hindu who had left a Will which was not probated must be treated for some purpose as his legal representative until some other claimant comes forward. In the course of his judgment the learned Judge observes that the executor does not represent the deceased by virtue of the Will until he has obtained probate, that somebody must have represented the deceased and, must represent the deceased and that the person who was in possession of the estate and managed it till probate was obtained might be treated as the person who was representing the estate The same learned Judge, however, in *Komollochun Dutt* v. *Nilruttun Mundle* (14) observed "when the probate is granted it operates upon the whole estate, and (by s. 188) it establishes the Will from the death of the testator and renders valid all intermediate acts of the executor as such. The property vests in the executor by virtue of the Will, not of the probate. The Will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the Will. So long as the probate exists it is effectual for that purpose." The question for determination there however, was whether when once probate was granted it can be set aside by a separate suit and it was held that the only way to set it aside was to apply to the Court which granted the probate to revoke the grant. In *Sakina Bibee* v. *Mahomed Ishak* (1) it was held by Pugh, J., following *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6) that the powers conferred by the Probate and Administration Act do not apply to an executor who has not taken out probate and that the powers of the executor under such a Will must be the same as it was before the passing of the Act. The observations of the learned Judge were, however, *obiter* as the question did not arise for determination.

I may refer to two Calcutta cases decided by their Lordships of the Privy Council which were referred to in the course of the argument. The first is *Administrator-General of Bengal* v. *Premlal Mullick* (7). The question in that case was whether a Hindu executor who had obtained probate of a Will can transfer the administration to the Administrator General by virtue of the provisions of the Administrator-General's Act II of 1874. The Will was executed in 1889 after the passing of the Probate and Administration Act. Their Lordships of the Privy Council were of opinion that the right conferred by s. 31 of the Administrator-General's Act was not confined to any particular class of executors and that the executor under a Hindu Will can take advantage of the provisions of the Act In the course of their judgment their Lordships of the Privy Council, after pointing out that s. 31 of the Administrator-General's Act of 1874 is a re-enactment, without verbal alterations of s. 30 of the Administrator General's Act 1867 (Act XXIV of 1867), make the following observation at page 796*: —"It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased. The Will of the late Nundo Lal Mullick was executed in August 1889, and his executors, therefore, on their obtaining probate, became immediately vested, by force of Statute, with the whole estates which belonged to him at the time of his decease." The words "the executors, therefore, on their obtaining probate became immediately vested by force of Statute" are relied upon as supporting the view that the powers of an executor only arise on probate being taken. I do not think that we can hold that these observations which were *obiter* can be taken as an authoritative interpretation of s. 4 of the Probate and Administration Act. The only question for decision was whether a Hindu who obtains Probate of a Will executed after the passing of the Probate and Administration Act was a person who came within the class of persons empowered to transfer the estate to the Administrator-General under s. 31 of the Administrator-General's Act. There is great force in the following observations of Sir E. J. Trevelyan in his book The Law relating to Hindu Wills":—"Although it was unnecessary to decide this question, these observations would show that an estate does not vest in an executor until probate. It is submitted that their Lordships have omitted to consider the words 'unless probate has been granted to him,' in s. 90(2) the omission from s. 4 of any reference to probate and the expression of the effects of probate in ss. 12 and 59, which, it is submitted suggest that the powers of an executor are not dependent upon probate." I may also point out that Sir Rowland Wilson in his work on Muhammadan Law is also of opinion that the powers of an executor of a Muhammadan under a Will which is not probated are subject to the provisions of the Act and that without probate he is an executor within the meaning of the probate and Administration Act except where the contrary appears from the context [*see* page 232, 5th Edition.]

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Reference has also been made to *Kurrut-ul-ain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan*, (8). That was a case where a Muhammadan left a Will which under the Muhammadan Law would be invalid to the extent of two-thirds of the estate. The Will was executed in 1893 after the passing of the Probate and Administration Act and the question was what the effect of the probate was as regards two-thirds of the estate which the testator under Muhammadan Law had no power to dispose of. It was held that the grant of probate did not estop the plaintiff from pleading that the Will did not operate on two-thirds of the estate. Their Lordships of the Privy Council at page 130* state that, although the Supreme Courts granted probates of Hindu and Muhammadan Wills, those Courts never applied the English rule as to the necessity for probate to such Wills nor did they attribute to such probates, when granted, the English doctrines as to the operation of probate, and observe as follows: "Under that system a Hindu or Muhammadan executor took no title to property merely as such by virtue of the probate." I do not think this decision throws much light on the question before us.

So far as the legislation in Madras is concerned there are two Regulations which deal with this matter. One is Regulation III of 1802 and s. 16 gave power to executors of Muhammadans and others to take charge of assets and to execute the trusts mentioned in the Will and forbade Courts from interfering except on complaints. This section, however, was repealed so far as Hindus were concerned by Regulation V of 1829 and the preamble states that the provisions of s. 16 of Regulation III of 1802 were contrary to the provisions of Hindu Law and the authorities prevalent—Section 4 of Regulation V of 1829 says that Wills left by Hindus shall have no legal force whatever except so far as their contents may be in conformity with the provisions of the Hindu Law, according to the authorities prevalent in the respective Provinces under this Presidency.

I am of opinion that the view taken by the Bombay High Court and by our own Court in *Ganapathi Aiyar* v. *Sivamalai* (9) is correct. As regards the vesting of the estate on the executor before probate is obtained I think the observations of their Lordships of the Privy Council in *Soona Mayna Kena Roona Meyappa Chetty* v. *Soona Navena Suppramanian Chetty* (23) are clear. They observe "it is quite clear that an executor derives his title and authority from the Will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death." I think there are many practical difficulties in coming to the opposite conclusion. Section 12 of the Probate and Administration Act says that Probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such; so that it will be open to the executor to defer taking out probate and after administering the estate with the limited powers of a manager to apply for probate and clothe himself with rights which are far more extensive and which would have retrospective effect For example, if he sells property before obtaining probate, the sale would not be binding unless there was an express provision in the Will or unless it were necessary and beneficial to the estate within the meaning of *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (24) but if he takes out probate the alienation would be

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(23) 35 Ind. Cas. 323; 43 I. A. 113; 20 C. W. N. 833; (1916) 1 M. W. N. 455; 18 Bom. L. R. 642; 85 L. J. P. C. 179; (1916) 1 A. C. 603; 114 L. T. 1002 (P. C.).

(24) 6 M. I. A. 393; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

valid from the date of death of the testator because under s. 90 unless there is an express prohibition, there is no question of necessity. It is not in every case that a purchaser can apply for Letters of Administration with Will annexed. As the view taken by the Madras High Court has always been that the provisions of the Probate and Administration Act apply to cases where probate has not been obtained and as it would unsettle many titles if a contrary view were held we should not do so unless we are satisfied that the view taken till now is clearly erroneous.

Turning to the Probate and Administration Act, I do not think there is anything in the Act which clearly indicates that it is only applicable to executors who take out probate. Executor is defined generally in s. 3 as a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided. Section 4 enacts that the executor or administrator, as the case may be, of a deceased person, is the legal representative for all purposes and all the property of the deceased person vests in him as such. No doubt this section comes under Ch. II which is headed "Of grant of Probate and Letters of Administration," but I do not think that this fact has much bearing on the general words of the section nor do I think that the fact that an administrator gets title only from the date of the grant of Letters of Administration throws much light on the question. I think the meaning of the section is that property will vest in both of them but that in the case of an executor it vests from the date of the death of the testator, but by virtue of ss. 14 and 15 an administrator being merely a person to whom the Court confides the management of the estate the property vests in him from the date of the grant of Letters of Administration and not before. I do not think there is much point in the contention that because executors and administrators are both referred to in s. 4 and because an administrator's rights commence from the date of the grant a similar restriction should be placed upon the executor who derives title from the Will of the testator. Section 90, I think, makes the point clear. It distinctly applies to both executors who have taken out probate and those who have not. Clause (1) gives the executor or administrator power to dispose of all or any of the property for the time being vested in him under s. 4 and cl. (2) says that if the Will contains a restriction and the executor wants to sell property he should obtain probate and get the leave of the Court. It is difficult to read s. 90 as not applying to unprobated Wills. It clearly contemplates the vesting of property in the executor who has not obtained probate. It is no doubt true that in the preamble it is stated that it is expedient to provide for the grant of Probat Wills and Letters of Administration to the estates of deceased persons in cases to which the Indian Succession Act does not apply but I do not think that this fact alone should be taken as conclusive on the question. It seems to me that if the Legislature intended that only Wills which are probated should be governed by this Act, it would have said so in unequivocal terms and in the absence of any such statement I do not think I will be justified in holding that the Act is not applicable to cases where probate has not been obtained. There are several sections in the Act which have nothing to do with probate and which are general in their character and there is no reason why such provisions should not be applied to Hindu Wills of which probate has not been obtained. I think there is great force in the observations of Sir Charles Sargent, C. J., in *Shaik Moosa* v. *Shaik Essa*, (12) where the learned Judge observes that the object of the Legislature in enacting the Probate and Administration Act seems to have been to frame an act which would be applicable to all natives of this country whilst leaving the existing law as to those Hindus, to whom the Hindu Wills Act apply untouched.

I would answer the reference by stating that in cases of Hindu Wills to which the Hindu Wills Act does not apply the estate vests in the executor (who accepts office) from the date of the testator's death and that the provisions of the Probate and Administration Act are applicable even though probate has not been obtained.

Coutts Trotter, C. J.—I agree.

Phillips, J.—I agree.

V. N. V. *Reference answered.*
R. L.

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BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 21 OF 1925.
December 16, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

VASANTRAO GOVINDRAO PRABHAKAR—PLAINTIFF—APPELLANT
versus
NANABHAI SADANAND—DEFENDANT No. 1—RESPONDENT.

Mortgage—Foreclosure—Decree nisi *before Transfer of Property Act—Mortgagee allowed possession—Mortgagor's right to demand account and further day for payment—Long silence, effect of.*

Before the passing of the Transfer of Property Act, it was not the practice of the Bombay High Court to require a mortgagee, who had obtained a decree *nisi* for foreclosure, upon non-payment of the money due at the time prescribed, to obtain an order for foreclosure absolute as against the person or persons in default; the mortgagee was permitted to foreclose by proceedings in execution of the decree instead of obtaining an order absolute. [p. 101, col. 2.]

As a general rule after an order for foreclosure *nisi*, the mortgagor can apply for, and in suitable circumstances and on certain conditions obtain an order enlarging the time for redemption; but enlargement of the time is not a matter of course. The power to extend the time is in the discretion of the Court, and in order to entitle himself to such indulgence the mortgagor must apply to the Court with reasonable promptitude. [p. 103, col. 1.]

A mortgagee obtained a decree *nisi* for foreclosure in 1875. The period allowed to mortgagor for payment and redemption was six months. Soon after the mortgagee got possession of the property under some arrangement with the mortgagor. The mortgagor never took any steps to ask for further accounts, nor did he or those claiming under him ever apply to the Court for enlargement of the time. The mortgagee treated the property as his own and erected costly buildings over it to the knowledge of the mortgagor. After the lapse of 45 years the representatives-in-interest of the mortgagor brought a suit claiming the property:

Held, (1) that the mortgagor acquiesced in the position that the mortgagee was entitled to hold the property as his own and it was no longer necessary for the mortgagee to execute the decree and he became full owner of the property; [p. 103, col. 2.]

(2) that assuming that this was not so, and that the plaint in the suit could be treated as an application for extension of time for payment made in the foreclosure suit of 1875, the delay of 45 years on the part of the mortgagor was fatal to his case. [*ibid.*]

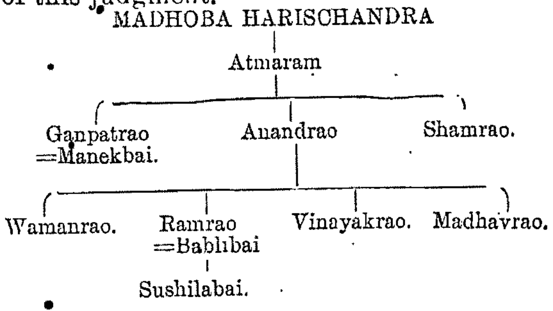
Appeal against the judgment of Mr. Justice Kemp

Messrs. *M. C. Setalvad* and *H. J. Kania*, for the Appellants.

Messrs. *Coltman* and *Lalji*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiffs filed this suit for the redemption of two properties, hereinafter called the Girgaon property and the Mahim property respectively, after taking an account of the two mortgages mentioned in the plaint. The following pedigree is necessary for the purposes of this judgment.



The original plaintiffs Nos. 1 to 3 were Wamanrao, Vinayakrao and Madhavrao, while plaintiffs Nos. 4 and 5 were the executors of Maneckbai widow of Gunpatrao.

In 1869 Madhoba negotiated with one Shrikrishna Naranj for a loan of Rs. 82,000 to be secured on the Girgaon property. An agreement was arrived at whereby Shrikrishna Naranji was to advance Rs. 82.000 on a deposit of the title deeds of the Girgaon property and Madhoba was to purchase the Mahim property from Shrikrishna for Rs. 50,000. Accordingly the title deeds of the Girgaon property were deposited with Shrikrishna who advanced Rs. 82,000 to Madhoba. Madhoba died on September 19, 1869, leaving a Will dated April 16, 1862, and a codicil thereto dated September 18, 1869.

Probate of the Will and codicil was granted to Atmaram Madhoba as the executor named in Will on January 20, 1870. On March 25, 1870, Atmaram obtained a conveyance of the Mahim property from Shrikrishna, and on the same day Atmaram executed two mortgages one of the Girgaon property and the other of the Girgaon and Mahim properties to secure the sums of Rs. 82,000 and Rs. 50,000 respectively.

On March 4, 1875, Shrikrishna assigned the said two mortgages and all his rights thereunder to his son Sadanand.

Sadanand filed a suit No. 259 of 1875, against Atmaram for the realization of the amounts due on these mortgages, and obtained a decree *nisi* on July 15, 1875, by which it was directed that the defendant as executor should pay to the plaintiff Rs. 2,39,538-5-8 for debt and interest on the two mortgages with costs and further simple interest on the principal sum of Rs. 2,32,672 at 13 per cent, per annum from the date of the decree till payment, and it was ordered that on the defendant paying the said principal, interest and costs, within six months after the date of the decree, the plaintiff should re-convey the premises comprised in the mortgage-deeds to the defendant free of all incumbrances, but on the defendant failing to pay what should be due for principal, interest and costs by the said time the defendant should from thenceforth stand absolutely debarred and foreclosed of and from the equity of redemption of the said mortgaged premises. In or about the month of November 1875, before the six months prescribed in the decree expired, Atmaram put Sadanand in possession of the Girgaon property. The arrangement under which possession was given is said to have been recorded in a letter of November 29, 1875, written by Atmaram to Sadanand, which is Ex. F to the plaint, though it does not appear to have been proved and put in as an exhibit in the suit. It is alleged in the plaint para. 9 that the Municipality of Bombay was pressing Atmaram to execute some repairs to certain *chawls* on the Girgaon property and was threatening in default to pull them down. As Atmaram could not comply with the requisition of the Municipality he agreed that Sadanand should enter into possession, and re-build such of the *chawls* as were required to be re-built, debiting Atmaram with the costs thereof and crediting him with the rents received.

The first defendant Nanabhai Sadanand, son of the mortgagee, in para. 4 of his written statement, denied any knowledge of this arrangement, but he admitted that Sadanand was put into possession of the Girgaon property in December 1875 and that letters were addressed to the tenants to pay rent to Sadanand. He further set up an oral arrangement that Sadanand was to repair and re-build while Atmaram should have a further six months within which to redeem. The plaintiff further alleges that in or about the month of July 1877 Atmaram put Sadanand in possession of the Mahim property as mortgagee in possession but in spite of such possession being given Sadanand filed a Suit No. 869 of 1877 for possession which was dismissed with costs. Atmaram died on July 6, 1893, and Sadanand in or about the year 1910, leaving his son the first defendant as executor of his Will.

The plaintiffs contended that Sadanand not having obtained a decree absolute for foreclosure or for sale in Suit No. 259 of 1875 and having entered into possession of the said property under the arrangement referred to, the relation of mortgagor and mortgagee between Atmaram and Sadanand continued to subsist and still subsisted between the plaintiffs as executors of the Will of Manekbai and as administrators *de bonis non* of the estate of Madhoba and the defendant as executor of Sadanand. Further that execution of the decree *nisi* had long been time-barred. The plaintiff alleged that Manekbai had an interest in the suit properties but they did not set out in the plaint how that interest was acquired.

However it appears that on June 6, 1878, Anandrao and Ganpatrao, sons of Atmaram, were adjudicated insolvent. When Atmaram died in 1893 the Official Assignee put up for sale the interests of Anandrao and Ganpatrao in the Girgaon property and other properties and sold them to one Major Kirtikar. He died on May 9, 1917, leaving a Will and a codicil. By the codicil he devised the Girgaon property to Manekbai, the widow of Ganpatrao. Her executors, therefore, had no claim upon the Mahim property.

By an order of August 1, 1924, plaintiffs Nos. 1 to 3 were struck out and added as defendants Nos. 2, 3 and 4. For some reason or other this order was cancelled on August 2, but the amendment was re-instated by an order of September 24. All these orders were made after the suit was first called on for hearing, and it is curious to note that the plaint was re-declared on August 5, 1924, and October 17, 1924, by one Motiram Kirtikar, constituted attorney for defendants Nos. 2, 3 and 4.

Para. 21 of the plaint at page 5 of the printed book should not have been in black ink, as it refers to the order made on September 24.

Then the concise statement which appears at page 9 could not possibly have been the original concise statement, as it in no way corresponds with the plaint as drawn. In para 13 of the plaint the plaintiff said they were applying for letters of administration with the Will and codicil of Madhoba annexed to the estate of Madhoba. These letters were not granted until October 31, 1924, limited to the two properties mentioned in the suit. Now the concise statement recites that the plaintiffs and defendants Nos. 2, 3 and 4 pray that it may be declared that the plaintiff and defendants Nos. 2, 3 and 4 as administratrix and administrators of the estate of Madhoba Harichandra were entitled to redeem the properties mentioned in the plaint, while the decree which was eventually passed dismissing the suit recites that the plaintiffs pray that it may be declared that they, as executors of the Will of Manekbai and as administrators *de bonis non* jointly with defendants Nos. 2, 3 and 4 of the estate of Madhoba, should be entitled to redeem the suit properties. Then from the record at page 54 it would appear that the hearing commenced on November 10, 1924, although the decree re-cites that it was called on for hearing on several days in July, August and October.

It is necessary to point out all these defects in the record, since in a case of this description where the parties appear to have more than once changed their positions and their characters, unless the record is properly kept confusion is likely to arise.

The first defendant filed a written statement on January 7, 1922, which does not appear to have been amended since. He contended that the decree in the suit of 1875 was not a decree *nisi* but a final decree, and that in the events which occurred Sadanand became entitled to possession of the Girgaon property at the latest on July 15, 1876, and of the Mahim property on January 15, 1876.

He denied that Sadanand went into possession of the Mahim property as mortgagee, on the contrary the Judge in Suit No. 689 of 1877 held that Sadanand had obtained possession of the Mahim property before suit and on that ground dismissed the suit. He claimed that even if the decree in Suit No. 259 of 1875 was not a final decree, any claim to redeem the properties was *res judicata* by virtue of the decree.

Further, the Mahim property had been handed over to Sadanand in execution of the decree, and had been conveyed by Sadanand in 1882 to one Purshottam Srikrishna. Large sums had been spent on the Girgaon property and in any event the plaintiff could not redeem without an account being taken of such sums. The rule of *damdupat* had no application.

Defendants Nos. 2, 3 and 4 were allowed to put in a written statement on November 10, 1924, supporting the plaintiffs.

The Judge found on the issues which were raised on the pleadings. (1) That the plaintiffs, as executors of Manekbai were only interested in the Girgaon property. They could not sue to redeem only one of the two (the Judge appears to have forgotten there were two mortgages) properties under the mortgage. They had no interest in the other. (2) That Dattaram Vaidyaram, heir of Purshottam Srikrishna, was a necessary party. (3) That the decree in Suit No. 259 of 1875 barred the defendant therein from all equity of redemption in default of payments as therein directed. (4) That Atmaram had no interest in the Girgaon property as from January 15, or July 15, 1876. (5) That the plaintiffs' claim was barred by adverse possession, and dismissed the suit.

The plaintiffs, executors of the Will of Manekbai, have appealed.

The difficulties in the case have mainly arisen from the fact that Suit No. 259 of 1875 was filed on two separate mortgages, that the decree was passed as if there was one mortgage, and that thereafter the properties in each mortgage were dealt with in different ways. It is admitted that in December 1875, before the redemption period had expired, Sadanand obtained possession of the Girgaon property by arrangement with the mortgagor. Whatever that arrangement may have been, Sadanand continued in possession thereafter as owner. As to the Mahim property Sadanand, in 1877, took out a summons for executing the decree in Suit No. 259 of 1875, and on July 23, 1877, a Judge's order was made on the summons that the decree should be executed against Atmaram by ordering delivery to be given to Sadanand. But when the Judge was asked to sign a further order for the purpose of carrying out the previous order, that a warrant should issue to the Sheriff, he declined to sign it and told Sadanand to file a suit for possession. Sadanand then filed the suit already referred to, but as Atmaram in his written statement stated that he was served with a rule or order to show cause why the decree in Suit No. 259 of 1875 should not be executed and did not appear to show cause against the rule but thereupon gave up possession to the plaintiff, the suit was dismissed. Sadanand transferred the property by deed of gift in 1882 to Purshottam. The position then is somewhat unorthodox. No objection appears to have been taken to the form of the Suit No. 259 of 1875 which apparently treated the two mortgages as one and sought for one account of what was due on both the mortgages. With regard to one property the decree was executed as if it was a final decree, with regard to the other the mortgagee entered into possession by arrangement with the mortgagor before the time prescribed for paying off the mortgage had expired. Even assuming that the mortgage on the Mahim property had been foreclosed absolutely, the mortgage on the Girgaon property continued to be in existence. It would have been otherwise if Sadanand had entered into possession after the six months fixed in the decree had passed. The Judge was of opinion that the decree was a final one, but I think the most that can be said on that question is, that at the time the decree was passed, it was probably the practice to foreclose by proceedings in execution, instead of obtaining an order absolute. Undoubtedly, the decree was in the form of a decree *nisi* according to the precedent appearing in Seton which is reproduced in form 3 in Appendix P to the First Schedule of the C. P. C. of 1908. I should prefer form No. 27 annexed to the High Court Rules appearing at page 235 in which it is directed that in default of the defendants paying principal, interest and costs by the time prescribed, the plaintiff will be entitled to a decree absolute for sale.

The English practice with regard to foreclosure absolute is set out in Lord Halsbury's Laws of England, Vol. XXI, para. 520 at page 293, as follows:—

"Upon non-payment of the amount certified to be due at the time and place prescribed, the mortgagee is entitled to an order for foreclosure absolute as against the person or persons in default. The order is obtained upon motion or summons, and there must be an affidavit made by the mortgagee...of attendance at the prescribed time and place and non-payment of the money; and also an affidavit by the mortgagee...of non-payment since the appointed time."

And note (*b*) on the same page says:—

"If the order is made on motion, the matter is not mentioned to the Court unless there has been some irregularity preventing the motion from being treated as of course; Counsel hands his brief duly indorsed to the Registrar. But usually it is made on summons in Chambers...whether the proceedings are by writ or summons."

It might be advisable to consider whether this practice should not be prescribed for this Court by rule.

But though it would appear that the form used by this Court in those days for decrees in mortgage suits was the same as was used according to the English practice for decrees *nisi*, there was no regular practice prescribed for the course to be followed by the mortgagee when default occurred in payment of principal, interest and costs, within the time allowed. It really did not make any difference whether the mortgagee executed his decree, and obtained possession of the mortgaged property, or applied for a final decree, except that an application for execution might be subject to the law of limitation. The question remains, what is the legal position of the parties if the decree is not executed and no order absolute is asked for?

Now ordinarily speaking, if after a decree *nisi* for foreclosure has been passed and the mortgagee enters before the period for payment of the principal, interest, and costs, has expired, the mortgagee could not foreclose without a further account being taken as he would be liable to account for the rents received. Admittedly, rents were received from the Girgaon property, but the question would arise by what procedure were these accounts to be taken if the mortgagor demanded them.

Presumably, this Court, before the Transfer of Property Act came into force, would be guided by the English practice. Lord Halsbury, in para 532 of Vol. XXI says:—

"The time for redemption will be enlarged if the mortgagee is in possession and receives rents between the date of the master's certificate and the day appointed for payment. Such receipt opens the account, and a fresh certificate must be made and a further day appointed; but after default on the day appointed for payment, the mortgagee receives the rents on his own account and the time is not thereby enlarged."

The fact then that Sadanand entered into possession before the time appointed for payment rendered necessary the issue of a fresh certificate and the appointment of a further day for payment. The next question is, whether the mortgagor's right to bring a redemption suit is barred by the mortgagee obtaining an order *nisi* for foreclosure. In *Hill* v. *Rowlands* (1) an order for foreclosure was made in the common form and a certificate had also been made in the common form appointing the last day of six calender months from the date of the certificate as the time for redemption, on payment of the principal money with interest up to that day and costs. The mortgagor claimed to be allowed to redeem at an earlier date than the date so fixed on payment of the amount found due with interest up to the date of payment only. The application was refused by Romer, J., and on appeal Lindley, L. J., said: "The rights of the parties are settled by the judgment, and the mortgagor cannot redeem before the time fixed by the certificate on payment of a less sum than is named in it."

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(1) (1897) 2 Ch. 361; 66 L. J. Ch. 689; 77 L. T. 34; 46 W. R. 26

It would thus appear that the mortgagors' rights are confined to applying in the foreclosure action for an enlargement of the time for payment.

The general principles by which the Court will be guided in entertaining such an application are set out in para 528 of Lord Halsbury's Laws of England, Vol. XXI:

"...Enlargement of time is not a matter of course. There must be some reason for it, such as that the security is ample, and that the mortgagor has a reasonable probability of obtaining the money to pay the mortgage debt;...The matters to be taken into consideration include the nature of the estate, whether in reversion or in possession, whether the mortgaged property shows a sufficient margin to protect the mortgagee against loss; and whether the mortgagor's reasonable expectations (of raising the money to pay off the mortgage) have been disappointed."

An application to enlarge the time and take further accounts 45 years after the mortgagee had been put in possession after an order for foreclosure *nisi* had been made, even though possession was given before the day appointed for payment had arrived, could hardly have been within the contemplation of the learned author. If after a preliminary decree for foreclosure has been passed under the C. P. C. of 1908 the mortgagee enters into possession before the day appointed for payment has arrived, the mortgagor would certainly have a right to demand a fresh account and the appointment of a further day for payment, but if he allowed many years to pass before making his application the Court would probably consider how far by his conduct he could be said to have foreclosed himself.

But in this case there is a decree which at the time it was passed, whatever its form might be, was considered by the Court capable of execution. When the mortgagor put Sadanand into possession of the Girgaon property in December 1875, he had not the means to comply with the Municipality's requisitions for re-building or repairing some of the *chawls* thereon and he would not have had the slightest expectation of redeeming the mortgaged properties either on the day appointed for payment or six months later. The rents received by the mortgagee between the date of taking possession and the date fixed for re-payment could not have amounted to any great sum. I think it must be considered that Atmaram by taking no further steps to ask for a further account, and for extension of the time for payment, acquiesced in the mortgagee holding the property as his own and induced him to believe that it was no longer necessary either to execute the decree he had obtained or to obtain an order absolute for foreclosure.

Even if it were held that the suit could be re-constituted as an application in the mortgage suit to enlarge the time for redemption, and an order was made to take accounts from December 1875, it is obvious that the amount due to the mortgagees according to the terms of the mortgage would be many lakhs, as the rule of *damdupat* does not apply to mortgagees in possession, and any possibility of the plaintiffs being able to pay what would be found due may be discarded.

The appeal must be dismissed with costs.

Coyajee, J.—The plaintiffs claimed that they and the 2nd, 3rd and 4th defendants are entitled to redeem the two immoveable properties mentioned in the plaint, and which it will be convenient to describe as the Girgaon property and the Mahim property. Madhoba Harischandraji was the original owner of the Girgaon property. In or about the year 1869 Shrikrishna Naranji agreed to advance the sum of Rs. 82,000 on the security of that property, Madhoba agreeing to buy for the sum of Rs. 50,000 the Mahim property which was then owned by Shrikrishna. Accordingly, Shrikrishna advanced the sum of Rs. 82,000 and Madhoba deposited with him the title-deeds of the Girgaon property. In 1869 Madhoba died having by his last Will and codicil appointed his son Atmaram his executor. In January 1870, Probate of the Will and codicil was granted to Atmaram. On March 26, 1870, Atmaram, as executor of Madhoba, obtained a conveyance of the Mahim property from Shrikrishna. On the same day he executed two mortgages, Exs. A and B, in favour of Shrikrishna. Exhibit A was for Rs. 82,000 and comprised the Girgaon property, Ex B was for Rs. 50,000 and comprised both the Mahim property and the Girgaon property. On March 4, 1875, Shrikrishna assigned both the mortgages and his rights thereunder to his son Sadanand.

Sadanand filed Suit No. 259 of 1875 in the High Court against Atmaram for realization of the money due on both the mortgages. On July 15, 1875, a decree was passed in these terms:—

"The said defendant...do pay to the plaintiff the sum of Rs. 2,39,538-5-8 for debt and interest (due on the said two Indentures of mortgage...) and the costs of this suit...and further simple interest on the principal sum of Rs. 1,32,672 at the rate of 13 per cent. per annum from the date hereof until payment and this Court doth further order that upon the said defendant paying to the plaintiff the said principal, interest and costs within six calender months after the date of this decree the plaintiff do re-convey the premises comprised in the said mortgage-deeds ...but on the defendant failing to pay to the plaintiff what shall be due for principal, interest and costs as aforesaid by the time aforesaid the defendant doth from thenceforth stand absolutely debarred and foreclosed of and from equity of redemption of in and to the said mortgaged premises."

The parties agree that in or about December 1875 Atmaram gave possession of the Girgaon property to Sadanand; but they differ as to the circumstances under which the transfer of possession took place. The plaintiff's allegations are set out in para. 9 of the plaint; but it may be noted that the letter referred to therein is not proved. As regards the Mahim property, the plaint (para 11) alleges that in the month of July 1877 Atmaram put Sadanand in possession of it as mortgagee. The plaintiffs contend that Sadanand not having obtained a decree absolute for foreclosure in Suit No. 259 of 1875, and having entered into possession of the mortgaged properties under the arrangements above referred to, the relation of mortgagor and mortgagee still subsists between them and the 2nd, 3rd and 4th defendants on the one hand and the 1st defendant on the other.

The 1st defendant resisted the claim on the grounds, (1) that the decree in Suit No. 259 of 1875 was a final decree; (2) that the claim to redeem the properties was *res judicata* by reason of that decree; (3) that Atmaram had delivered over the Mahim property to Sadanand in execution of the said decree, and it was in the possession of Dattaram Vidyaram as the heir of Purshottam to whom Sadanand had conveyed it by an indenture dated June 26, 1882; (4) that Sadanand and after him the defendant claim to be in possession of the Girgaon property as owner thereof, and their possession had been adverse and the suit as to that property was barred by the law of limitation; and (5) that Sadanand had expended large sums in erecting substantial buildings on the Girgaon property and those entitled to the equity of redemption, had there been any, were aware that such buildings were being erected and stood by and took no steps to assert any claim to the said property and allowed the said buildings to be erected well knowing that Sadanand claimed to be its owner.

The learned Trial Judge dismissed the suit, holding: (1) that the decree pssed in 1875 was a final decree, it was not superseded by the agreement set up in the plaint, and the mortgagor had no interest left in the suit properties; (2) that the alienee of the Mahim property was a necessary party to the suit; (3) that the claim to redemption was barred by *res judicata*; and (4) that the plaintiffs had lost their interests, if any, in the said properties by the adverse possession of the 1st defendant.

The 1st defendant has brought this appeal.

The decree was passed in the year 1875, long before the Transfer of Property Act was enacted. The Trial Judge rightly points out that before the year 1880 it was not the practice of this Court to require the mortgagee, upon non-payment of the money due at the time prescribed, to obtain an order for foreclosure absolute as against the person or persons in default; the mortgagee was permitted to foreclose by proceedings in execution of the decree instead of obtaining an order absolute.

In this case, on July 12, 1877, Sadanand took out a summons that the decree made in Suit No. 259 of 1875 be executed against

Atmaram by ordering the delivery of the Mahim property to Sadanand, and an order to that effect was passed on July 23, (Ex. 1). The Chamber Judge, however, refused to sign a warrant for possession, apparently on the ground that the decree contained no order for possession. Sadanand then brought Suit No. 699 of 1877 against Atmaram claiming that he had become absolutely entitled to the properties, and asking for possession of the same (Ex. E.) In his written statement, Atmaram contended that he had given possession of the Girgaon property to Sadanand in pursuance of certain arrangements between the parties, and as regards the Mahim property he stated as follows:—

"8. The defendant continued in possession of the said Mahim property and no steps were taken and no notice given by the plaintiff to the defendant of his intention to get possession thereof until July 12, 1877, when a rule or order signed by a Judge of this Hon'ble Court was served by the plaintiff on the defendant calling upon the defendant to show cause on or before July 23, then instant, why the decree in Suit No. 259 of 1875 aforesaid should not be executed against him by ordering the delivery to the plaintiff or his agent of the said Mahim property...The defendant did not appear to show cause against the said rule or order but thereupon gave up possession to the plaintiff of the Mahim property, who thereupon took possession thereof and has been and still is in possession thereof and of the rents and profits accruing thereat."

It is clear, then, that as regards the Mahim property, the decree passed in 1875 was executed by the mortgagee applying for possession in accordance with the practice then obtaining in this Court. On August 6, 1882, Sadanand conveyed that property to Purshottam Shrikrishnaji (Ex. 4). And it is now in the possession of Purshottam's grandson Dattaram who was examined as a witness in the case but is not joined as a party to these proceedings.

As regards the Girgaon property, Sadanand obtained possession of it by a private arrangement with Atmaram. It is difficult to ascertain the true nature of that arrangement. The rival contentions are set out, respectively, in para. 9 of the plaint and para. 5 of the 1st defendant's written statement. The evidence bearing on the question is meagre and inconclusive. But on such evidence as there is in the case, it would seem that Sadanand entered into possession for the purpose of re-building and repairing some of the *chawls*; probably also, the time for payment prescribed in the decree was extended by six months. But it is clear that thereafter Atmaram took no steps to ask for further accounts neither he nor those claiming under or through him ever applied to the Court for enlargement of the time; and as the evidence of Nanabhai Sadanand shows, Sadanand held the property as his own and erected costly buildings on it to the knowledge of Atmaram. In the year 1884 Crustnarao Sacaram and another, who were the grandsons of Madhoba Harichandraji, brought Suit No. 428 against Atmaram Madhoba in the High Court for administration of the estate of the said Madhoba: the properties specified in their plaint included the Girgaon property (Ex. 2). In his written statement, Atmaram stated, *inter alia*, as follows:—

"This defendant says that the debts due by the testator [*i. e.* Madhoba Harischandra] were considerably in excess of the property left by the testator and that almost all the immoveable properties were encumbered by the testator and could not be and were not redeemed but on the contrary they were sold or taken possession of by the mortgagees in liquidation of their respective claims under decrees of this Hon'ble Court excepting only two lands at Worlee and Batty Fields and garden at Salsette" (Ex. 2).

On the 5th of March 1885, Atmaram made an affidavit in which he stated as follows:—

"In the month of June 1869 the testator mortgaged the *oart* with ranges or *chawls* in Girgaum for Rs. 82,000...with Shrikrishna Narayanjee and the said Shrikrishna Narayanjee took possession of the said *oart* with ranges or *chawls* in or about the month of December 1875, under a decree of this Hon'ble Court in Suit No. 259 of 1875 for foreclosure" (Ex. 9).

The effect of the evidence adduced in this case is this: the decree of 1875 was capable of enforcement in accordance with the practice then obtaining in this Court; it was enforced as regards possession of the Mahim property; as regards the Girgaon property, Atmaram acquiesced in the position that Sadanand was entitled to hold the property as his own and it was no longer necessary for him to execute the decree. In my opinion, the mortgagee has been holding both the properties as absolute owner for the last 45 years, and this suit must, therefore, fail.

Even if the decree passed in Suit No. 259 of 1875 were regarded as a decree *nisi*, still the result would be the same. The general rule, no doubt, is that after an order for foreclosure *nisi*, the mortgagor can apply for, and in suitable circumstances and on certain conditions obtain an order enlarging the time for redemption; but enlargement of the time is not a matter of course (Halsbury, Vol. XXI, s. 528). The power to extend the time is in the discretion of the Court, and in order to entitle himself to such indulgence the mortgagor must apply to the Court with reasonable promptitude. Assuming that it is permissible to treat the plaint in this suit as an application made in the foreclosure suit of 1875, the delay of 45 years on the part of the mortgagor is fatal to his case.

The decree dismissing this suit is, in my opinion, correct, and I agree to the order proposed by the learned Chief Justice.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2172 OF 1925.

February 9, 1926.

Present:—Mr. Justice Zafar Ali.

SHER AFZAL—DEFENDANT—APPELLANT

versus

MOHAN LAL—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 114—Letter posted under registered cover—Note of refusal by postman—Presumption.

Where a letter under a registered cover is proved to have been posted and bears a note by the postman that the addressee refused to take it, the presumption is that he did refuse to take it.

Jogendro Chunder Ghose v. *Dwarka Nath Karmokar*, 15 C. 681; 7 Ind. Dec. (N. S.) 1038, *Durga Nath Pramanik* v. *Rajendra Nath Saha*, 20 Ind. Cas. 363; 17 C. W. N. 1073 and *Girish Chandra Ghose* v. *Kishore Mohan Das*, 54 Ind. Cas. 5; 23 C. W. N. 319, followed.

Second appeal from the decree of the District Judge, Rawalpindi, dated the 25th May 1925, reversing that of the Subordinate Judge, Fourth Class, Rawalpindi, dated the 23rd February 1925.

Mr. *Aziz Ahmad*, for the Appellant.

Lala *Gobind Ram Khanna*, for the Respondent.

JUDGMENT.—This suit by a landlord against his tenant for ejectment and to recover rent was dismissed by the Trial Court but has been decreed by the lower Appellate Court.

The only question on which this second appeal by the defendant was admitted was whether he was liable to pay rent for ten months at the enhanced rate charged by the plaintiff. His plea was that he was not, because no previous notice for enhancement of rent had been given to him as required by the terms of the lease under which he had rented the house. The plaintiff produced a notice sent by him to the defendent by post in a registered cover, but returned by the postman with the note that the addressee refused to receive it. The posting of the notice having been proved by the evidence of the plaintiff, the presumption under s. 114 of the Evidence Act, as held in *Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar* (1), *Durga Nath Pramanik* v. *Rajendra Nath Saha* (2) and *Girish Chandra Ghose* v. *Kishore Mohan Das* (3) was that the defendant did refuse to receive it. The plaintiff, therefore, did send notice to the defendant and the appeal must fail. I accordingly dismiss it with costs.

R. L. *Appeal dismissed.*

(1) 15 C. 681; 7 Ind. Dec. (N. S.) 1038.
(2) 20 Ind. Cas. 363; 17 C. W. N. 1073.
(3) 54 Ind. Cas. 5; 23 C. W. N. 319.

PATNA HIGH COURT.

CIVIL REVISION No. 331 OF 1925.

February 18, 1926.

Present:—Mr. Justice Adami.

JANKI SAHAY AND OTHERS—DEFENDANTS—PETITIONERS

versus

LALBEHARI LAL AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Court Fees Act (VII of 1870), s. 7 (iv) (c)—Valuation of injunction accepted by District Judge—Interference in revision.

The High Court will not interfere in revision with a valuation given by the plaintiff to a suit for injunction which the District Judge found to be a reasonable one.

Application for revision of an order of the District Judge, Gaya, dated the 6th June

1925, affirming that of the Munsif, Aurangabad, dated the 11th February 1925.

Messrs. *L. N. Singh* and *Sarjoo Prasad*, for the Petitioners.

Messrs. *S. Dayal* and *Adit Narain Lal*, for the Opposite Party.

JUDGMENT.—It appears that partition proceedings between the parties were taken before a Revenue Court, and, on the 5th December 1923, the Revenue Officer determined the share of the parties and directed the Batwara to proceed. The value of the entire property, it seems, is about Rs. 12,000.

The opposite party was dissatisfied with the decision of the Revenue Court as to the shares to which he was entitled in the *shamilat* lands in the various *tauzis*, and he instituted a suit in the Court of the Munsif of Aurangabad, praying for a declaration that the shares in the *shamilat* in the various *tauzis* were equal between the various parties, and that the order of the Partition Deputy Collector was erroneous. He prayed that an injunction might issue restraining the defendants to that suit from proceeding with the partition. He valued the suit for purposes of Court-fee at Rs. 150. Before the Munsif exception was taken by the present petitioners to the valuation stated in the plaint. The learned Munsif, after looking into the value of the *tauzis* involved in the suit, came to the conclusion that their value was more than Rs. 3,000 and, therefore, he held that he had no jurisdiction to try the suit and returned the plaint to be presented to the Subordinate Judge. The opposite party then appealed to the District Judge who held that under s. 7, sub-s. (iv), cl. (*c*) of the Court Fees Act, the suit was within the jurisdiction of the Munsif, for it was open to the plaintiff to value the injunction at such value as he pleased. He held that the valuation of Rs. 150 was a reasonable valuation.

Before me it is contended that, considering the value of the properties, the valuation of Rs. 150 was too small and was an altogether arbitrary valuation, and that on this ground it is open to this Court to interfere.

The question that arises is whether this Court can interfere in the present case. The District Judge had jurisdiction to decide the matter and he has found that the valuation placed on the suit by the plaintiff was a reasonable valuation. If I found that the valuation was altogether arbitrary and unreasonable, I might interfere, but on the finding of the learned District Judge that the valuation was not unreasonable, he having considered the matter, I cannot see that I can interfere in the case at all.

The application must be rejected. Hearing-fee two gold *mohurs*.

R. L. *Application rejected.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 50 OF 1925.

December 25, 1925.

Present:—Justice Sir Amberson Marten, KT., and Mr. Justice Madgavkar.

DHAIRYASINGH GORDHANDAS—AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KISSANDAS TRIBHOVANDAS MANGALDAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Compromise of suit on behalf of minor—Benefit of minor—Matters to be considered by Court in sanctioning compromise.

How far a Judge should go into the facts and the law of each case before he makes up his mind to sanction a compromise on behalf of minors must depend on the circumstances of each case and where the Judge exercises his discretion in a judicial manner it is not one which can be afterwards called in question in subsequent proceedings. [p. 107, col. 2.]

It is not practicable to lay down a definite or hard and fast rule as to what particular materials a Judge may call for before he is satisfied that the compromise is one for the benefit of the minors. It must be left to his discretion and that discretion may vary in different cases. [p. 109, cols. 1 & 2.]

A Judge is entitled to rely upon the opinion of the Counsel at least in part, that the compromise is for the benefit of minors. [p. 107, col. 2; p. 108, col. 1.]

There is no authority for the proposition that a Judge is bound to gauge the chances of success of the minors and weigh against them the chances of the opposite party and sanction only if the chances of the minors appear to him slender. [p. 112, col. 1.]

[Case-law reviewed.]

Appeal against the judgment of Mr. Justice Shah.

Mr. *Coltman* (with him Mr. *Mulla*), for the Appellants.

Mr. *Campbell* (with him Mr. *B. J. Desai*), for Respondents Nos. 1, 4, 5 and 6.

Mr. *Engineer*, for Respondent No. 3.

JUDGMENT.

Marten, J.—This is an appeal from the judgment of Mr. Justice Shah dismissing the suit of the minor plaintiffs, who sought to set aside a compromise decree passed in four suits by Mr. Justice Fawcett on December 13, 1922. The plaintiffs are the minor sons of Gordhandas, defendant No. 2, and were concerned in disputes between Gordhandas and his sons on the one hand and his brother Kissondas on the other hand as to various assets in which his father Tribhovandas and his grandfather Sir Mangaldas had been interested. One main point of controversy was whether these assets were ancestral or self-acquired. Sir Mangaldas died on March 9, 1890, and Tribhovandas on April 5, 1920. It is material to observe that Kissondas was born in Sir Managaldas's lifetime, but that Gordhandas was not born until after the death of Sir Mangaldas, and further that the eldest son of Gordhandas was born in 1914. Kissondas has no son.

Sir Mangaldas had two other sons, Purshottamdas and Jagmohandas, but for the purposes of the present case it is sufficient to say that their interests have been otherwise provided for, and that we are solely concerned with Tribhovandas and his branch. Similarly two deceased sons of Tribhovandas, namely, Jamnadas, who died in 1907, and Amindas, who died in infancy, may be mentioned and passed by.

The parties are all Hindus, and the papers before us show a melancholy record of family disputes and litigation extending over some 40 years, namely, from the agreement of June 2.), 1881, Ex A, which Sir Mangaldas entered into with his sons Tribhovandas and Purshottamdas down to December 13, 1922, when the above compromise was approved by Mr. Justice Fawcett, on behalf of the infant sons of Gordhandas in the four suits to which I have alluded.

In the earlier part of Tribhovandas's lifetime the parties had been at least four times up to the Court of Appeal, and the various decisions of that Court will be found in *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathuboy* (1), *Yorke Smith* v. *Tribhovandas Mangaldas* (2) and *Tribhovandas Mangaldas* v. *Yorke Smith* (3) and Ex. L. In the latter part of Tribhovandas's lifetime there appears to have been a comparative lull, but on his death in 1920 disputes broke out again, and by 1922 four suits were filed, namely, two by Gordhandas and two by Kissondas: Those four suits are (1) Suit No. 3386 of 1920 relating to what is known as the Charni Road Property, (2) Suit No. 663 of 1921 relating to what is known as the Worli Property, (3) Suit No. 2017 of 1921 for the administration of the estate of Tribhovandas, and (4) Suit No. 1354 of 1922 relating to the Girgaum Property Nos. 1 and 2 were brought by Gordhandas and Nos. 3 and 4 by Kissondas.

On December 12, 1922, the first three of these suits were on the Board for hearing. The first of them, *viz.*; Suit No. 3389 of 1920 relating to the Charni Road property was opened by Mr. Coltman, Counsel for the plaintiff Gordhandas and was continued the next day, December 13. The parties then proceeded to negotiate, and the Judge was asked to retire. The negotiations resulted in provisional terms being arrived at, and accordingly the Judge returned to Court. These terms related not only to the three suits then on Board, but also to the fourth Suit No. 1354 of 1922 relating to the Girgaum property. It was accordingly arranged that the fourth suit should be forthwith placed on Board, and also that the three infant sons of Gordhandas should be added as parties and should appear by their father Gordhandas as their guardian *ad litem*.

That was done, and thereupon Sir Thomas Strangman, who led Mr. Coltman and Mr. Setalved of Gordhandas and his sons, explained the proposed compromise to the Court. I may mention here that Kissondas was represented by the Advocate-General (Mr. Kanga), who led Mr. B. J. Desai and Mr. Taraporewala. Mr. Kanga has acted and Mr. Taraporewala is acting as a Judge of this High Court. Sir Thomas Strangman had been Advocate-General for over 12 years and while he was in Bombay had been practically in every case of importance on the Original Side of this High Court for many years past. Accordingly, in my opinion, Mr. Justice Fawcett had every right to depend on the ability, fairness, and experience of, the Counsel before him.

The terms of the compromise will be found in Ex. 9, and the Judge's notes of what took place are Ex. 11. It is common ground that the Girgaum property was the most valuable of the properties, and with reference to that the Judge's notes of what

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(1) 10 B. 528; 5 Ind. Dec. (N. S.) 742.
(2) 19 B. 401; 10 Ind. Dec. (N. S.) 270.
(3) 21 B. 349; 11 Ind. Dec. (N. S.) 236.

Sir Thomas Strangman stated are in part as follows:—

"Question is whether it is joint property or not. Point also of limitation arises. Girgaum property is the most valuble... Gordhandas is satisfied with consent terms and I as Counsel am also. Litigation would probably last 10 years, and Gordhandas runs risk of getting nothing out of Girgaum property, if limitation point good, and would at most get one-third of Worli property which I think is exceedingly small as against one-fourth he gets of Girgaum property. So I have no hesitation in saying the terms are for benefit of the minors."

Then, after the Judge had questioned Gordhandas and Kissondas, the former of whom stated that he considered the terms beneficial to the minors, the Judge's note concludes as follows:—

"In view of the above I think it is for the benefit of the minor sons that the litigation, which is bound to be very costly should be settled, and the terms seem to me to be reasonable and good for the interests of Gordhandas and his sons. Any affidavit as to decree being for their benefit is dispensed with."

"I, therefore, sanction the compromise. Consent decree in terms signed by Counsel and handed in."

"By consent the four suits are consolidated and one decree to issne accordingly."

Now before us Mr. Coltman, the Counsel for the infants, does not contend that this compromise was not for their benefit. He told us he did not propose to argue that point. The real question was whether the essential conditions for obtaining the Court's sanction to a compromise were in fact satisfied. or as he put it to us in reply, " Was the settled law on this point given effect to? That is the whole point in the case. Must you put before the Court all material facts? Does O. XXXII, r. 7, mean that the Court is to apply its own mind or may it delegate its authority to Counsel?" It was accordingly argued that material documents were not before Mr. Justice Fawcett: that he was not in a position to exercise his own discretion: and that apart from that the compromise was left vague and unenforceable by reason of the appointment of an arbitrator without a time limit for making his award, and also in the non-joinder of the mortgagees of Kissondas.

Counsel concentrated his attack on the fourth suit, which dealt with the valuable Girgaum property. So far as the other three suits were concerned he advanced no special arguments to us against the validity of the compromise apart, of course, from his general arguments affecting all four suits. But in his reply he did refer to a difficulty about a right of passage in connection with the Charni Road Property, which appears to have arisen when proceedings were taken before the arbitrator in pursuance of the terms of the consent decree. I can understand Counsel taking this course, because it is clear that as regards the first three suits, they were all before the Court. Counsel had got their briefs, and as far as the Charni Road Property was concerned, the case had been opened and a witness examined and many details placed before the Court as appears from Judge's notes. It could not, therefore, be contended that Counsel, at any rate, was not in full possession of the material facts of the case. And as regards the Charni Road Property the Judge had by the second day of the trial obtained sufficient acquaintance with the case to have, at any rate, a clear idea as to what the important points in the controversy were. I accordingly do not propose to go into any detail as regards those particular properties. It is sufficient to say that as regards the Charni Road Property Gordhandas had advanced certain moneys to his father Tribhovandas under an alleged agreement, but had not obtained the particular lease, which he claimed to be entitled to under the arrangement with his father, and that in particular a proposed document had not in fact been executed before Tribhovandas's death.

As regards the Worli Properties Kissondas claimed those as survivor under an agreement that had been entered into between him and Tribhovandas, On the other hand Gordhandas claimed to be entitled to one-half of the two-thirds share, which passed under that agreement to Tribhovandas.

The third suit was for the administration of the estate of Tribhovandas. A compromise would only tend to prevent the necessity of costly enquiries extending probably over many years.

I may here mention a most importan

clause in the consent terms Ex. 9, *viz.*, cl. 9, which runs 'Any property coming to Gordhandas under this decree of whatever nature shall as between himself and his sons be joint property.' So there was no question of there being any contest between Gordhandas and his sons with reference to any property he was acquiring under the compromise. The general effect of the terms was that as regards the first three suits Gordhandas and his sons took the Charni Road Property and Kissondas took the Worli Property subject to an arrangement about certain mortgages, and the Receiver in the third suit was discharged.

Returning to the Girgaum property, the subject of the fourth suit, the compromise provided that it was to be divided between Kissondas and Gordhandas in the proportion of 3 to 1. It was argued that before the Judge could properly sanction the compromise as being for the benefit of the infants, it was his duty to go into the whole history of the family dispute for the past 40 years including all the documents in the case, and that in particular he was not entitled to rely on the statement of Counsel for Gordhandas and the infants that there was a point of limitation in their way of which the Counsel took a serious view.

In the first place I entirely decline to hold that Mr. Justice Fawcett's note of what was said represents everything that Sir Thomas Strangman said to him on the point of limitation. To my mind that would be making a most unfair use of the learned Judge's notes, and nonetheless so because the evidence shows that Counsel took about three-fourths of an hour to explain the matter to the Judge and to obtain his sanction. Indeed I do not think it is seriously contended that that is all Sir Thomas Strangman said on the point, but if it is, then I reject the contention. Next as to the point that it was obligatory on the Judge to investigate the past history and all the documents, I may observe that the appeal paper book before us runs to 419 printed pages. In my judgment that argument is equally unfounded. I think the true rule is that how far the Judge should go into the facts and the law of each case before he makes up his mind to sanction a compromise on behalf of minors must depend on the circumstances each case, and that provided he exercises his discretion in a judicial manner, it is not one which can be afterwards called in question in subsequent proceedings. I again repeat that there the learned Judge had several of the leading Counsel in Bombay before him. Further, Sir Thomas Strangman had had all the details of this case before him for many months. It is shown in the evidence that Gordhandas proposed to bring a suit in respect of this very Girgaum property, but that he had been anticipated in this respect by Kissondas's suit. But if Gordhandas had eventually brought his suit, or had made a counter-claim in Kissondas's suit, then the infant children of Gordhandas would necessarily have been parties, as indeed is pleaded in Gordhandas' written statement in Kissondas' suit.

Certain authorities were cited to us by Counsel for the minors to support the proposition which he asked us to adopt, but to my mind they fall far short of the length to which he asks us to go. In *Sakinabai* v. *Shirinibai* (4) which was a case before the Privy Council, I agree that the following portion of the head-note is entirely wrong and misleading, *viz.*, "the Courts in India should ordinarily accept as sufficient the assurance of the minor's Counsel that the compromise which is proposed is for his benefit." Their Lordships of the Privy Council never decided anything of the sort. But it is noteworthy that in that case there was a compromise of an appeal to their Lordships, and the Board relied not only on the oral statement of Mr. Kenworthy Brown, the Counsel for the minor in the Privy Council, but they also relied on the certificate of Mr. Kanga and Mr. Taraporewala, who were the Counsel for the minor in the Court below that the compromise was for the benefit of the minor. I may mention that the two latter Counsel were the same as those who appeared for Kissondas in the present proceedings. Their Lordships in that particular case sanctioned the compromise. There is nothing there, so far as I can see, to support the case for the present plaintiffs. On the contrary it shows that the Court is entitled to rely on the opinion of Counsel. I do not mean exclusively rely, but to base their opinion in part at any rate on the opinion of Counsel that the compromise is for the benefit of the infants.

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(4) 55 Ind. Cas. 943; 22 Bom. L. R. 552: 11 L. W. 486; 38 M. L. J. 431; (1920) M. W. N. 311; 18 A. L. J. 499; 2 U. P. L. R. (P. C.) 107; 47 I. A. 88 (P. C.).

Then in *Virupakshappa* v. *Shidappa* (5) Sir Lawrence Jenkins and Mr. Justice Chandavarkar held that the lower Court had not before it the materials necessary to enable it to arrive at a judicial conclusion with respect to the compromise. If that was the case here I quite follow that the case would be an authority in point. But in the case cited, no sanction at all had been given to the compromise, nor did the Court have before it the materials on which it could give its sanction. I fail to see, therefore, that that case is of any assistance to us in the present case.

Bibi Solomon v. *Abdool Azeez* (6), a decision of Sir Richard Garth and Mr. Justice Pontifex, was also cited. The clue to that decision will be found at page 696*, where the Court pointed out that after the compromise had been sanctioned by the Court, the executors who had obtained this sanction suddenly discovered that property of at least the value of three lacs, and possibly of nine lacs, belonging to the estate in question had not been mentioned in the application for Probate or in the petition for the Court's approval. The Court, therefore, held that the compromise was entered into by the parties and sanctioned by the Court under a serious misapprehension of material facts; and that this misapprehension was caused either by the actual fraud of, or at any rate by a culpable neglect of duty, of the executors, sufficient, as the Court thought, to amount to fraud in the view of a Court of Equity (see page 705*). There is, however, nothing of that sort in the present case.

If one turns to *Brooke* v. *Lord Mostyn* (7) it will be found that Lord Justice Turner states the English Law as follows (page 416†):—

"It is to be considered, then, what are the circumstances which will furnish sufficient ground for impeaching a compromise made under the order of the Court, and I think they must be such as to amount to fraud in the party claiming the benefit of the compromise, meaning by fraud not moral fraud, but what in the eye of this Court is considered as amounting to fraud. A compromise of doubtful rights between adult parties cannot, as I conceive, be set aside on any other ground. If there be no fraud, and equal knowledge on both sides, the compromise cannot be disturbed, but if there is knowledge on one side which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts in the view of a Court of Equity to fraud. The rule which applies between adults seems to me to be not less applicable to compromises by the Court on behalf of infants. The orders of the Court cannot be set aside on grounds less strong than those which would be required to set aside the transaction between competent parties. Whether the grounds which would be sufficient to set aside a compromise between competent parties would in all cases be sufficient to set it aside when sanctioned by this Court, I do not think it necessary for us in this case to determine."

In that particular case the Lords Justices set aside the particular compromise, which had been sanctioned on behalf of an infant, on the ground that material facts as to the value of the property were not laid before the Master in Chancery. On the facts that decision was reversed in the House of Lords [*Mostyn* v. *Brooke* (8),] where the report expressly states that the reversal did not affect the law as laid down by the Lords Justices.

I do not think it necessary for us to say that what Lord Justice Turner's judgment states is also the law of this Court. It may be that he has stated the law rather too widely against those who are interested in setting aside a compromise. It is accordingly unnecessary for the respondents in the present case to rely on that judgment of Lord Justice Turner as being entirely correct in the broad principles which it lays down.

Then there is another case of *Rameswar Pershad Singh* v. *Ram Bahadur Singh* (9), in the Privy Council, the head note of which begins as follows:—

"In this case the appellant sued to set aside a compromise and decree in accordance therewith in a former suit, which had been made on his behalf by the adult members of a joint family, of which he was an infant member, and for other reliefs. The High Court held that under the circumstances the compromise was valid and binding, and on appeal the Judicial Committee were of opinion that he could not obtain the other relief prayed for without first setting aside the compromise, and held that there were no grounds for setting it aside."

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(5) 26 B. 109; 3 Bom. L. R. 565.

(6) 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446.

(7) (1864) 2 De G. J. & S. 373; 34 L. J. Ch. 65; 10 Jur. (N S.) 1114; 11 L. T. 392; 13 W. R 1115; 46 E. R. 419; 139 R. R. 134.

*Pages of 6 C.—[*Ed.*]

†Page of (1864) 2 De G. J. & S.—[*Ed.*]

(8) (1869) 4 H. L. 304.

(9) 34 C. 70; 11 C. W. N. 178; 5 C. L. J. 175; 17 M. L. J. 59; 2 M. L. T. 165 (P. C.).

In delivering their Lordships' judgment Lord Macnaghten said (page 71*):—

"The suit in which it (the compromise) was made had progressed up to a certain stage; it had been opened on behalf of the plaintiff; witnesses had been examined, and the Court knew very much more about the question in dispute than the Court generally does know when it is asked to confirm a compromise of pending litigation. The infant had no separate interest; the adult members of the family, who were presumably competent to judge of their own interests, had taken part in this compromise and assented to it, and the Court pronounced that it was for the benefit of the infant, who was made a party for the purpose of binding his interest, such as it was. It seems to their Lordships hopeless now to attempt to set it aside."

There are, of course, distinctions of fact between that case and this, but it is important to note that an Equity Judge of such great experience and eminence as Lord Macnaghten was aware that in many cases where the Court sanctions a compromise, it necessarily does not know as much about the questions in dispute as if they had been argued in whole or in part before it. This to my mind exposes one of the fallacies of the appellant's arguments, for what he really asks us to do is to lay down a rule of practice, which is nowhere to be found in any Statute or decided authority, but which if carried out would inflict hardships on many litigants in this Court and would cause serious difficulties in the way of compromising suits.

We have on the Original Side a large number of suits in which minors are engaged. There are, for instance, a large number of suits in which Marwadi Hindu trading firms are engaged, and in which it frequently happens that minors are technically parties to what is a mere commercial transaction, *e. g.*, for the sale of cotton or piecegoods. Supposing then there is a dispute between two trading firms with minors on either side and after prolonged negotiations between the adult parties these hard headed business-men arrive at a certain figure by way of compromise of their respective claims is it seriously to be supposed that the Court is bound to refuse to sanction the compromise unless it is taken through all the books and documents and hears the rival arguments based on all the material facts. I unhesitatingly say that this is a proposition which is wholly untenable. Nor again is it practicable to lay down a definite or hard and fast rule as to what particular materials a Judge may call for before he is satisfied that the compromise is one for the benefit of the minors. It must be left to his discretion, and that discretion may vary in different cases and it may even vary as regards the practice of different Judges.

Without going further into the case, the result, in my opinion, is that there is nothing wrong in law in the course which Mr. Justice Fawcett took. There is no such rule as Counsel for the appellants has contended, and under all the circumstances of the case the learned Judge was entitled to rely on the statement of Counsel as to this point of limitation and that in Counsel's opinion it was in the interests of the father and his infant sons that the compromise should be sanctioned.

* * * *

I also wish to mention one other matter. To those familiar with Chancery practice it may seem strange that the Judge did not require the infants to obtain the consent of the Judge in Chambers to the compromise. In England I do not recollect any express clause in the Annual Practice corresponding to O. XXXII, r. 7, here. But in, say, a contested witness action which is provisionally settled it is not unusual for a Chancery Judge to give an adjournment in order to enable the terms to be approved in Chambers on behalf of the infants. In normal cases that application would go not before that particular Judge, but before the Judge who was taking Chamber business. And there is this good reason for that course, namely, that a Judge who is trying a suit between *A* and *B* may be prejudiced in the eventual determination of that suit, if half way through he is asked to approve a compromise on behalf of the minors and is told quite frankly what the difficulties of their own particular legal situation are. Moreover, Counsel for the infant may at times be embarrassed in telling the Court frankly in the presence of his opponents exactly what

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*Page of 34 C.—[*Ed.*]

his weak points are. It follows that if the compromise is not approved by the Judge on behalf of the minors, their position may conceivably be prejudiced in the subsequent proceedings in the case.

But I also wish to say that it is not the general practice in this High Court to send a case to Chambers so far as the infants are concerned. One reason may be, as I have already mentioned, that the suits in which infants are involved are numerous and that litigation is as expensive or more expensive, particularly as regards Counsel fees now-a-days, than is the case in England. Accordingly, to send perhaps two or three sets of minors to the Chamber Judge to obtain his consent would in many cases be a hardship to the parties. Moreover, we have the express provisions of the Code in O. XXXII, r. 7, which at any rate contemplate that the Judge hearing the case shall have jurisdiction to sanction a compromise on behalf of the infants. Further, in Mofussil Courts there might be no other Judge for the infant to go to obtain sanction. I may even go further as illustrating a different opinion at to the practice on this point. In a case, which was before me as Trial Judge, I was asked informally by a Registrar of this Court, who had been appointed guardian *ad litem* and who proposed to compromise the suit, whether he should make his application to myself as Trial Judge or whether he should take it to the Chamber Judge. As the amount involved was substantial, and I felt I might be embarrassed in the subsequent hearing of the trial if I refused to sanction the compromise, I advised him to go to the Chamber Judge, and he did so. But the Chamber Judge of the day, who, I think, was the Chief Justice, took a different view of the matter and I think it was only because the guardian *ad litem* had gone on my advice that he escaped paying the costs of the application in Chambers.

I also wish to say that in a large number of cases I have sanctioned compromises on behalf of infants where practically the same course has been adopted as was taken by Mr. Justice Fawcett in the present case. It is a common occurrence for litigants to compromise not only the one or more suits before a Judge, but also pending suits as well. In that event it is common practice to have all the suits placed on Board. Moreover, I consider myself entitled to rely on the assurance of Counsel for the minors not exclusively, but sufficiently, at any rate to enable me to rest assured that the proposed compromise is in the best interests of the infants. What particular explanations I require, and what details I go into depends very largely on the particular case.

I only refer to all this not because we are not familar with the practice in this particular Court, but because it is conceivable that to those who are not familar with our practice, some of the matters that have taken place may require explanation. As far as I can see, what happened here was really normal every day practice, and there was nothing really exceptional except the value of the property and the complexity of the disputes and the fondness for litigation shown by the family.

If, however, it is material to go into the past history of the case I agree with the conclusion which Mr. Justice Shah arrived at page 124, namely :—

"I have examined the materials with a view to see whether there is anything therein which would clearly show that if they had been placed before the learned Judge he could not have come to the conclusion that the compromise was for the benefit of the minors. On the materials, which have been placed before me, there is nothing so far as I can see to show that the learned Judge could not have come to the conclusion at which he arrived."

My opinion is that Mr. Justice Fawcett rightly satisfied himself that the compromise was for the benefit of the minors. And as regards the suggestion that before the compromise was sanctioned there should have been a formal valuation of the property, it may be pointed out that these properties had been in the family for years and that as regards the Girgaum property it was to be divided by fractions and not by value. It seems to me, therefore, there is nothing in that point either.

In the result I would dismiss the appeal and dismiss it with costs.

Madgavkar, J.—This an appeal by the minor plaintiffs, represented in this suit by their mother, against the dismissal of their claim to avoid a compromise decree against them and their father, defendant-respondent No. 2 Gordhandas, appointed guardian *ad litem* by the Court in Suit No. 1354 of 1922 and sanctioned under O. XXXII, r. 7 of the C. P. C. The compromise had been effected by Gordhandas and his brother Kissondas the contesting defendant in respect of this suit and three other pending suits between them.

The salient facts regarding the family disputes to the estates of their ancestor Sir Mangaldas during his lifetime and afterwards as to whether the properties particularly the Girgaum property, were ancestral or self-acquired, the subject-matter of the suit in which the minors were added as parties, are detailed in the judgment appealed against. The appellants rely on six grounds to avoid the compromise.

Firstly, the interests of the minors were not identical with the interest of Gordhandas, their father. And there was even a conflict particularly as regards the question of limitation, and Gordhandas was guilty of gross negligence in not putting this distinction forward expressly before the Judge who santioned the compromise and in not placing before him the essential materials recited in para. 62 of the plaint, particularly the Will of Sir Mangaldas, the agreement of 1881, and other documents bearing on the question of the nature of the property and on limitation.

Secondly in consequence of the absence of these materials, the learned Judge was not in a position to bring his mind to bear on the essential questions, before he could sanction the compromise. Reliance is placed on certain observations in *Virupakshappa* v. *Shidappa* (5).

Thirdly, the reference to arbitration being a part of the compromise decree, the compromise is void because the Court did not fix the time for the making of the award under Sch. II para. 3 of the C. P. C.

Fourthly, the mortgagees, defendants-respondents Nos. 4, 5 and 6 were not parties to the compromise and only ratified it two years afterwards before Shah, J., in the present suit.

Fifthly, Gordhandas's Solicitor, Mr. Captain, who was conversant with the matter and the interests of Gordhandas, was away and the interests of the minors were not placed before the Court.

And, lastly, the compromise was hastily effected and hastily sanctioned.

The third ground is new. On the other grounds the Trial Court upheld the contentions of the defendant-respondent No. 1 Kissondas, that the interests of Gordhandas and the minors were identical and that all necessary and sufficient materials were placed before the Court when Fawcett, J., considered and sanctioned the compromise, and no gross negligence was proved on the part of Gordhandas or his legal advisers. It was argued further for the respondents in this Court that the question of the validity of the reference was never raised in the lower Court and has not even found a place in the grounds of appeal and is merely due to Counsel's ingenuity in argument.

Order XXXII, r. 7, nowhere prescribes the materials necessary for the Court before it can sanction a compromise. And it is even doubtful if an appeal exists against such a sanction: *Rakhal Moni Dassi* v. *Adwyta Prosad Roy* (10). No decided case has been brought to our notice laying down such rules in respect of the necessary materials. All that the law requires is, firstly, that there should be a compromise, secondly, that the Court should be in possession of its terms, thirdly, that the Court should bring its mind to bear on the terms from the point of view of the minors and judge if it is for their benefit, and, lastly, that it should grant or withhold its sanction. Clearly if the terms of the compromise are not before the Court, it is impossible for the Court to apply its mind to grant or withhold the sanction the law requires. This, and no further is, I think, the extent of the decision in *Virupakshappa* v. *Shidappa* (5).

In that case the compromise itself and its terms were not at all before the Court, as they were in the present case. That case is, therefore, of no avail to the appellants.

In the present case the compromise in terms was before the Court. Counsel on both sides laid before it the facts they thought necessary. The Court applied its mind and sanctioned it. It is conceded by both sides in this appeal that it is not for this Court now to consider for itself whether the compromise was or was not for the benefit of the minors. But for the appellants it is argued that it was impossible for the Court to decide whether it was or was not for the benefit of the minors without the materials in para. 62 of their plaint.

This impossibility, is not a psychological impossibility since Fawcett, J., was able to arrive at the conclusion he did. And, therefore, it appears to me that the contention of the appellants amounts, in fact to this, that, if these materials had been placed before Fawcett, J., then he would or might have arrived at a different conclusion.

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(10) 30 C. 613; 7 C. W. N. 419.

The considerations, however, in deciding the question of sanction are entirely different from the considerations in deciding the issues and the reliefs in a contested suit. It is of the essence of a compromise that each party gives up some portion of his claim. How much or how little of the claim is right is a matter which the Court is usually not in a position to judge, least of all at an early stage of the case. No authority is shown for the proposition, and, speaking for myself, I cannot agree that before sanction the Judge is in law bound to guage the chances of success of the minors, and—a necessary corrollary—weigh against them the chances of the opposite party and sanction only if the chances of the minors appear to him slender.

I say so not only because such a process, whether one calls it guess-work or speculation or nice calculation of probabilities, appears to me foreign, almost repellent, to the judicial mind, but also because it is in fact impossible, unless the Judge calls upon the parties not only for some, but for all, the main data on both sides such as the evidence not only documentary but also oral, and then finally tries to arrive without argument at a rough and hasty, conjectural *quasi*-judgment on the merits of the case. From the arguments here, the course suggested by the appellants in the present case could hardly have occupied less than two days. And if I may judge by the result on my own mind, speaking with all humility and without disrespect to Counsel on either side, it would not, I think, have advanced further the issue as to sanction or benefit of the minors, much less the question whether the Girgaum property was ancestral or joint or the question of limitation.

If among the materials in para. 62 of the plaint there had been one or two documents or facts, so decisive in favour of the present ancestral character of the Girgaum property, and Gordhandas had deliberately omitted or even perhaps failed to bring them to the notice of the Court, when it considered the question of sanction, then possibly it might have been a plausible contention for the appellants that Gordhandas' action fell within the rule of culpable or wilful negligence tantamount to fraud or misrepresentation on material facts, which alone in law would enable the minors to avoid the compromise sanctioned.

For these, I think, are the only grounds laid down by the Courts in England and in India. It was expressly laid down in *Brooke* v. *Lord Mostyn* (7) that a compromise can be set aside only if there has been conduct amounting to fraud. This case was followed in India in *Bibee Solomon* v. *Abdool Azeez* (6) where gross and deliberate omission with regard to the value of the property materially affected the sanction. But it has been held that a compromise of a doubtful right is a sufficient foundation for an agreement amongst the members of a family and is binding on them: *Rameshwar Pershad Singh* v. *Lachmi Prosad Singh* (11) distinguishing the case above, and confirmed in appeal by the Privy Council: *Rameswar Pershad Singh* v. *Ram Bahadur Singh* (9).

Into the general powers of a joint Hindu father acting for his minor sons, it is not necessary to enter in detail. But ordinarily, a *bona fide* compromise or reference by him in regard to joint family property is binding on the minors: *Ujagar Singh* v. *Pitam Singh* (12) confirming the decision of the Allahabad High Court in *Pitam Singh* v. *Ujagar Singh* (13). A Hindu father and the joint family Manager can refer to arbitration on a question of joint property partition: *Jagan Nath* v. *Mannu Lal* (14); and the minors are bound: *Balaji* v. *Nana* (15) and *Dwarka Das* v. *Krishan Kishore* (16).

At the same time it must be conceded in favour of the appellants that when a joint father is appointed guardian *ad litem* his powers as the managing member relating to the minor's interest are controlled by O. XXXII, r. 7, and that agreement by compromise on behalf of the minors infants must be sanctioned: *Ganesha Row* v. *Tuljaram Row* (17). As regards the consent of Counsel, the case referred to for the appellants, *Sakinabai* v. *Shirinbai* (4) was subsequently considered by the Privy Council in *Gobinda Chandra Pal* v. *Kailash Chandra Pal* (18) which laid down that it was only in rare cases such as *Sakinabai's case* (4) that leave to withdraw for a minor would be given on Counsel's certificate; usually a certificate from the High Court will be required that the agreement is for the benefit of the minors.

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(11) 31 C. 111; 7 C. W. N. 688.

(12) 8 I. A. 190; 4 A. 120; 4 Sur. P. C. J. 275; 2 Ind. Dec. (N. S.) 579 (P. C.).

(13) 1 A. 651; 1 Ind. Dec. (N. S.) 454.

(14) 16 A. 231; A. W. N. (1894) 60; 8 Ind. Dec. (N. S.) 150.

(15) 27 B. 287; 5 Bom. L. R. 95.

(16) 61 Ind. Cas. 628; 2 L. 114; 3 L. L. J. 349.

(17) 19 Ind. Cas. 515; 40 I. A. 132; 15 Bom. L. R. 626; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 36 M. 295 (P. C.).

In the present case I am quite unable to see any conflict of interest between the minors and their father. It appears to me that the minors were added as parties *pro majore cautela* to place the matter beyond doubt, and perhaps in view of Gordhandas' written statement that they were necessary parties.

With regard to the question of limitation, the position is far from clear. The difficulties appear to me to be the same as in the question of the ancestral or the self-acquired character of the property. When adverse possession in favour of Kissondas and as against Gordhandas arose and time began to run against him, and how far that possession was adverse to the minors also by reason of Gordhandas being the joint family father and the Manager, are questions on which I for one am not able to form an opinion one way or the other. Nor am I able to say that this outstanding fact was not mentioned before Fawcett, J., or that all necessary documents were not laid by Sir Thomas Strangman before him. The materials alleged to be not before the Court as mentioned in para. 62 of the plaint are detailed in the judgment of Shah, J., and have been referred to by my learned brother in his judgment just delivered, together with the history of the litigation between the parties and their ancestors. It is clear that the records and proceedings in all the three suits were before Fawcett, J., and he was equally well aware of the fact that in the fourth suit in regard to the Girgaum property Gordhandas and his sons claimed a half share, on the ground that it was ancestral property. It is clear to me that unless he was prepared to go into the merits, if not in all four suits, at least in the fourth suit, the materials mentioned in para. 62 of the plaint had small bearing on the question of sanction. The terms of the compromise were before him. He knew that apart from the admitted half share of Kissondas, each party in fact gave up half his claim by virtue of the compromise. He knew how old, complex and bitter the dispute was. He knew the delay, expense and uncertainty of the final result and he knew that the Girgaum property was of far greater value than the other properties. He knew the identity of interests of Gordhandas and the minor. He knew that this deplorable litigation was wasting the substance of Sir Mangaldas, lowering the reputation of his family, keeping alive the most bitter feelings among the brothers, and that negotiations had been going on for years. And he had the assurance from the eminent Counsel that the compromise was in the interests of Gordhandas and his sons. Last, but not least, he had the fact before him of the consent of Gordhandas, a man of adult age, a graduate, perfectly conversant with his family affairs and perfectly able to judge how far, if at all, the compromise was beneficial to himself and his sons. It was not alleged then, and is not alleged now, that Gordhandas has been lacking as a father. In my opinion these materials were ample before Fawcett, J., to enable him to decide the question of sanction and to decline to prolong this litigation between the brothers. To say that these materials were not sufficient is, I repeat, in fact, to invite Fawcett, J., either to form a hasty and immature judgment on the merits on insufficient materials or to a decision after contest on the merits, which might have occupied not days but weeks, if the question of limitation or the nature of the joint family property was at all to be gone into. In my opinion on negligence—much less gross negligence—least of all misrepresentation or fraud, on the part of Gordhandas, is proved in the materials or the sanction obtained.

As regards the Solicitor, it is clear that in the absence of Mr. Captain, his partners Mr. Merchant and Mr. Vaidya, who advised Gordhandas, were perfectly able to act in the matter. For all practical purposes I am unable, I confess, to distinguish the present suit from an ill-advised attempt by Gordhandas himself to resile from the compromise decree under colour of the name of his wife and children.

This disposes, I think, of the main contentions in the suit.

The next contention is as to the reference. In my opinion the reference is perfectly separable from the main part of the decree and would not affect the main question as to the portion of the Girgaum property awarded to Gordhandas and the minors, as is clear from the decree, which only refers 'any question arising as to the carrying out of the terms of this decree and any disputes not covered by this decree arising out of any of the above suits'. This reference to arbitration and the arbitrators' award necessitated no further appeal to the Court to embody in its judgment and decree under Sch. II, para 16; and if so, it does not follow on the *ratio decidendi* in *Raja Har Narain Singh* v. *Chaudurani Bhagwant Kuar* (19) that the reference was necessarily bad. It would rather fall under O. XXIII, r. 3, of the C. P. C., as an adjustment which the Court was competent to grant: *Manilal Motilal* v. *Gokaldas Rowji* (20). This contention of the appellants, therefore, fails.

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(18) 66 Ind. Cas. 154; 48 I. A. 241; 14 L. W. 396; 26 C. W. N. 105; 3 U. P. L. R. (P. C.) 77; 30 M. L. T. 181; 48 C. 991; A. I. R. 1922 P. C. 186 (P. C.).

The remaining contentions may briefly be disposed of. The mortgagees ratified the agreement later and the delay is not shown to have prejudiced the minors in any way and it is not, therefore, a ground which would enable the minors to avoid the decree.

With the question of the speed of the compromise, my learned brother with his large experience of the Chancery Division and of the Original Side of this Court has already dealt. Speaking for myself, the question of speed of the sanction in Court is not necessarily a test of the speed of the actual compromise. In this case, the record shows that negotiations had been going on or at least had been in the air, for years, and had been attempted by Sir Thomas Strangman since a long time before. Further, as far as the minors were concerned, they were only added to the fourth suit at the last stage, and there was no necessity whatever for Fawcett, J., further to deliberate under the circumstances.

In the result, therefore, without reiterating what had been said by Shah, J., and by my learned brother. I agree that the appeal has no merits and must be dismissed with costs.

Marten, J.—In the special circumstances of this case, we think that the trustees are entitled to a separate set of costs from those of the respondent Kissondas.

R. L. *Appeal dismissed.*

(19) 18 I. A. 55; 13 A. 300; 6 Sar. P. C. J. 14; 15 Ind. Jur. 283; 7 Ind. Dec. (N. S.) 189 (P. C.).

(20) 59 Ind. Cas. 53; 45 B. 245; 22 Bom. L. R. 1048.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 648 OF 1923.

March 17, 1926.

Present:—Mr. Justice Broadway and Mr. Justice Fforde.

LACHI AND OTHERS—APPELLANTS

versus

SURJA AND OTHERS—RESPONDENTS.

Custom—Alienation—Necessity—Purchasing of house to live in.

Where the only house which a man possessed is sold in an execution sale and he is in imminent danger of being turned out and it is not easy to rent a house, the buying of a house to live in is a legal necessity.

Second appeal from a decree of the District Judge, Karnal, dated the 9th January 1922, confirming that of the First Class Sub-Judge, Karnal, dated the 8th November 1921.

Mr. *Shamair Chand*, for the Appellants.

Lala *Balwant Rai* and Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—This second appeal has arisen in the following circumstances. On the 16th February 1921 one Chelu, a *jat* of Karnal, sold 39 *bighas* to 10 *biswas* of land to Lachhi Ram and Banu Mal, sons of Telu Mal, for Rs. 6,000. On the 26th April 1921, Surja, one of Chelu's reversioners instituted a suit for the usual declaration to the effect that the sale would not be binding on him on the ground that it had been effected without consideration and necessity. The vendees claimed that there had been necessity for the sale and that full consideration had passed. They also pleaded that the property was not ancestral.

The Courts below have held that the property was ancestral, by which conclusion we are bound, and further that the whole consideration passed and that out of it all but a sum of Rs. 2,115 was for necessity. Accordingly the sale was transformed into a mortgage charging a sum of Rs. 3,885 on the property, and Surja was granted a decree accordingly.

In this second appeal, before us, Mr. Shamair Chand has urged that the conclusion arrived at by the Courts below that the balance of the consideration which had been advanced to Chelu for the purpose of purchasing a house and with which a house had actually been purchased was not for necessity. No direct authority has been brought to our notice on this point. It appears that Telu Mal, the father of the vendees, had held the ancestral house belonging to Chelu on mortgage. He had obtained a decree on this mortgage and had brought the house to sale, the auction sale taking place in October 1919, and the sale had been confirmed. It is obvious that Chelu had done his level best for as long a period as he could. It is equally clear that he was being pressed to vacate for he actually did surrender possession of his house to the auction-purchaser on the 25th February 1921. In order to have a house to live in he entered into an arrangement by which he bought a house on the 13th February 1921 and in order to obtain the funds necessary to pay for it sold the land in question on the 16th February 1921. The vendees are non-agriculturists and the sale had, therefore, to be sanctioned by the Deputy Commissioner.

The point for determination is whether in this case it was necessary for Chelu to part with ancestral property in order to purchase a house to live in. The Courts below have held that it was not necessary for Chelu to purchase "another house." The use of the words "another house" by the learned District Judge indicates that the learned District Judge was under the impression that Chelu was the owner at least of one house other than the one purchased whereas that is not the case. His ancestral house had already been sold in execution of the decree as already pointed out and his ejectment from that ancestral house was imminent. He is an old man of 80 without any son and accustomed to live in a house of substantial dimensions which is evident from the fact that his ancestral house which was sold realized a sum of Rs. 2,000. There is no evidence on the record to show that any houses were available in this village to be rented and as a rule it is not easy to rent a house in a village. I would also point out that in the Court below the respondents' Counsel appears to have admitted that a house to live in was a necessity, his argument being that it was not necessary to buy one. As already stated there is nothing to show that a house could be rented, and in the special circumstances of this case, I think that the purchasing of this house by Chelu must be regarded as a necessity.

I would, therefore, accept this appeal and dismiss the plaintiffs' suit with costs throughout.

R. L. *Appeal accepted.*

CALCUTTA HIGH COURT.

CIVIL RULE NO. 11 OF 1925.
August 18, 1925.
Present:—Mr. Justice Cuming and Mr. Justice Mukerji.

RANJIT CHANDRA TALUKDAR AND OTHERS—PLAINTIFFS—PETITIONERS
versus
BISSAY RAM MANDAL AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), Sch. II, cl. 10—Award—Notice of filing of award, absence of—Revision.

The omission to give notice to the parties that the award has been filed by the arbitrators is a serious irregularity furnishing good ground for revision.

Rangasami v. *Muttusami,* 11 M. 144; 4 Ind. Dec. (N. S.) 100 and *Chatarbuj Das* v. *Ganesh Ram,* 20 A. 474; A. W. N. (1898) 132; 9 Ind. Dec. (N. S.) 664, followed.

Rule against an order of the Court of the Sadar Munsif at Gauhati (District Kamrup) A. V. Districts, in Title Suit No. 1498 of 1923.

Babu *Manmatha Nath Roy,* for the Petitioners.

Babu *Biraj Mohun Majumdar,* for the Opposite Parties.

JUDGMENT.

Cuming, J.—The facts of the case out of which this petition has arisen and the Rule has been granted are as follows:—On the 29th of August 1923 the plaintiffs brought a suit against a number of persons and on the 11th June the case by consent of parties was referred to arbitration. Certain time was allowed to the arbitrators to submit their report. On the 16th July they asked for further time and time was extended till the 9th of August. On the 7th August apparently the arbitrators filed their award and on the 9th August 1924 the following order was recorded by the Court "The arbitrators filed their award on the 7th August 1924. Put up on the 20th August for objections if any". When the case was put up on the 20th August the plaintiffs asked for further time to file objections. The Munsif refused to grant any further time and disposed of the case on the 21st August.

The plaintiffs have moved this Court and the first ground which was taken and which, in my opinion, is sufficient to dispose of this Rule is that no notice of the filing of the award was given to the parties. Schedule II, cl. 10 of the C. P. C. provides "where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them ; and notice of the filing shall be given to the parties." As far as can be seen from the order-sheet in this case the notice required by cl. 10 was never given. The order of the 9th August noting that the arbitrators filed their award on the 7th August and directing that the case be put up on the 20th August for objections if any was not signed by the Pleaders. There is nothing to show that they were aware that this arbitration award had been filed.

This question of giving notice of the filing of the arbitration award has been considered in several cases to which our attention has been drawn. The first case is the case of *Rangasami* v. *Muttusami* (1). In that case a District Munsif passed a decree in the terms of an award without giving notice of the filing of the award to the parties and the learned Judges held that in doing so he acted with material irregularity. The same point was considered in the case of *Chatarbuj Das* v. *Ganesh Ram* (2). There the learned Judges held that it was a good ground for revision of a decree based upon an award filed in Court that no notice of the filing of the award was given by the Court to the parties as required by s. 516 of the C. P. C. (which corresponds to Sch. II, cl. 10 of the present Code) even though the applicant in revision might have received information *aliunde* that the award had been filed. This case is even stronger than the Madras case to which I have already referred. It, therefore, seems to me that the learned Munsif in omitting to give notice of the filing of the award to the parties has committed a serious irregularity.

The learned Munsif's order, therefore, will be set aside and the case will be sent back to him to be dealt with after giving due notice under cl. 10, Sch. II, C. P. C., of the filing of the award to the parties and allowing proper time for filing objection, if any, which they desire to make.

In the circumstances of this case there will be no order as to costs.

Mukerji, J.—I agree.

M. B. *Rule made absolute.*

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(1) 11 M. 144; 4 Ind. Dec. (N. s.) 100.

(2) 20 A. 474; A. W. N. (1898) 132; 9 Ind. Dec. (N. s.) 664.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 8 OF 1926.

January 25, 1926.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

GAJANAN RAMKRISHNA MULE—APPELLANT

versus

BHASKAR BALVANT KULKARNI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXVIII r. 5—High Court—Attachment before judgment—Property outside jurisdiction—Procedure—Practice.

Where the property of the defendant sought to be attached is outside the local limits of the jurisdiction of the High Court, the proper course to follow is to transmit the order for attachment before judgment to the Court in whose jurisdiction the property is situated with a request that that Court should levy the attachment.

The practice of appointing plaintiff's Solicitor's clerk as a special bailiff to levy such attachment is not a proper one and must be stopped.

Mr. *Kanga*, Advocate-General, for the Appellant.

Mr. *B. J. Desai*, for the Respondent.

JUDGMENT.—The plaintiff filed this suit to recover on a promissory note signed by the defendant on May 11, 1925. The promissory note recites an agreement previously arrived at on May 9, between two parties Bhaskar Balvant Kulkarni and the plaintiff. It would appear from the recitals in that agreement that the parties were transacting certain business in grocery at Nagar and Bombay, and the agreement was effected in order to settle the responsibilities between the parties. In consequence of that agreement the promissory note in suit was signed. An application was made to the Court by the plaintiff for an order against the defendant for attachment before judgment on the ground that the defendant was about to dispose of the whole or any part of his property with intent to obstruct or delay the execution of any decree that might be passed against him.

Whether, as a matter of fact, a defendant has brought himself within the provisions of O. XXXVIII, r. 5, is always a difficult question for a Court to decide on affidavits. Considering the joint interest which the parties previously had, and the fact that the documents show that an arrangement was arrived at for the dissolution of those interests, it is difficult to say on the materials before us that the plaintiff has proved sufficient facts to enable this Court to make an order for attachment before judgment which has already been refused by the Chamber Judge.

It is not suggested that the defendant has any property within the local limits of the jurisdiction of this Court. It appears, however, that when an *ex parte* order was obtained by the plaintiff for attachment before judgment of the defendant's property, outside the local limits, the attachment was effected by a clerk in the plaintiff's attorney's office, who was appointed as a special bailiff for that purpose. That clerk had levied the attachment without even furnishing the usual returns to the Sheriff's office stating particulars of the attachment levied or the inventory of the goods attached. We are told that when an attachment before judgment is ordered of property outside the local limits of the jurisdiction of this Court, it has been the practice for the plaintiff to obtain an order in Chambers appointing his Solicitor's clerk a special bailiff for the purpose of levying attachment. We think that such a practice is entirely wrong and must be stopped. If the property of the defendant sought to be attached is outside the local limits of the jurisdiction of this Court, the proper course for the Court to follow is to transmit the order for attachment before judgment to the Court in whose jurisdiction the property is stated with a request that that Court should levy the attachment.

The appeal will be dismissed with costs.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 516 OF 1925.
February 23, 1926.
Present:—Mr. Justice Campbell.
WIRU RAM—PLAINTIFF—PETITIONER
versus
AMAR CHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13—Ex parte *decree, proceedings for setting aside, whether case—Application barred by time—Jurisdiction.*

Proceedings for setting aside an *ex parte* decree, since they involve the reversal of a final order and decree are themselves a case within the meaning of s. 115, C. P. C.

Firm Lal Chand-Mangal Sen v. *Firm Behari Lal-Mehr Chand*, 84 Ind. Cas. 259; 5 L. 288; A. I. R. 1924 Lah. 425; 6 L. L. J. 558; 1 L. C. 36 and *Firm of Sughru Mal-Harcharan Das* v. *Firm of Sham Lal-Gokal Chand*, 46 Ind. Cas. 777; 146 P. W. R. 1918, referred to.

When a Court in effect decides that an application is time-barred and in spite of its decision refers to that application, which is one for which the law does not permit it to extend time, as within time and proceeds to decide it in favour of the applicant, the Court illegally assumes jurisdiction which it does not possess.

Petition for revision of an order of the Subordinate Judge, Third Class, Fazilka, District Ferozepore, dated the 7th July 1925.

Mr. *Mukand Lal Puri*, for the Petitioner.

Lala *Parkash Chander* for Mr. *H. D. Bhalla*, for the Respondents.

JUDGMENT.—This is an application for revision of an order setting aside an *ex parte* decree. The *ex parte* decree was passed on the 4th April 1924 and the application to set it aside was made on the 15th January 1925. On receiving the application the Court struck an issue "Is the judgment-debtor's application dated the 15th January 1925 for setting aside the *ex parte* decree within time."

The suit was instituted on the 20th February 1924 and the Court distinctly holds that on the 26th February, the petitioner-defendant refused to take summons in Fazilka hospital. The Court decided that there was no regular service of summons but that the defendant had knowledge of the suit. It proceeded in its order to observe that in such a case the judgment-debtor had thirty days time from the date on which he had knowledge of the decree to apply for an order setting it aside. The learned Subordinate Judge went on to discuss certain evidence and then recorded as follows: "In view of the above facts and the parties' evidence it is difficult to say with certainty as to when the judgment debtor had knowledge of the decree. Hence the application of the judgment-debtor is within time and there are sufficient grounds for setting aside the decree."

Preliminary objections are taken before me, firstly, that the order is not one deciding a case within the meaning of s. 115 of the C. P. C. in view of the decision by the Full Bench of this Court in *Firm Lal Chand-Mangal Sen* v. *Firm Behari Lal-Mehr Chand* (1) and, secondly, that an erroneous decision on a point of law, that is to say a point of limitation is not one which comes within the scope of s. 115. Both these points are covered by my decision in *Piroj Shah & Co.* v. *Mian Qarib Shah* (Civil Revision No. 429 of 1925, decided on the 8th of December 1925), and I adhere to what I said there. When an *ex parte* decree is passed, the suit is terminated and it remains terminated until the proceedings on the application to set aside the decree come to an end. There is no suit pending, either when the application is presented or when the order disposing of it is passed and the proceedings since they involve the reversal of a final order and decree are themselves a case.

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(1) 84 Ind. Cas. 259; 5 L. 288; A. I. R. 1924 Lah. 425; 6 L. L. J. 558; 1 L. C. 36.

As regards the second preliminary objection, when a Court in effect decides that an application is time-barred and in spite of its decision refers to that application, which is one for which the law does not permit it to extend time as within time and proceeds to decide it in favour of the applicant the Court is guilty of much more than an erroneous decision of law. It illegally assumes jurisdiction which it does not possess. To view the case otherwise would be to admit that the express provisions of the Law of Limitation may be qualified or relaxed at the pleasure of a Court. In the present case the issue framed by the Court shows that it appreciated properly that the onus lay on the petitioner of proving that his application was presented within 30 days of his having knowledge of the decree. That onus lay the more heavily upon him when it was found that he had knowledge of the suit. The Court nowhere says erroneously that the onus of proof in regard to knowledge of the decree was on the decree-holder and indeed if it had said this there is authority in the case printed as *Firm of Sughru Mal-Harcharan Das* v. *Firm of Sham Lal-Gokal Chand* (2) for this Court to interfere on revision. The situation is that there has been no decision that the petition is within time and any decision, that there has been amounts to one that it is time-barred. Hence the learned Subordinate Judge had no jurisdiction to accept it and to set aside the decree.

I accept the revision with costs and set aside the order of the lower Court.

R. L. *Revision accepted.*

(2) 46 Ind. Cas. 777; 146 P. W. R. 1918.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2293 OF 1923.

December 3, 1925.

Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

EASIN SHEIKH—PLAINTIFF—APPELLANT
versus
SIKANDAR SHEIKH AND OTHERS—
—DEFENDANTS—RESPONDENTS.

Mesne profits—Trespassers
A trespasser actually cultivating the land is bound to pay mesne profits on produce basis.

Appeal against a decree of the Additional Subordinate Judge, Khulna, dated the 15th of May 1923, affirming that of the Munsif, Second Court of that place, dated the 17th of December 1921.

Dr. *Jadu Nath Kanjilal* and Babu *Purna Chandra Chandra*, for the Appellant.

Babu *Shib Chandra Palit* and Babu *Surendra Nath Bose*, for the Respondents.

JUDGMENT.

Cuming, J.—This appeal arises out of a suit for ascertainment of mesne profits. The facts appear to be these: The plaintiff is the landlord. He had let out the land to a certain *raiyat* who paid money rent to him. The plaintiff in execution of a money-decree of his own against his *raiyat* purchased the *raiyati* himself. When he went to take possession he was resisted by the defendants who were subsequently found to be trespassers.

The Court of first instance awarded the plaintiff mesne profits on the basis of fair and reasonable rent. This decision was upheld in appeal. The plaintiff appeals to this Court and he contends that he is entitled to *wasilat* on the basis of the produce of the land. He argues that the defendants were in possession of the land actually cultivating it and that he is entitled to the profits which the defendants actually received from the cultivation of his land or might with ordinary diligence have received therefrom.

This contention of the appellant seems to me to be well-founded. Mesne profits are defined in the C. P. C., as those profits which the persons in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits. Now, it is admitted that the defendants were in actual possession cultivating the property as *raiyats*. Therefore the plaintiff is entitled to recover from them the mesne profits what is described as a produce basis, namely, the actual profits that they might by cultivation of the land have received.

The decrees of the lower Courts must be set aside and the case remanded to the Court of first instance to determine what were the actual profits that the defendants realized by cultivation of the land or might have realized with due diligence and to assess mesne profits on this basis as provided in cl. 12 of s. 2 of the C. P. C.

The appellant is entitled to his costs in this appeal and in the lower Appellate Court.

Ghose, J.—I agree.

M. B. *Case remanded.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2102 OF 1925.

March 13, 1926.

Present:—Mr. Justice Zafar Ali.

PURAN MAL—SURETY—APPELLANT

versus

THE FIRM DINA NATH-HARI RAM—DECREE-HOLDER AND THE FIRM RAM CHAND-SOHAN LAL—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 46—Precept, issue of—Security, acceptance of, by Court to which precept is issued—Jurisdiction—Estoppel.

It is not beyond the jurisdiction of the Court to which a precept has been issued to accept security offered by the judgment-debtor for payment of the decretal amount by a particular date and stay execution till then.

Where a security has been so offered to and accepted by the Court, judgment-debtor and surety are both estopped from challenging the jurisdiction of the Court to do so.

Bunwari Lal v. *Abdul Ghafur Khan*, 1 Ind. Cas. 48; 5 P. L. R. 1909; 4 P. W. R. 1909 and *Nawabzada Muhammad Akbar Khan* v. *Dya Nath*, 200 P. R. 1889, referred to.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Simla, dated the 14th August 1925.

Lala *Nawal Kishore*, for the Appellant.

Lala *Fakir Chand* and Lala *Sohan Lal Kapur*, for the Respondents.

JUDGMENT.—The facts are fully stated in the order appealed against and are briefly as below:—

A precept under s. 46, C. P. C. having been issued to the Court of the Subordinate Judge, First Class at Simla, for attachment of the property of the judgment-debtor Ram Chand, the latter applied to that Court for stay of execution for one month and ten days offering to furnish security for payment of the decretal amount and promising to pay it within the said period. This was agreed to and the Court accepted the security of Rai Sahib Puran Mal. But instead of making payment, which the judgment-debtor had promised to do, he obtained an order from the High Court for stay of execution. This was, however, withdrawn later and the decree was then transferred to the Court at Simla for execution and the decree-holder proceeded to execute it against the surety. The latter raised the objections that the Court had no authority to take security but could only attach the property specified in the precept and that in any case the security lapsed after two months.

These objections having been overruled the surety appeals to this Court. There can be no doubt that a Court to which a precept is issued derives its authority from that precept and has no power to do anything not authorized thereby, but it must be presumed to have inherent powers to deal with all matters that may incidentally arise in connection with proceedings for attachment. Now, it is clear that an Executing Court must stay its hands and drop all proceedings if the judgment-debtor should deposit the decretal amount, and by analogy the Court to which a precept is issued for attachment of property should do the same under the same circumstances. It cannot, therefore, be said that the Court to which a precept is issued has no jurisdiction to accept money or security. But even if it be assumed for the sake of argument that the Court acted without jurisdiction, the judgment-debtor and the surety are both estopped from raising the objection, and cannot be allowed to challenge the validity of an arrangement brought about by themselves. They mean to play a trick on the Court as well as the decree-holder, and this they cannot be suffered to do. See *Bunwari Lal* v. *Abdul Ghafur Khan* (1) and *Nawabzada Muhammad Akbar Khan* v. *Dya Nath* (2).

I, therefore, dismiss the appeal with costs.

R. L. *Appeal dismissed.*

(1) 1 Ind. Cas. 48; 5 P. L. R. 1909; 4 P. W. R. 1909.
(2) 200 P. R. 1889.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 709 OF 1924
WITH
RULE No. 1201 (s) OF 1924.
December 8, 1925.
Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.
SATISH CHANDRA RAY AND OTHERS —PLAINTIFFS—APPELLANTS
versus
JOY CHANDRA ROY—DEFENDANTS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Objection to attachment dismissed—Execution case dismissed—Suit under O. XXI, r. 63, necessity for—Attachment effected second time—Dismissal of second application—Regular suit—Limitation, starting point of.

Where an execution case is dismissed it is not incumbent upon the claimant to bring a suit under O. XXI, r. 63, C. P. C., in order to set aside the order rejecting his claim. In case an attachment is made second time, it is competent to the objector to file another application and in the event of rejection of such application to bring a regular suit under O. XXI, r. 63, C. P. C., within one year from the date of dismissal of second objection application.

Najimunnessa Bibi v. *Nacharaddin Sardar*, 83 Ind. Cas. 233; 51 C. 548; 39 C. L. J. 418; A. I. R. 1924 Cal. 744, followed to.

Appeal against a decree of the First Additional Judge, Dacca, dated the 17th December 1923, affirming that of the Subordinate Judge, First Court of that place, dated the 28th of February 1922.

Babus *Upendra Lal Ray* and *Jatindra Kumar Sen Gupta*, for the Appellants.

Babu *Prokash Chandra Pakrasi*, for the Respondents.

JUDGMENT.

Ghose, J.—This is an appeal on behalf of the plaintiff against a judgment and decree of the First Additional District Judge of Dacca, affirming a decision of the Subordinate Judge. It is unnecessary to state the facts of the suit in detail. The facts relevant for the purpose of the appeal may be shortly stated thus—the defendant obtained a decree for possession of certain immoveable properties in which an order had been made under the old C. P. C. for ascertainment of mesne profits in the Execution Department. When an application was made for attachment before judgment in the matter of ascertainment of mesne profits in the execution proceedings a claim was preferred by the plaintiff which was dismissed on the 28th of February 1914. The execution case was then dismissed on the 22nd of January 1915. The defendant-respondent ultimately succeeded in obtaining an order from the Appellate Court allowing their right to prosecute the application for ascertainment of mesne profits in 1918. The property appears to have been attached again by the defendant and another claim was preferred by the plaintiff which was dismissed on the 2nd of August 1921. The plaintiff then brought the suit on the 4th August 1921 under the provisions of r. 63, O. XXI, C. P. C.

Both the Courts below have held that the suit is barred by limitation as not having been brought within one year from the 28th February 1914 when the plaintiffs' claim was first rejected.

It seems to me that when the execution case was dismissed on the 22nd January 1915 the result of which was that the property was released from attachment it was not incumbent on the plaintiff to bring a suit under O. XXI, r. 63, C. P. C. in order to set aside the order rejecting his claim. When a fresh attachment was made after the decision of the Appellate Court it was open to the plaintiff to prefer a fresh claim as was done in the present case; and the suit having been brought within the period of limitation after the order of the 2nd August 1921 the suit is not barred. It is unnecessary to discuss the questions raised in this appeal in detail as these questions have been fully discussed in the case of *Najimunnessa Bibi* v. *Nacharaddin Sardar* (1).

The judgments and decrees of the lower Courts must, therefore, be set aside and the case sent back for trial on the merits to the Court of first instance. Costs of this hearing as well as the costs of the Courts below will abide the result of the final decision.

No order is necessary in the Rule.

Cuming, J.—I agree.

R. L. *Appeal allowed.*
Case remanded.

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(1) 83 Ind. Cas. 233; 51 C. 548; 39 C. L. J. 418; A. I. R. 1924 Cal. 744.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No. 32-B OF 1925.
February 5, 1926.
Present:—Mr. Hallifax, A. J. C., and Kotval, A. J. C.
Khwaja KUTUAB-UD-DIN AND ANOTHER—APPLICANTS
versus
Khwaja GULAM RABBANI AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XX, rr. 1, 3, 7—Judgment, pronouncement of—C. P. Courts, practice of—Decree, appeal or application against—Limitation, operation of—Limitation Act (IX of 1908), s. 5—Extension of time—Sufficient cause.

The period of limitation for an appeal or application against a decree runs from the date of the decree and not from the date when the decree is signed.

Pandu v. *Rajeshwar*, 78 Ind. Cas. 996; 20 N. L. R. 131; A. I. R. 1924 Nag. 271, explained.

In the Central Provinces a judgment cannot be said to have not been "pronounced" within O. XX, r. 1, C. P. C., simply because it is not read out entirely by the Court.

An applicant filing an application beyond time, under a mistaken view that it is within time, cannot ask for extension of time under s. 5 of the Limitation Act, where even according to his own mistaken view he has filed it on the very last possible day.

Application for permission to appeal to His Majesty in Council against a decision in First Appeal No. 69-B of 1925, dated the 17th March 1925.

Messrs. *A. V. Khare* and *W. B. Pendharkar*, for the Applicants.

Messrs. *M. Y. Shareef* and *G. G. Hatvalne*, for the Non-Applicants.

JUDGMENT.—Mr. A. V. Khare and Mr. W. B. Pendharkar appear for the applicants, and Mr. Yusuf Sharif and Mr. G. G. Hatvalne for the opposite party. The application was filed one hundred and twenty five days after the date of the decree, the period allowed being ninety days only. Mr. Khare states that he was misled by the ruling in *Pandu* v. *Rajeshwar* (1) into thinking the period allowed ran from the date on which the decree was signed. If that were correct the application would be regarded as filed on the ninetieth day. The admittedly incorrect statement of the law appears only in the head-note of that case, not in the judgment. As for s. 5 of the Limitation Act, the filing of the application on the very last possible day, even according to the mistaken view taken by the applicant's Pleader, makes any appeal to that hopeless. Mr. Khare further argues that the judgment has never yet been "pronounced," which word he suggests as meaning a reading out of the whole judgment by the Court. If that is so there is at present no judgment or decree against which to appeal, but anyhow we cannot give to the word "pronounce" a meaning different to that it has been given in all the Courts of the C. P. and the applicants must pay all the costs. The Pleader's fee will be Rs. 15 in this and in each of the other five applications connected with it.

N. H. *Order accordingly.*

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(1) 78 Ind. Cas. 996; 20 N. L. R. 131; A. I. R. 1924 Nag. 271.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1844 OF 1925.
January 28, 1926.
Present:—Mr. Justice Broadway.
FIRM JAMITA MAL-SANT RAM—DEFENDANTS—APPELLANTS
versus
GOKAL CHAND—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 108 (c)—Lessor and lessee—Lessee's duty to surrender possession.

A lessee whose possession has been disturbed only temporarily and who gets back into possession before the term of the lease comes to an end, is duty bound at the termination of the lease to surrender peaceably the premises leased to him. [p. 122, col. 2.]

Kunhayen Haji v. *Mayan*, 17 M. 98; 4 M. L. J. 21; 6 Ind. Dec. (N. S.) 68, *Tayawa* v. *Gurshidappa*, 25 B. 269; 2 Bom. L. R. 1070, *Dharm Narain* v. *Labh Singh*, 60 Ind. Cas. 477, *Dhuramsey Soonderdas* v. *Ahmedbhai Hubibbhoy*, 23 B. 15; 12 Ind. Dec. (N. S.) 10, *Nowrang Singh* v. *Janardan Kisorilal Singh Deo*, 70 Ind. Cas. 161; 50 C. 68; 35 C. L. J. 28; 27 C. W. N. 71; A. I. R. 1923 Cal. 41 and *Srinivusa Aiyangar* v. *Rangasami Aiyangar*, 25 Ind. Cas. 812; 1 L. W. 858, referred to.

Second appeal from an order of the District Judge, Rawalpindi, dated the 26th May 1925, setting aside that of the Fourth Class Sub-Judge, Rawalpindi, dated the 2nd April 1925.

Mr. *M. S. Bhagat*, for the Appellants.

Lala *Hargopal*, for the Respondent.

JUDGMENT.—This second appeal has arisen in the following circumstances:—One Gokal Chand leased a certain house at Kohala to the firm of Jamita Mal-Sant Ram for a period of one year commencing on the 25th July 1923 and terminating on the 24th July 1924 at an annual rental of Rs. 150. The premises leased were destroyed by fire and it appears that within a few days Mir Zaman and others claiming to be the owners of the site entered into possession of the same and erected thereon what appear to have been certain ephemeral structures. Gokal Chand took action under s. 145, Cr. P. C., and was referred to the Civil Courts for further relief. It appears, however, that the original tenants were permitted by order of the Magistrate to retain possession of the site and to erect buildings thereon. This order was passed on the 17th June 1924. For reasons known to themselves the defendant-firm on the 18th June 1924 entered into an agreement with Mir Zaman and others apparently recognizing them as the owners of the site and agreeing to pay them a sum of Rs. 15 per annum as ground rent for the site on which they, the defendant-firm, were erecting their new building. Subsequently on the 26th August 1924, that is to say, after the term of the lease had terminated, Gokal Chand issued a notice to the defendant-firm calling upon them to vacate their permises or in default to pay a certain sum of money as rent. As this notice was not complied with Gokal Chand instituted a suit for ejectment from the shop and for the recovery of Rs. 155 against the said firm of Jamita Mal-Sant Ram.

Various pleas were raised and issues were settled the first of which was whether the relation of landlord and tenant ceased after the shop was burnt. The Trial Court held that the relationship of landlord and tenant had come to an end on the 15th May 1924 and dismissed the plaintiff's suit with costs.

On appeal by the plaintiff to the District Judge it was held that the relationship of landlord and tenant had not ceased and that, therefore, the suit could proceed and the cause was remanded accordingly. Against this order of remand the defendant-firm have come up to this Court in second appeal through Mr. Bhagat, while Mr. Hargopal has addressed me on behalf of the plaintiff-respondent.

It has been urged on behalf of the appellant that having regard to the provisions of s. 108 (*b*) (*e*), the tenancy had come to an end when the premises were destroyed and that, therefore, s. 65 of the Contract Act came into operation and the lease became void. It was further contended that inasmuch as Mir Zaman and his companions had claimed to be paramount owners of the site and had entered into possession thereof, that fact also terminated the lease. Finally it was urged that if any notice was necessary to terminate the lease, the fact that the appellant-firm had attorned to Mir Zaman and his companions was sufficient to convey to the plaintiff, the determination of the defendant-firm to regard the lease as ended. Now, the lower Appellate Court has come to a definite finding that Mir Zaman, etc., have not been shown to have been the paramount owners. That is a finding of fact which it is impossible for me to examine and in these circumstances, it appears to me that this point must be decided against the appellant.

Mr. Bhagat relied on *Kunhayen Haji* v. *Mayan* (1), *Tayawa* v. *Gurshidappa* (2) and *Dharm Narain* v. *Labh Singh* (3). On the other side Mr. Hargopal cited *Dhuramsey Soonderdas* v. *Ahmedbhai Hubibbhoy* (4), *Nowrang Singh* v. *Janardan Kishorilal Singh* (5) and *Srinivasa Aiyangar* v. *Rangasami Aiyangar* (6). Now with the principles enunciated in these authorities I have no quarrel. What has been therein laid down is very aptly put by Mr. Justice Mukerji in *Nowrang Singh* v. *Janardan Kishorilal Singh* (5) where it was held that upon a true construction of s. 108 (*c*) of the Transfer of Property Act, an unauthorised act of a co-lessee would not absolve the other lessee from the liability of paying rent in accordance with the lease and further, that the covenant implied in the Transfer of Property Act protected the lessee against all disturbance by the lessor whether lawful or not save under a right of re-entry but as against other persons it protects the lessee only against lawful disturbance.

In the present case, it has not been found that there was any lawful disturbance. It has further been found that although the lessee's possession was disturbed for a few days he got back into possession before the term of the lease came to an end. It was the duty of the lessee at the termination of the lease peaceably to surrender the premises leased to him. Instead of doing so he entered into an agreement with persons, who must (or for the purpose of this case at present) be regarded as trespassers, and have been holding over since the termination of the lease.

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(1) 17 M. 98; 4 M. L. J. 21; 6 Ind. Dec. (N. S.) 68.
(2) 25 B. 269; 2 Bom. L. R. 1070.
(3) 60 Ind. Cas. 477.
(4) 23 B. 15; 12 Ind. Dec. (N. S.) 10.
(5) 70 Ind. Cas. 161; 50 C. 68; 35 C. L. J. 28; 27 C. W. N. 71; A. I. R. 1923 Cal. 41.
(6) 25 Ind. Cas. 812; 1 L. W. 858.

So far as the question of the exercise of the option to terminate the lease is concerned, it has been found by the learned District Judge, that this option was never exercised, a finding which I regard as one of fact.

In these circumstances I hold that this appeal must fail and I dismiss it with costs accordingly.

R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 182 OF 1923.
September 8, 1925.
Present:—Mr. Justice Odgers and
Mr. Justice Viswanatha Sastri.

LINGA IYER *alias* RAMALINGA IYER—
DEFENDANT No. 1—APPELLANT
versus
LAKSHMANAN CHETTIAR AND ANOTHER
—PLAINTIFF AND DEFENDANT No. 2—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. I, r. 10—Suit, dismissal of, against necessary party by consent—Order "striking off" name of party—Order, construction of—Subsequent suit against party, maintainability of.

Where a party is properly impleaded as one of the defendants in a case and the case as against would proceed to judgment but for the fact that the plaintiff elects to abandon part of his case and the suit is in consequence dismissed as against that defendant, the party is a defendant against whom a suit has been dismissed within the meaning of the Explanation to s. 47, C. P. C. [p. 123, col. 2.]

But where a defendant has been improperly joined as a party, the proper procedure is to strike out the name of the defendant under O. I, r. 10, C. P. C., and not to dismiss the suit as against him. [*ibid.*]

Vaddadi Sannamma v. *Koduganti Radhabhayi*, 43 Ind. Cas. 935; 41 M. 418; 22 M. L. T. 532; 34 M. L. J. 17; (1918) M. W. N. 23; 7 L. W. 234 and *E. G. Ramaswami Sastrulu* v. *Kameswaramma*, 23 M. 361; 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653, relied on.

Where in a suit against several defendants, the Court in its judgment stated as to one of the necessary defendants, "By consent I strike off the 2nd defendant's name. Plaintiff will pay by consent half the costs":

Held, (1) that the substance and not the form of the order must be regarded; [p. 124, col. 1.]

(2) that since the defendant was not an unnecessary party to the suit, the order was really one of dismissal as against him, although the words "strike off" were inappropriately used; [*ibid.*]

(3) that the order amounted to a decree which not having been appealed against became final and a subsequent suit against the same defendant was not maintainable. [*ibid.*]

Second appeal against a decree of the Court of the Subordinate Judge, Dindigul, in A. S. No. 12 of 1921, preferred against that of the Court of the District Munsif, Dindigul, in O. S. No. 1380 of 1919.

Messrs. *A. Krishnaswami Iyer* and *M. Patanjali Sastri*, for the Appellant.

Mr. *K. P. Padmanabha Pillai*, for the Respondents.

JUDGMENT.

Odgers, J.—This is an appeal from the decree of the Subordinate Judge of Dindigul confirming in part the decree of the District Munsif of Dindigul. The suit was brought by the plaintiff for a declaration that certain property in the hands of the 1st and 2nd defendants belonged to a debtor of his, Subbaraya Iyer. The 2nd defendant was Subbaraya Aiyar's widow and the 1st defendant was his brother. The suit was brought in consequence of the allowance of a claim petition in favour of the brother, the 1st defendant. Exhibt B is the judgment in O. S. No. 598 of 1917 in which the same plaintiff sued to recover from the widow and the brother certain money due on dealings and promissory notes. The District Munsif in the fourth paragraph of his judgment states as follows:—"By consent I strike off the 2nd defendant's name. Plaintiff will pay by consent half of his costs".

The point raised in second appeal is whether the 2nd defendant is in spite of that procedure a party to the suit under s. 47 (Explanation). If he is, the present suit is barred and the proper remedy would be by way of appeal under that section. For the respondent stress has been laid on the form of words used by the learned District Munsif, namely, that the 2nd defendant's name was "struck off." It is admittedly a form of words more appropriate to striking off a misjoined plaintiff or defendant than applicable to the case of a party against whom the plaintiff does not wish to proceed further, as is the fact in the present case. It is well-known that the state of the law was uncertain until the Legislature enacted the Explanation to s. 47 whereby the Madras view as contained in *E. G. Ramaswami Sastrulu* v. *Kameswaramma* (1) was affirmed as against the view of certain other High Courts. In that case it was held that when a party defendant is exonerated from a suit, *i.e.*, the suit is dismissed against him and a

(1) 23 M. 361; 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653.

decree passed against a co-defendant and in execution of that property belonging to and in possession of the exonerated defendant is attached and sold, the latter is not entitled to maintain a suit, but the question of his claim to and recovery of possession of the property is a question falling under s. 244 now s. 47 of the Code. The case of *Gangadhara Ramarao* v. *Surya Rao* (2) shows that the substance of the order and not the form of it is to be regarded. In that case a preliminary objection was taken against the maintainability of the appeal as the learned Subordinate Judge had struck out the name of the 1st defendant under O. I, r. 10 (2) and removed him from the record. It was contended that that being so no appeal was provided, but Mr. Justice Seshagiri Iyer says: "In my opinion this is an adjudication determining the rights of the plaintiffs to bring a suit of this nature, and his order is a 'decree' as defined in s. 2 (2), C. P. C.................................Consequently where a substantial claim has been adjudicated upon and where the party's name has been struck out not on the ground that a suit against him would not lie and where a substantial relief claimed in the suit has been ordered to be deleted, I am of opinion that the Court has 'conclusively adjudicated the rights of the parties with regard to a matter in controversy' and that, therefore, the order of the Subordinate Judge is a decree." The important part for the present purpose of the judgment is that we are to regard the substance of the order and not the form. It is quite clear that if the learned District Munsif in the suit of 1917 had said he dismissed the suit as against the 2nd defendant the case would have been perfectly plain, and s. 47 would have applied. The trouble has arisen because he has employed the words "struck off". The authoritative case on the subject is *Vaddadi Sannamma* v. *Kobuganti Radhabhayi* (3). There the Full Bench held that where a party has been properly impleaded as one of the defendants in the case and it is not contended in the present case that the 2nd defendant was improperly impleaded, the case as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against this defendant, he is a defendant against whom a suit has been dismissed within the meaning of the Explanation to s. 47. The learned Chief Justice expressed the opinion that under O. I, r. 10 (2) the proper course would be for the Court to exercise the power which it now has of ordering at any stage of the proceedings the name of a defendant improperly joined to be struck out instead of dismissing the suit against him. That will, following the decision in *E. G. Ramaswami Sastrulu* v. *Kameswaramma* (1), have the effect of taking him out of the operation of s. 47 which ought not to apply to him seeing that he has no real connection with the suit. Therefore, the opinion of the Full Bench is that striking out under O. I, r. 10 (2) is the proper procedure to be employed in the case of misjoinder. In any other case the proper course is dismissal. This would appear to be also the opinion of the learned Judges who decided the case reported in *Krishnappa Mudaly* v. *Periaswamy Mudaly* (4) that where a party sets up a paramount title in a mortgage suit to both the mortgagor and the mortgagee and has been exonerated from the suit on the ground of misjoinder, he does not remain a party to the suit for the purpose of s. 47.

The lower Courts here have dealt with this question in what may be described as a perfunctory manner. The issue is distinctly raised as No. 6 in the suit. The learned District Munsif says: "As stated in the latter Full Bench ruling *Vaddadi Sannamma* v. *Koduganti Radhabhayi* (3) the 1st defendant's name should be deemed to have been struck off from the record though erroneously retained in the cause title in the decree, and as such the 1st defendant cannot be said under s. 47 to be a person against whom a suit has been dismissed." This opinion has not been attempted to be supported by the learned Counsel for the respondent and it is, in my opinion, an entire misreading of the result of the Full Bench case in *Vaddadi Sannamma* v. *Koduganti Radhabhayi* (3). It does, however, furnish one possibly useful item, and that is, that in spite of the 2nd defendant's name being struck off, his name was retained in the cause title in the decree that was finally drawn up so that if, as insisted by the learned Counsel for the respondent, one is to insist on the importance of the form, this would seem to show that the 2nd defendant's name had in fact not been struck off. The learned Subordinate Judge deals with the point in an even more perfunctory manner. He says: "The failure to strike off his name is not a ground for holding that he is still a party to the suit", referring to the alleged mistake of continuing the 1st defendant's name in the cause title of the decree. In my opinion, following the Full Bench ruling in *Vaddadi Sannamma* v. *Coduganti Radhabhai* (3) there can be other conclusion than that what the learned District Munsif really led in the original suit was to dismiss it as against the 2nd defendant. By an unhappily or mistaken use of language he used the expression "strike off" in the judgment which is I think appropriate only to the case of misjoinder of parties, or causes of action. I, therefore, am of opinion that the suit is incompetent throughout. The second appeal must be allowed and the suit dismissed with costs throughout. The memorandum of objections is dismissed without costs.

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(2) 49 Ind. Cas. 835; 42 M. 219; 36 M. L. J. 169; 9 L. W. 329; 25 M. L. T. 184.

(3) 43 Ind. Cas. 935; 41 M. 418; 22 M. L. T. 532; 34 M. L. J. 17; (1918) M. W. N. 23; 7 L. W. 234.

(4) 38 Ind. Cas. 297; 40 M. 964; 21 M. L. T. 121; 5 L W. 369; 32 M. L. J. 532.

Viswanatha Sastri, J.—I fully agree with what has fallen from my learned brother and have nothing to add.

V. N. V.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2300 OF 1925.

March 8, 1926.

Present :—Mr. Justice Zafar Ali.

THAKAR SINGH—PLAINTIFF—APPELLANT

versus

GHANAYA SINGH—DEFENDANT—RESPONDENT.

Evidence—Document not public admitted as such—Effect.

If a document is admitted in evidence on the understanding that it is a public document, it loses all evidential value when it is discovered that it is not a public document.

Second appeal from a decree of the Senior Subordinate Judge, Hoshiarpur, dated the 18th July 1925, reversing that of the Subordinate Judge, Third Class, Hoshiarpur, dated the 7th February 1925.

Lala *Balwant Rai*, for Lala *Badri Das*, R. B., for the Appellant.

Mr. *Muhammad Amin*, for the Respondent.

JUDGMENT.—The lower Appellate Court held that the *resadbandi* or *chowkidara* papers relied on by the plaintiff were not admissible in evidence and, it is argued in this second appeal that the papers were public documents and were admissible in evidence as such under s. 35 of the Indian Evidence Act. But there is nothing on the record to show that these documents were prepared by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country. Next it is argued that the documents having once been admitted in evidence the lower Appellate Court was not competent to exclude them from evidence. This point was not taken in the grounds of appeal and possesses no force. If a document is once admitted in evidence on the understanding that it is a public document, it loses all evidential value when it is discovered that it is not a public document.

No other point is raised. The appeal fails and I dismiss it with costs.

R. L.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1939 OF 1921.

January 14, 1926.

Present :—Mr. Justice Campbell and Mr. Justice Zafar Ali.

ARSHAD ALI—PLAINTIFF—APPELLANT

versus

BICHHA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption suit—Pre-emption price exceeding Court's jurisdiction—Decree.

Where in a suit for pre-emption regarding revenue paying land the value for jurisdiction, *i. e.*, 30 times the proportionate land revenue does not exceed the pecuniary jurisdiction of the Court, but the amount payable by the pre-emptor exceeds its jurisdiction it can hear the suit but cannot pass a decree. However, if such a suit is transferred to another Court which has jurisdiction to pass the decree, the latter will pass the decree and not dismiss the suit on the ground that the first Court had no jurisdiction to entertain the suit.

Arshad Ali v. *Zorawar Singh*, 92 Ind. Cas. 986; 8 L. L. J. 60, followed.

First appeal from a decree of the Senior Sub-Judge, Rohtak, dated the 31st January 1921.

Bakhshi *Tek Chand*, for the Appellant.

Messrs. *Shamair Chand*, *Sagar Chand* and Lala *Harish Chandra*, for the Respondents.

JUDGMENT.—This is a pre-emption

suit by the son of Anwar Ali for pre-emption of 1 *bigha* 11 *biswas* sold by Anwar Ali to Bichha Lal and Sher Singh on the 9th of November, 1917. The suit was instituted on the 27th of August, 1918.

Except that here there is no question of improvements or of the full sale price in the deed not having been paid, the circumstances are precisely similar to those of Civil Appeal No. 1014 of 1922, [*Arshad Ali* v. *Zorawar Singh* (1)] decided to-day. Here too the plaintiff claimed to pre-empt for a small amount and fixed the value of the suit for Court-fee and jurisdiction on the proportionate land revenue of the plot sold. The lower Court held that the sale-price entered in the deed, namely, Rs. 1,758 had been paid but dismissed the suit because it had been instituted in the Munsif's Court which had no jurisdiction to hear it. As in the other appeal, we hold that at any rate the value for jurisdiction was 30 times the proportionate land revenue and that the question of Court-fee need not be decided since the lower Court, acting under s. 149 of the C. P. C., permitted the plaintiff to make up the fee to the amount held by it to be correct. As regards jurisdiction, the lower Court was wrong in overlooking the Explanation to r. 1 (*b*), pages 93 and 94. Rules and Orders of the Chief Court, Vol. III and the Munsif, in whose Court the suit was instituted, had jurisdiction to hear it, although, as pointed out in *Muhammad Afzal Khan* v. *Nand Lal* (2), he had not jurisdiction to pass a decree. It may be observed that *Muhammad Afzal Khan* v. *Nand Lal* (2) has not been altogether understood by the lower Court, for it does not lay down that when the money to be paid in a pre-emption suit exceeds the Court's jurisdiction, the Court has no jurisdiction to entertain the suit, but, merely that the decree must be passed by a superior Court, as has been done in the present case. There was no reason why the plaintiff, whose right of pre-emption was otherwise admitted, should not have been given a decree by the Court of the Junior Subordinate Judge to whom the suit was transferred by order of the District Judge.

We accept the appeal with costs and grant the plaintiff a decree for possession by pre-emption on payment of Rs. 1,758 on or before a date three months from the date of the decree.

The decree is to be drawn up in accordance with O. XX, r. 14 (1). We direct further that in the Courts below parties shall bear their own costs since the plaintiff failed there conspicuously in respect of the pre-emptive price.

S. S. *Appeal accepted.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 234 OF 1923.

AND

APPEAL AGAINST APPELLATE ORDER No. 2 OF 1924.

November 6, 1925.

Present :—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

IN A. A. O. No. 234 OF 1923.

ARUNACHELLAM CHETTIAR BY AGENT SIVARAMANCHETTIAR—APPELLANT

versus

NAYANNA NAICKER AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 20, 52—Interim *Receiver—Delivery of property.*

An application under s. 52 of the Provincial Insolvency Act to the Court executing a decree against the judgment-debtor to deliver property to the Receiver can only be a valid application if the Receiver has been clothed by the Insolvency Court with powers to take possession of the insolvent's property.

Where the *interim* Receiver appointed under s. 20 of the Provincial Insolvency Act is not clothed with any such powers, the Court has no jurisdiction to hand over the property to the Receiver.

Quære.—Whether the term "Receiver" used in s. 52 of the Provincial Insolvency Act is restricted to a Receiver appointed after the adjudication, or will apply to an *interim* Receiver appointed under s. 20 of the Act and whether the application under that section is restricted to one by the Receiver or may be made by the insolvent or any one else.

IN A. A. O. No. 234 OF 1923.

Appeal against an order of the District Court, Coimbatore, dated the 31st January 1923, in I. A. No. 560 of 1922.

IN A. A. A. O. No. 2 OF 1924.

Appeal against the appellate order of the Court of the 2nd Additional Subordinate Judge, Coimbatore, dated the 6th September 1923, in Civil Appeal No. 31 of 1923, preferred against an order of the Court of the District Munsif, Tiruppur, dated the 7th February 1923, in E. P. R. No. 1524 of 1922, in O. S. No. 767 of 1921.

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(1) 92 Ind. Cas. 986; 8 L. L. J. 60.

(2) 16 P. R. 1908; 73 P. W. R. 1907; 146 P. L. R. 1908.

Mr. *T. M. Krishnaswamy Iyer*, for the Appellant.

Mr. *V. Balasundaram Iyer*, for the Respondents.

JUDGMENT.

In A. A. O. No. 234 of 1923.

The application to the District Munsif in the case was by the insolvent and was presumably under s. 52 of the Provincial Insolvency Act V of 1920. The District Munsif dismissed it on the short ground that it was not an application by the Official Receiver. The insolvent went up to the District Judge, who purporting to exercise the power of an Insolvency Court and presumably with a view of ensuring that the Executing Court acted properly under s. 52, set aside the execution sale. Neither before the District Munsif nor before the District Judge was there any prayer by the applicant to hand over the property to the Receiver. It is difficult to see how the case could come under s. 52 at all.

Further whether the term "Receiver" used in s. 52, is restricted to a Receiver, appointed after the adjudication, or will apply to an *interim* Receiver appointed under s. 20, and whether the application under that section is restricted to one by the Receiver or may be made by the insolvent or any one else, both of which points raise questions of difficulty which it is not necessary to answer in this case, it is perfectly clear to us that an application under s. 52 to the Executing Court to deliver property to the Receiver can only be a valid application if the Receiver has been clothed by the Insolvency Court with powers to take possession of the insolvent's property. To hold otherwise would open the way, *e.g.*, for such a delivery of the insolvent's property to an *interim* Receiver in the teeth of a refusal by the Court to confer on him powers to take delivery. In the present case the *interim* Receiver was not clothed with powers to take possession of the insolvent's property. In this view the District Munsif's order was correct; the District Judge had no jurisdiction to interfere (1), because there was no request before him that the property was to be delivered to the Receiver and (2), because the Receiver was not authorised to take delivery. The order must be set aside and the District Munsif's order restored with costs.

In A. A. A. O. No. 2 of 1924.

It follows that the sale should have been confirmed by the District Munsif, as no valid application to stop it had been put in before him within 30 days of the sale.

We allow the appeal. The appellant will get his costs in the two lower Courts and not in this Court.

V. N. V.

Appeal allowed.

LAHORE HIGH COURT.

Second Civil Appeal No. 532 of 1925.

December 10, 1925.

Present:—Mr. Justice Addison.

KARM CHAND and others—Plaintiffs—Appellants

versus

KARM SINGH and another—Vendees and GOPAL CHAND and another—Vendors—Defendants—Respondents.

Appeal, second—Pre-emption suit—Location of property—Question of fact or law.

The question whether a certain immoveable property is situated in a town or village is a question of fact.

Muhammad v. *Jumma*, 54 Ind. Cas. 646; 28 P. R. 1919; 16 P. L. R. 1920 and *Dewan Chand* v. *Nizam Din*, 75 Ind. Cas. 610; A. I. R. 1923 Lah. 443, followed.

Mansa Ram v. *Joti*, 62 Ind. Cas. 808, dissented from.

Second appeal from a decree of the District Judge, Jhelum, dated the 4th December 1924, reversing that of the Subordinate Judge, Fourth Class, Jhelum, dated the 15th July 1924.

Lala *Amar Nath Chona*, for the Appellants.

Mr. *M. L. Puri*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken that the finding of the learned District Judge that Sanghoi is not a town but a village, is a question of fact which cannot be raised in second appeal. It was laid down in *Mahmud* v. *Jumma* (1), that it was most doubtful if the question whether a place was a town or a village could be raised on second appeal. This was followed in *Dewan Chand* v. *Nizam Din* (2). There the question was whether the land was urban immoveable property or village immoveable property so that it had to be decided whether the place was a town or a village. The learned Judge who decided that case followed the Division Bench ruling *Mahmud* v. *Jumma* (1). In *Mansa Ram* v. *Joti* (3) it was held that the question whether the place was a town or a village was a question of law. The attention of the Judge, who decided that case, however, was not directed to the remarks in *Mahmud* v. *Jumma* (1). It seems to me that the question is clearly one of fact and that the authorities are on the whole in favour of this view. I hold, therefore, that this question cannot be raised in second appeal.

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(1) 54 Ind. Cas. 646; 28 P. R. 1919; 16 P. L. R. 1920.
(2) 75 Ind. Cas. 610; A. I. R. 1923 Lah. 443.
(3) 62 Ind. Cas. 808.

No other point was argued and it was admitted that this was the only possible point that could be taken in the appeal. I accordingly dismiss it with costs.

S. S. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 594 OF 1923.

January 20, 1926.

Present:—Mr. Justice LeRossignol and Mr. Justice Martineau.

FIRM GOKAL CHAND-JAGAN NATH OF SIALKOT THROUGH JAGAN NATH —PETITIONERS

versus

THE COMMISSIONER OF INCOME-TAX, PUNJAB, LAHORE—RESPONDENT.

Income Tax Act (XI of 1922), ss. 13, 66 (3)—Income-Tax Officer's decision on method of accounting—Finality—Mandamus, *competency to issue, when should be challenged.*

Income Tax Officer is the sole arbiter on the question of the possibility of deducing the income, profits and gains from the method of accounting employed and an assessee is not entitled to challenge his opinion.

The proper stage for questioning the competency to issue a *mandamus* under s. 66 (3), Income Tax Act, is the date of hearing the application and the question cannot be agitated after an order has been passed on the application.

Trikamjee Jiwan Das v. *Commissioner of Income Tax*, 86 Ind. Cas. 170; 4 Pat. 224; (1925) Pat. 17; A. I. R. 1925 Pat. 352, followed.

Petition, under s. 66 (3) of Act XI of 1922, praying that the Income Tax Commissioner may be required to draw up a statement of the petitioners' case and to refer it to the High Court for decision.

Lala *Mool Chand*, R. S., for the Petitioners.

Mr. *C. H. Carden Noad*, Government Advocate, for the Respondents.

ORDER.—In accordance with a direction given by this Court under s. 66 (3) of the Income Tax Act (XI of 1922) the Commissioner of Income Tax has referred two questions of law for decision. He has at the same time doubted the competency of this Court to issue the *mandamus* under s. 66 (3) on the ground that the Act applicable to the case is the Act of 1913 and not that of 1922, but this is a point which should have been taken at the hearing of the application made under the said section and in agreement with the view taken in *Trikamjee Jiwan Das* v. *Commissioner of Income Tax* (1) we hold that the order passed on the application cannot now be questioned.

The first point referred to us is whether in view of the undertaking given by the Income Tax Officer in the course of the assessment for the year 1920-21 the petitioners are entitled to receive credit in the assessment of 1921-22 for any loss which they are proved to have sustained in the sugar business in 1919-20. The learned Commissioner urges that the Income Tax Officer did not in fact give an undertaking that any loss sustained by the petitioners in their business in 1919-20 would be taken into account in the assessment for 1921-22, but only recommended that this should be done. However, this may be, we find that the Assistant Commissioner in his order of the 8th Novembar 1922 in the appeal against the assessment found that the alleged loss had not been proved, inasmuch as it was impossible to check the profit and loss statements because weights were not stated therein. On that finding no credit can be given to the petitioners for any losses for the year 1919-20.

The second point referred is whether an assessee is entitled to challenge the correctness of the opinion of the Income Tax Officer that the method of accounting employed is such that the income, profits and gains cannot properly be deduced therefrom. We think it was clearly intended by the proviso to s. 13 of the Act that the Income Tax Officer should be the sole arbiter on the question of the possibility of deducing the income, profits and gains from the method of accounting employed.

We accordingly answer both the points in the negative and direct that the petitioners shall pay the costs of the reference.

R. L. *Answered negatively.*

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(1) 86 Ind. Cas. 170; 4 Pat. 224; (1925) Pat. 17; A. I. R. 1925 Pat. 352.

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 1127 OF 1925.

December 9, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice.

EMPEROR—PETITIONER

versus

PIARA SINGH—RESPONDENT.

Punjab Excise Act (I of 1914), s. 61 (1), offence under—Criminal Procedure Code (Act V of 1898), s. 562, application of.

In an offence under the Excise Act it is necessary to impose a sentence which would have a deterrent effect and a mere sentence of fine will not do.

Emperor v. *Sujan Singh,* 35 Ind. Cas. 486; 19 P. R. 1916 Cr.; 41 P. W. R. 1916 Cr.; 144 P. L. R. 1916; 17 Cr L. J. 310, followed.

Ordinarily a person convicted under s. 61 (1), Punjab Excise Act, is not entitled to the benefit of s. 562, Cr. P. C., though the section is not only applicable to offences under the Penal Code but also to offences punishable under a special or a local Act.

Case reported by the Sessions Judge, Sialkot, with his No. 222 J. of the 23rd June 1925.

Mr. *Govind Ram,* for the Government Advocate, for the Petitioner.

Mr. *Mohsin Shah,* for the Respondent.

JUDGMENT.—There is ample evidence on the record to prove the fact that on the night between the 14th and 15th of February, 1925, the accused Piara Singh was found distilling illicit liquor in his field; and it is common ground that a distilling apparatus, a large quantity of *lahan* and two bottles containing illicit liquor were recovered from the field The Courts below have concurred in holding that Piara Singh is guilty of an offence described in cl. (*a*) of s. 61, sub-s. (1) of the Punjab Excise Act I of 1914; and I have no hesitation in endorsing their conclusion.

The Trial Magistrate has sentenced the convict to a fine of Rs. 200, but the learned Sessions Judge considers the sentence to be inadequate, and has submitted the record to this Court under s. 438, Cr. P. C., with a recommendation that the sentence be enhanced. In awarding punishment for an offence under the Excise Act the Courts must always bear in mind that illicit distillation implies a good deal of preparation and results not only in the loss of excise revenue, but also in drunkenness. Judicial experience also shows that the offence often escapes detection, and, as laid down in *Emperor* v. *Sujan Singh* (1), it is necessary to impose a sentence which would have a deterrent effect. That this was the intention of the Legislature is clear from the fact that the maximum term of imprisonment for manufacturing illicit liquor was raised in 1914 from four months to one year; and has recently been further enhanced to two years, *vide* s. 2 of the Punjab Excise (Amendment) Act, II of 1925.

In view of the large profits derived from illicit distillation and the fact that the crime is not always detected, I do not think that the sentence of a mere fine can have any deterrent effect. Nor do I consider that the principle embodied in s. 562, Cr. P. C., which, as amended by Act XVIII of 1923 applies not only to persons who are convicted of an offence punishable under the Indian Penal Code but also to those who are found guilty of an offence punishable under a special or a local Act, can be reasonably invoked by a person convicted of an offence like the present which, as I have already observed, not only implies previous preparation but often escapes detection. It cannot be urged on behalf of such a convict that he had succumbed to a sudden temptation, and that the Court should, therefore, exercise its discretion under the section in his favour and give him another chance. It is not desirable to lay down a hard and fast rule, and exceptional circumstances may outweigh these considerations and warrant the application of the rule enacted by the said section. Such cases are, however, rare and ordinarily a person convicted under s. 61 (1) of the Excise Act is not entitled to the benefit of s. 562, Cr. P. C.

Having regard to the principles enunciated above I am of opinion that the sentence awarded by the Magistrate is manifestly inadequate. While dismissing the application for revision preferred by the convict I accept the recommendation made by the learned Sessions Judge so far as to impose upon the convict a sentence of rigorous imprisonment for 6 months in addition to the fine inflicted by the Magistrate.

R. L. *Revision dismissed.*

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(1) 35 Ind. Cas. 486; 19 P. R. 1916 Cr.; 41 P. W. R. 1916 Cr.; 144 P. L. R. 1916; 17 Cr. L. J. 310.

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 1470 OF 1925.
January 29, 1926.
Present:—Mr. Justice Campbell.
EMPEROR THROUGH VIR SINGH—
COMPLAINANT—PETITIONER
versus
SOHAN SINGH—ACCUSED—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 562—*Lambardar *pocketting money received as water rate—Sentence.*

Where the accused, a *lambardar*, is convicted for pockctting the water rate money received by him as an agent of the Government from the complainant a landowner, the case is not a fit one to be dealt with under s. 562, Cr. P. C.

Case reported by the Sessions Judge, Amritsar, with his No. 713-M, dated the 31st August 1925.

FACTS.—Sohan Singh accused is the *lambardar* of the village Lopoki and Vir Singh complainant is a landowner of that village. Rupees 46-6-0 was due on a water rate from Vir Singh who paid the said amount to *lambardar* obtaining from him receipt Ex. PA. The complainant is illiterate and was satisfied with the receipt as it was given to him. The *lambardar*, however, pocketted that money and did not credit it into the Government Treasury. On the other hand sometime later he applied for a warrant to realize the amount from Vir Singh through Tahsil. On warrant being issued Vir Singh had to pay the *abiana* second time. He then lodged a complaint against the accused under s. 420, Indian Penal Code The accused denied the receipt PA as well as the receipt of the money alleged to have been paid by the complainant on the said receipt (Ex. PA). The complainant, however, proved by the evidence of several witnesses that he had really paid the amount to the accused on the first occasion and that the accused cleverly did not sign the receipt, Ex. PA, given by him. Other receipts admittedly given by the accused to other persons were produced and the opinion of the Government Examiner of Questioned Documents Mr. Brewster was obtained. The expert also supported the prosecution. The Magistrate finding that the accused had really received the *abiana* on the first occasion and given the receipt Ex. PA, convicted the accused under s. 420, Indian Penal Code, but sentenced him under s. 562, Cr. P. C., to furnish two securities for Rs. 3,000 for two years.

The complainant has filed a petition of revision, and urges that the offence really falls under s. 409, Indian Penal Code, and that the complainant has suffered a lot and paid Rs. 200 as fee to the hand-writing expert, that the sentence awarded is too mild, and that the accused should be given substantial punishment, and out of the fine, complainant should be awarded reasonable compensation.

GROUNDS.—The accused has filed no appeal against his conviction and having gone through the file, I find the facts as stated above to be fully proved by the evidence on the record. The conviction of the accused is amply justified. I also think the proper section applicable is 409, Indian Penal Code, and not 420, Indian Penal Code. The accused is an agent of the Government and was given *abiana* in that capacity and he misappropriated the amount. In any case, the sentence under s. 562 is certainly ridiculous in a case like this. The accused is said to be an old man of 62 years with a good previous record and that may be a good ground for not sending him to Jail, but that is no reason why he should not be fined substantially for having committed such a serious offence and so boldly, especially as the Magistrate himself remarks that his attitude in this case from the beginning to the end had been very unsatisfactory. It is recommended, therefore, that the conviction may be altered to one under s. 409, Indian Penal Code, and the sentence enhanced to a fine of Rs. 300 or in default the accused to undergo simple imprisonment for 6 months. It may be further ordered that out of the fine, if realized Rs. 200 may be paid to the complainant as a compensation under s. 545, Cr. P. C.

Lala *Amar Nath Chona*, for the Government Advocate, for the Petitioner.

Mr. *Ghulam Rasul*, for the Respondent.

ORDER.—The facts are given in the report by the learned Sessions Judge. The case was obviously one not suited for the application of s. 562, Cr. P. C. The Crown is represented and the learned Counsel appearing does not press for any greater sentence than that recommended by the learned Sessions Judge. A sentence of imprisonment, however, is obligatory under the law for an offence either under s. 409 or under s 420, Indian Penal Code.

Since the accused was not charged under s. 409, Indian Penal Code, I maintain the conviction under s. 420, Indian Penal Code, and sentence the accused to pay a fine of Rs. 300 and undergo one day's simple imprisonment. In default of payment of the fine the accused shall undergo 6 months, rigorous imprisonment. Rupees 200 of the fine to be paid to the complainant as compensation as recommended by the learned Sessions Judge.

R. L. *Conviction altered.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 849 OF 1925.

November 20, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice.

TARA SINGH—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 216B—False information to Police, whether harbouring.

A person giving false information to the Police with respect to a proclaimed offender or warning the latter of the approach of the Police so that he might make good his escape is guilty of the offence of harbouring.

Emperor v. *Husain Bakhsh*, 25 A. 261; A. W. N. (1903) 29, not followed.

Muchi Mian v. *Emperor*, 40 Ind. Cas. 731; 21 C. W. N. 1062; 26 C. L. J. 141; 18 Cr L. J. 731, *Akbar Ali* v. *Emperor*, 72 Ind. Cas. 949; 24 Cr. L. J. 485, followed.

Application for revision of an order of the Sessions Judge, Lahore, dated the 16th February 1925, affirming that of the Magistrate, First Class, Lahore, dated the 26th January 1925.

Mr. *I. C. Chopra*, for the Petitioner.

Mr. *Ram Lal*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The petitioner Tara Singh has been convicted under s. 216, Indian Penal Code, of having harboured an absconder Dhara Singh, and has been sentenced to rigorous imprisonment for six months.

The evidence on the record shows that Tara Singh was found sleeping at his threshing floor on the same *charpoy* with Dhara Singh, and that, when questioned by the Head Constable as to who his companion was, he replied that he was his guest and nephew. The question is whether these facts amount to "harbouring" within the meaning of s. 216-B.

Now, it has been held by the Allahabad High Court in the case of *Emperor* v. *Husain Bakhsh* (1), that the words "or assisting a person in any way to evade apprehension" as used in that section must be taken to indicate some method *ejusdem generis* with those that have been specified in the section, and that giving false information to the Police does not amount to harbouring within the meaning of the section. This view has, however, been dissented from by the Calcutta High Court and other Courts, *vide, inter alia, Muchi Mian* v. *Emperor* (2) and *Akbar Ali* v. *Emperor* (3). I consider that when a person gives false information to the Police with respect to a proclaimed offender, or warns him of the approach of the Police, in order that the said offender may make good his escape, he is guilty of the offence of harbouring him.

For the aforesaid reasons I hold that the petitioner has been rightly convicted. He has, however, been released on bail, and I accordingly accept the application for revision so far as to reduce the period of imprisonment to that already undergone.

R. L. *Revision partly accepted.*

(1) 25 A. 261; A. W. N. (1903 29.

(2) 40 Ind. Cas. 731; 21 C. W. N. 1062; 26 C. L. J. 141; 18 Cr. L. J. 731.

(3) 72 Ind. Cas. 949; 24 Cr. L. J. 485.

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 237 OF 1925.

January 29, 1926.

Present:—Mr. Justice LeRossignol.

SOHAN LAL—ACCUSED—PETITIONER

versus

GOPAL SINGH—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Convenience of parties.

For purposes of transfer, it is the convenience of the accused rather than that of the complainant that has to be considered.

Petition, under s. 526, Cr. P. C., for transfer of the case from the Court of the Magistrate, First Class, Montgomery, to the Court of some competent jurisdiction at Pakpattan, District Montgomery.

Lala *Ishar Das*, for the Petitioner.

Lala *Jagan Nath Bhandari*, for the Respondent.

ORDER.—The petitioner is the accused in the case and his convenience has to be considered rather than that of the complainant who, however, belongs to petitioner's village.

Montgomery is far away from the petitioner's abode, whilst Pakpattan is near. I transfer the case to the Court of Sub-Divisional Officer, Pakpattan.

R. L. *Case transferred.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 752 OF 1925.
February 18, 1926.
Present :—Mr. Justice Walsh, and
Mr. Justice Dalal.
Musammat DULLI—APPLICANT
versus
MANGLI AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 439 (4)—Murder trial—Conviction under s. 323, Penal Code—Revision—High Court's power to record conviction and sentence under s. 325.

If in a case tried under s. 302, Penal Code, on the facts disclosed and found an offence under s. 325, Penal Code, is committed but the Trial Court without considering the applicability of s. 325 acquits the accused under s. 302 but convicts and sentences him under s. 323, Penal Code, the High Court is not precluded by anything in s. 439 (4), Cr. P. C., from recording the conviction and sentence under s. 325, Penal Code, inasmuch as there was no acquittal under s. 325.

Criminal revision from an order of the Second Additional Sessions Judge, Cawnpore, dated the 26th October 1925.

Mr. *H. Cecil Desanges*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—On an application made by a relation of a deceased person a learned Judge of this Court issued notice to four persons to show cause why the sentence passed on them by the learned Sessions Judge of Fatehpur should not be enhanced. The four men have been convicted of an offence under s. 323 of the Indian Penal Code and the maximum sentence has been passed. The question, therefore, will arise of an alteration in the conviction if the sentence has to be enhanced.

The facts as found by the learned Judge are that one Maiku was attacked with *lathis* by these four men and extensive injuries were caused to him. He died immediately after and at the *post mortem* examination it was found that his ribs had been broken. According to the medical witness death was due to rupture of the spleen resulting from the fracture of the ribs. The spleen was not enlarged. The learned Judge acquitted the accused persons of an offence under s. 302 of the Indian Penal Code but did not consider whether an offence under s. 325 of the Indian Penal Code was committed or not.

The learned Assistant Government Advocate pointed out that under s. 439 of the Cr. P. C. this Court was precluded from converting the finding of acquittal under s. 302 into one of conviction as there was no Government appeal. This has been laid down by a Bench of this Court in the case of *Emperor* v. *Sheo Darshan Singh* (1) and in a judgment of the learned Chief Justice in *Nand Ram* v. *Khazan* (2). In the present case, however, we do not propose to alter the acquittal under s. 302 of the Indian Penal Code to one of conviction under that section. The injuries were caused not on the head or neck but on the lower portion of the body and it appears likely that the accused persons had not the intention of causing death. There is also no evidence that the injuries intended to be inflicted were sufficient in the ordinary course of nature to cause death. The medical witness has not stated that fracture of the ribs in the ordinary course would lead to a rupture of the spleen.

The question at issue is whether upon the facts disclosed and found by the lower Court a conviction under s. 325 should be recorded or not. There has been no acquittal of the accused persons of an offence of causing grievous hurt, so we are of opinion that we are not precluded from convicting the accused persons of that offence by reason of cl. (4) of s. 439 of the Cr. P. C. It is certain that Maiku's ribs were fractured during the beating given to him by the accused persons and it ought to make no difference whethar the ribs were fractured by *lathi* blows or by Maiku being knocked down on the ground. The extensive marks of injuries found on Maiku's person at the time of the *post mortem* examination leave no doubt that the intention of the accused persons was to cause grievous hurt. There is no suggestion made on the part of the defence that the ribs were not fractured during this particular beating. The defence that Maiku was beaten two days earlier and died from the effects of the injuries received then has been negatived by the medical evidence which is to the effect that the injuries were such as to result in death immediately after they were received. After such injuries the injured person could not have survived for two days.

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(1) 65 Ind. Cas. 858; 44 A. 332; 20 A. L. J. 190; 23 Cr. L. J 202; A. I. R. 1922 All 487.

(2) 61 Ind. Cas. 161; 19 A. L. J. 589; 22 Cr. L. J. 337.

We do not agree with the observation of the learned Judge:—"It cannot be presumed that the accused Nos. 2 to 5 caused the fracture of the ribs." When there is no evidence or suggestion that the ribs were fractured otherwise than during this particular beating, the presumption is that they were fractured by the act of the accused persons even though they may not have been fractured as the direct result of *lathi* blows.

In the result we alter the conviction to one under s. 325 of the Indian Penal Code and enhance the sentence in each case to rigorous imprisonment for five years.

S. D. *Conviction altered.*

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 30 OF 1926.

March 12, 1926.

Present:—Mr. Justice Fforde.

NARAIN SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Magistrate accepting hospitality of complainant's son—Transfer of case.

A Magistrate's accepting hospitality of the complainant's son is a circumstance which would naturally raise a reasonable apprehension in the mind of the accused that he would not have a fair trial though the Magistrate may have been quite ignorant of the fact that his host was the son of the complainant.

Petition, under s. 526, Cr. P. C., for transfer of the case from the Court of the Tahsildar, Chakwal, District Jhelum, to any other competent Magistrate's Court at Jhelum or in the District.

Dr. *Nand Lal*, for the Petitioner.

ORDER.—The Tahsildar admits that he accepted the hospitality of Kartar Singh the complainant's son. Although I would accept the Tahsildar's statement that it was not done with any ulterior motive and that he merely did so in ignorance of the fact that his host was the son of the complainant Mula Singh, at the same time this would naturally raise a reasonable apprehension in the mind of the accused that they would not have a fair trial in the Tahsildar's Court. I accordingly direct that the case amy be transferred to such other competent Court as the District Magistrate deems fit.

R. L. *Case transferred.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 172 OF 1926.

March 20, 1926.

Present:—Mr. Justice Campbell.

MAMI—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 437—District Magistrate—Further enquiry, when to be ordered.

District Magistrate's powers to direct further enquiry should be exercised in exceptional cases and for good reasons. Further enquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence obviously incomplete. [p. 134, col. 1.]

A Magistrate's disbelieving witnesses for reasons not cogent is no ground for ordering re-trial. [*ibid.*]

Emperor v. *Kiru*, 11 Ind. Cas. 132; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 12 Cr. L. J. 364; 205 P. L. R. 1911, relied on.

Petition, for revision of an order of the Additional District Magistrate, Multan, dated the 15th December 1925, reversing that of the Magistrate First Class, Multan, dated the 24th June 1925.

Dr. *Shuja ud-Din*, for the Petitioner.

JUDGMENT.—The principles upon which the District Magistrate's powers to direct further enquiry under s. 437, Code of Criminal Procedure, are to be exercised are laid down in *Emperor* v. *Kiru* (1). Such further enquiry should only be ordered in exceptional cases and for good reasons shown. Originally when a man is discharged under circumstances which make the order of the discharge equivalent to one of the acquittal no further proceedings should be taken against him under s. 437, and speaking generally further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete.

In the present case the Magistrate's order of discharge is one which deals with the prosecution evidence very exhaustively and is certainly equivalent to one of acquittal. The case is not an exceptional one. It is one of very common occurrence, a cattle theft case where the actual theft was not witnessed. Such cases in the experience of every Magistrate are exceedingly difficult to unravel and the evidence is often unsatisfactory. The learned Additional District Magistrate has not regarded the order of discharge as manifestly perverse or foolish and it was not based upon a record of evidence which was obviously incomplete. All that the Additional District Magistrate was prepared to hold was that the reasons given by the Trial Magistrate for disbelieving Ahmad and Sajjawal were not cogent.

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(1) 11 Ind. Cas. 132; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 12 Cr. L. J. 364; 205 P. L. R. 1911.

This opinion on the authority just quoted was not sufficient ground for ordering a re-trial. I accept the petition and set aside the order of the Additional District Magistrate The petitioner will be discharged from his bail-bond.

R. L. *Petition accepted.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 962 OF 1925.
March 10, 1926.
Present:—Mr. Justice Broadway and
Mr. Justice Fforde.
KANSHI AND OTHERS—ACCUSED—
APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 300, Exception—Burden of proof—Offence committed without premeditation and in heat but with hatchet—Benefit of Exception—Criminal Procedure Code (Act V of 1898), s. 439—Revision—Acquittal, conversion of, into conviction.

The onus is on the accused to show that his case falls into one of the Exceptions to s. 300, Penal Code. [p. 135, col. 2.]

Although culpable homicide may have been committed without premeditation and in a sudden fight and also in the heat of passion upon a sudden quarrel, if it appears that the accused had used a hatchet on another unarmed man and had struck a blow on the latter's head with a hatchet splitting the skull while under no reasonable apprehension of injury to himself, he cannot claim the benefit of Exception 4 to s. 300, Penal Code. [*ibid.*]

Where an accused has been convicted of one offence and acquitted of another, the High Court is competent on the revision side to convert the acquittal into conviction [p 136, col. 1.]

Emperor v. *Shivakutraya Durdundaya*, 86 Ind. Cas. 478; 48 B. 510; 26 Bom. L. R. 438; A. I. R. 1924 Bom. 436; 26 Cr. L. J. 680, dissented from; *Kambam Bali Reddy* v. *Emperor*, 22 Ind. Cas. 756; 37 M. 119; 15 Cr. L. J. 179 and *Bhola* v. *Emperor*, 12 P. R. 1904 Cr.; 1 Cr. L. J. 942; 110 P. L. R. 1904, followed.

Appeal from an order of the Sessions Judge, Karnal at Rohtak, dated the 27th August 1925

Dr. Sir *Mian Muhammad Shafi*, KT., and Mr. *Muhammad Rafi*, for the Appellants.

Mr. *J. M. Mackay*, for the Government Advocate, for the Respondent.

JUDGMENT.

Broadway, J.—Kanshi son of Phule, Ram Gopal son of Data Ram and Mai Dhan son of Lajje, *Banias* of *Mauza* Pinahana in the Sonepat Tehsil of the Rohtak District, have been convicted of having caused the death of one Ram Gopal son of Ghasi Ram, grievous hurt to one Santu and simple hurt to one Asa Ram, and have been awarded various terms of imprisonment and Mai Dhan and Ram Gopal have also been directed to pay fines. Against their convictions and sentences they have preferred this appeal to this Court. The relatives of the deceased Ram Gopal son of Ghasi Ram have also moved this Court under s. 439, Cr. P. C., praying that the convictions of the three persons named should be under s 302, Indian Penal Code, and appropriate sentences awarded.

The facts are simple. It appears that on the 24th April 1925 at about 9 A. M. a boy named Ram Govind, aged 12 years, had a quarrel with a lad named Moti of about 15 or 16 years of age outside a *shivala*. Ram Govind abused Moti who struck Ram Gobind and twisted his finger. This was witnessed by Santu (P. W. No. 12), a young man aged about 22, who was related to Ram Govind. Santu slapped Moti. This incident was witnessed by the three appellants who were at Ram Gopal appellant's shop a few paces from the *shivala*. These three proceeded to assault Santu in revenge for his having slapped Moti. Ram Gopal was armed with a *gandas*; Kanshi with a hatchet and Mai Dhan with a *khunta* or pole forming part of a bullock-cart—all three formidable weapons. According to the evidence, Mai Dhan was the first to hit Santu inflicting an injury on his head; Kanshi struck him a violent blow on his chest with a hatchet cutting his sternum and actually damaging the lung. Santu fell and was struck by Ram Gopal on the calf of his leg with the *gandas* inflicting an injury 8" long 2¼" wide and deep to the bone. In the meantime Asa Ram, father of Ram Gobind, appeared on the scene and was assaulted in his turn by Kanshi with a hatchet and Mai Dhan with a *khunta*. Asa Ram was not armed. Immediately behind him came Ram Gopal son of Ghasi Ram who received a violent blow on the head delivered by Kanshi with a hatchet. Ram Gopal was felled to the ground and died. Immediately behind him came Ratan at whom Ram Gopal appellant aimed a blow with a *gandas*. Ratan managed to catch hold of the *gandas* and kept hold of it in spite of being hit by Kanshi with a hatchet. Babaria (P. W. No. 8), a *Jat*, arrived on the scene and took hold of his *gandas*. Other people then arrived and the incident came to an end, the parties being separated. The matter was reported at 5-30 P. M. on the same day, the Police Station being 13 miles distant.

It has been urged that there was delay in making the report, but having regard to the circumstances I do not think that there is anything sinister in the time that elapsed. It has to be borne in mind that an attempt to make a report on the part of the other side was made even at a later time on the same day.

It has been urged that there was no previous enmity between the parties who are *Banias* by caste and that the whole affair was sudden and unpremeditated. Although one of the appellants has attempted to show in his statement that there was some previous ill-feeling, I think it may be accepted that the relations between the parties were not such as to supply any adequate motive for violence of this nature. It may be accepted that the occurrence took place suddenly and was due to the quarrel between Ram Govind and Moti.

An attempt was made by the defence to prove that there was a general fight between two factions but the evidence led, which was read to us by Sir Muhammad Shafi, has only to be referred to to show how utterly absurd this theory is. While attempting to establish the innocence of the appellants, non of the witnesses makes any attempt to account for the injuries inflicted upon Santu, Ram Gopal son of Ghasi Ram or Asa Ram. I would, therefore, hold in agreement with the learned Sessions Judge that the story told by the prosecution as detailed is substantially accurate.

It remains to consider what offence or offences the appellants have committed. With regard to Kanshi, there can be no doubt that he is responsible for the grievous hurt caused to Santu, and the death of Ram Gopal son of Ghasi Ram. The learned Sessions Judge, in disagreement with the assessors, has found that the act of Kashi in connection with the death of Ram Gopal son of Ghasi Ram constituted an offence under the second part of s. 304, Indian Penal Code, and for that offence Kanshi has been awarded ten years' rigorous imprisonment. He has also been convicted of having caused grievous hurt to Santu and Asa Ram and for the first offence has been sentenced to seven years' rigorous imprisonment and for the second to one year's rigorous imprisonment, the sentences to run consecutively. I would note here that the assessors, who were four in number, were unanimously of opinion that all the appellants were guilty of murder and causing grievous hurt with an instrument used for cutting—section 326, Indian Penal Code. Now, as far as Kanshi's act in connection with the killing of Ram Gopal son of Ghasi Ram is concerned, the onus is on Kanshi to show that his act fell within one of the Exceptions to s. 300. It has been urged that inasmuch as the offence committed was entirely unpremeditated and was the result of a sudden quarrel, it fell within the 4th Exception to s. 300. That Exception runs as follows:—

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

It may be granted that in the present case culpable homicide was committed without premiditation and in a sudden fight and also in the heat of passion upon a sudden quarrel, but it seems to me that when a man uses a hatchet on another unarmed man and strikes him a blow on the head with that hatchet splitting his skull while he was under no reasonable apprehension of injury to himself, cannot claim the protection that this Exception affords. In my judgment the offence committed by Kanshi in killing Ram Gopal falls within the purview of s. 302, Indian Penal Code, and I would, therefore, alter his conviction to one under that section and sentence him to transportation for life. I would also maintain his conviction under s 326 in respect of the injuries caused to Santu and Asa

Ram, but do not think it necessary to pass any separate sentence for those offences.

Ram Gopal appellant has been found guilty of having caused simple hurt to Santu with a sharp edged weapon an offence under s. 324. In my judgment his attack on Santu falls within the purview of s. 326, Indian Penal Code. As stated above, all the three appellants came together from Ram Gopal appellant's house or shop with a view to assaulting Santu in revenge for his having slapped Moti. Of these three persons two of whom one was Ram Gopal, were armed with formidable sharp edged weapons while the third was armed with a heavy pole. All three used the weapons that they were armed with on Santu and having regard to the provisions of s. 34, Indian Penal Code, I consider that they all had the intention of causing at least grievous hurt to Santu. Grievous hurt was actually caused. I would, therefore, alter the conviction of Ram Gopal to one under s. 326 and sentence him to seven years' rigorous imprisonment. The fine however is set aside and if paid will be refunded. In the case of Mai Dhan he has been found guilty of having caused simple hurt to Santu and Asa Ram. In my opinion his case is on the same footing as that of Ram Gopal so far as the attack on Santu is concerned, and I would, therefore, alter his conviction to one under s. 326, Indian Penal Code, and sentence him for that offence to seven years' rigorous imprisonment. I do not think it necessary to inflict any separate sentence on him for the offence committed in regard to Asa Ram, and I would, therefore, direct that the fine, if paid, be refunded.

Before concluding I would note that it has been urged at the Bar that this Court has no power under s. 439 (4) to enhance the sentence as the decision of the learned Sessions Judge amounted to an acquittal on the more serious charges. In this connection attention was drawn to *Emperor* v. *Shivaputraya Durdundaya* (1). That authority no doubt supports the contention but the contrary view was taken by the Madras High Court in *Kambam Bali Reddy* v. *Emperor* (2) and by this Court in *Bhola* v. *Emperor* (3) which I think is the correct view for me to follow.

Fforde, J.—I agree. I must confess I have some doubts whether sub-cl. (4) of s. 439 of the Cr. P. C. does not prohibit a Court from convicting in revision on a charge upon which the Trial Court has in effect acquitted an accused. Being bound, however, by the unanimous current of decisions of this Court it would serve no useful purpose to express my views upon this question.

R. L. *Conviction altered.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 38 OF 1926.

February 18, 1926.

Present:—Mr. Justice Daniels.

MATHURA PRASAD—ACCUSED

versus

MUNICIPAL BOARD, ETAWAH—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), s. 307 (b)—Order of continuing fine when can be passed.

It is not legal for a Magistrate to pass an order of continuing fine in a trial for an unauthorised construction. Such an order can be passed only on a separate trial if the accused fails to remove the unauthorised construction after his original trial.

Criminal reference made by the Additional Sessions Judge, Etawah, dated the 7th of December 1925.

Mr. *Sailanath Mukerji*, for the Applicant.

JUDGMENT.—This case has been referred by the Additional Sessions Judge of Mainpuri on the ground that an order of continuing fine purporting to be passed under s 307 (*b*) of the U. P Municipalities Act is illegal. The Magistrate convicted the accused of constructing a culvert without the permission of the Municipal Board and fined him Rs. 20. At the same time he ordered the accused to remove the culvert and directed that if he failed to do so he would have to pay a daily fine of Re. 1 so long as it was not removed. The learned Magistrate in his explanation justifies the order as covered by s. 307 (*b*). The provisions of this section are constantly misunderstood by Magistrates in spite of their effect having been pointed out more than once by this Court. Section 307 (*b*) says that the offender shall be liable on conviction before a Magistrate to a daily fine for every day after the date of the first conviction during which the offender is proved to have persisted in the offence. This clearly implies that there must be a separate prosecution and a separate conviction after the accused has failed to comply with the order and has rendered himself liable to a continuing fine. A Magistrate cannot at the time of the original conviction pass an order in respect of a future offence. This was already laid down by this Court in *Amir Hasan Khan* v. *Emperor* (1) and again in *Kashmiri Lal* v. *Emperor* (2). I accordingly accept the reference and set aside that part of the Magistrate's order which imposes a daily fine on the accused.

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(1) 86 Ind. Cas. 478; 48 B. 510; 26 Bom. L. R. 438; A. I. R. 1924 Bom. 456; 26 Cr. L. J. 830.

(2) 22 Ind. Cas. 756, 37 M. 119; 15 Cr. L. J. 179.

(3) 12 P. R. 1904 Cr.; 1 Cr. L. J. 942; 110 P. L. R. 1904.

S. D. *Reference accepted.*

(1) 46 Ind. Cas. 150; 40 A. 569; 16 A. L. J. 527; 19 Cr. L. J. 694.

(2) 63 Ind. Cas. 410; 43 A. 644; 19 A. L. J. 541; 22 Cr. L. J. 650; 3 U. P. L. R. (A.) 175.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 1196 OF 1925.
January 22, 1926.
Present:—Mr. Justice Dalip Singh.
GHULAM MUHAMMAD AND ANOTHER—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 304II— Lethal *blow—Knowledge of likelihood of causing death—Presumption.*

When a person chooses to lay about with a *lath*, it being a *lethal* weapon, with all the force at his command, it must be presumed that he knew he was likely to cause death.

Appeal from an order of the Sessions Judge, Jhelum, dated the 27th October 1925.

Mr. *Balkishan* for Diwan *Chaman Lal*, for the Appellant.

Lala *Din Dyal Kapur*, for the Government Advocate, for the Respondent.

JUDGMENT.—In this appeal Ghulam Muhammad and Nur Muhammad, sons of Mahmud, have been convicted under s. 304, Part II, Indian Penal Code for causing the death of Sardara and have been sentenced to rigorous imprisonment for ten years each.

The facts as found by the learned Sessions Judge on the evidence led in the case seem to be that Ghulam Muhammad and Nur Muhammad were leading some bullocks and happened to pass by the threshing-floor of the complainants. It is amply proved on the record that there were various grounds for enmity between the party of the complainants and of the appellants. The result was that owing to certain circumstances which have not been proved at all a fight seems to have occurred between Ghulam Muhammad and Nur Muhammad on one side and Raja and Sardara on the other. Barkhurdar, who made the First Information Report, at first mentioned four persons as having taken part in the fight and having caused the death of Sardara and injuries to Raja and Jafar. Subsequently he seems to have implicated nine more persons. Twelve persons were challaned in all of whom ten have been acquitted by the learned Sessions Judge and two, Ghulam Muhammad and Nur Muhammad, have been convicted. The names of these men are mentioned in the First Information Report and there seems no reasan to doubt, especially as both have injuries on their persons, that they were present in the fight. It is equally clear that Sardara and Raja were also present in the fight that took place. According to the prosecution evidence—and there is no defence evidence in the case at all—Jafar, who also received injuries, ran away before the fight, in which Sardara was killed, began. The learned Sessions Judge has found from this evidence that Jafar received his injuries at the hands of persons other than the appellants. Be this as it may, the result is that Sardara received five injuries two of which were fatal; one being a blow on the head with a *lathi* which fractured the skull, and another being a blow on the back which ruptured the spleen. Raja received twenty injuries in all two of which were grievous. The finding, therefore, of the learned Sessions Judge at any rate is correct to this extent that Ghulam Muhammad and Nur Muhammad laid about them with all the force at their command with *lathis*. Now, a *lathi* is a lethal weapon and, if a person chooses to lay about with a lethal weapon with all the force at his command, it must be presumed that he knew he was likely to cause death. I, therefore, consider that the conviction under s. 304, Part II, is, in the circumstances of this case, justifiable. At the same time I do not consider that this is a case in which the maximum sentence need be inflicted, because, though there is no direct evidence on the record to prove this, the circumstances seem to point to the complainants having in all probability been the aggressors, and I, therefore, accept the appeal so far as to reduce the sentence to rigorous imprisonment for five years in the case of each appellant.

R. L. *Appeal partly accepted.*

LAHORE HIGH COURT.

CRIMINAL REFERENCE NO. 1723 OF 1925.

January 29, 1926.

Present:—Mr. Justice Broadway.

NOTIFIED AREA *alias* SMALL TOWN AREA, COMMITTEE, KHARAR THROUGH UTTAM SINGH—COMPLAINANT—PETITIONER

versus

KARTA RAM AND ANOTHER—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 250—Appellate Court, power of, to award compensation.

Section 250 does not authorise a Court of Appeal to grant compensation.

Balli Pande v. *Chittan*, 28 A. 625; 3 A. L. J. 382; A. W N. (1906) 145; 3 Cr. L. J. 441, *In re Pitambar Dwarkadas*, 7 Bom. L R. 993; 3 Cr. L. J. 88, *Mehi Singh* v. *Mangal Khanda*, 12 Ind. Cas 297; 39 C. 157; 14 C. L. J. 437; 16 C. W. N. 10; 12 Cr. L J. 529 and *Chedi* v. *Ram Lal*, 81 Ind. Cas. 615; 46 A. 80; 21 A L. J. 834; 9 O. & A. L. R 1056; A. I. R. 1924 All. 224; 25 Cr. L. J. 967, followed.

Case reported by the Sessions Judge, Ambala, with his No. 1332G of 13th October 1925.

FACTS.—On 17th March 1923, Rajab Ali Darogha of the Notified Area Committee, Kharar reported that Karta Râm and Chajju Ram had built two *qadamchas* of stairs in a public street without getting permission. Upon this a notice was issued to them by the Committee on 31st March 1923 to demolish within a month. The notice was not complied with. Upon this the Committee lodged a complaint under s. 219 of Act III of 1911 against these persons. The Tahsildar who tried the case convicted the accused and sentenced them to pay a fine of Rs. 50 each and a penalty of Rs. 160. From this order the accused appealed to T. B. Deeks Esquire, Sub-Divisional Magistrate, First Class, Rupar, who accepted the appeal, set aside the conviction and sentence and holding that the prosecution was of a malicious nature awarded Rs. 10 compensation to the accused. The Notified Area Committee filed a revision from this order praying that the award of compensation be set aside.

GROUNDS.—Under s. 250, Cr. P. C., compensation can be awarded only by the Magistrate by whom the case was heard. That such powers cannot be exercised by Courts of Appeal is clear by the rulings of the various High Courts [*vide Balli Pande* v. *Chittan* (1), *In re, Pitambar Dwarkadas* (2), and *Mehi Singh* v. *Mangal Khanda* (3).] The last is a Full Bench ruling and discusses in full clause (*d*) of s. 423. The order awarding a compensation does not necessarily follow or arise out of an order of discharge or acquittal and it is not *per se* an order "Consequential or incidential thereto." There is no ruling of our own Hon'ble High Court on the point, at least none has been brought to my notice but s. 250 itself is very clear.

It is recommended that the order of T. B. Deeks, Esquire dated the 16th February 1924 awarding compensation to the accused be set aside.

Lala *Hukam Chand*, for the Petitioner.

ORDER.—This is a reference under s. 439 of the Cr. P. C. made by the learned Sessions Judge of Ambala in the following circumstances:—

The Notified Area Committee of Kharar instituted a case against Karta Ram and Chajju Ram under s. 219 of Act III of 1911. The Trying Magistrate found the accused persons guilty and sentenced them to certain fines. An appeal by them to the Sub-Divisional Officer of Rupar, who had appellate powers, resulted in their acquittal and in an order under s. 250, Cr. P. C., directing the Notified Area Committee as complainant to pay to each of the persons proceeded against a sum of Rs. 5 by way of compensation. The Notified Area Committee moved the learned Sessions Judge on the revision side who has sent this case up with the recommendation that the order for compensation should be set aside as illegal.

In addition to the authorities quoted in the order of reference there is the case of *Chedi* v. *Ram Lal* (4) in which it was held that under the provisions of s. 250, Cr. P. C., it is only the Trying Magistrate who, if he discharges an accused person, can order compensation to be paid. The phraseology of s. 250, Cr. P. C., seems to me to be perfectly clear on this point.

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(1) 28 A. 625; 3 A. L. J. 382; A. W. N. (1906) 145; 3 Cr L. J. 441.

(2) 7 Bom. L. R. 998; 3 Cr. L. J. 88.

(3) 12 Ind. Cas. 297; 39 C. 157; 14 C. L. J. 437; 16 C. W. N. 10; 12 Cr. L. J. 529.

(4) 81 Ind. Cas. 615; 46 A. 80; 21 A. L. J. 834; 9 O. & A. L. R. 1056; A. I. R. 1924 All. 224; 25 Cr. L. J. 967.

I accept this reference and set aside so much of the Sub-Divisional Officer's order as directs the complainant to pay compensation to the persons accused. The compensation, if paid, will be refunded.

R. L. *Reference accepted.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1550 OF 1925.

January 22, 1926.

Present:—Mr. Justice Martineau.

SANTOSH SINGH AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 106—Penal Code (Act XLV of 1860), s. 452, conviction under—Security for keeping peace.

On conviction under s. 452, Penal Code, no security can be demanded for keeping the peace as the offence does not involve any breach of the peace.

Abdulla v. *Emperor*, 63 Ind. Cas. 869; 2 L. 279; 22 Cr. L. J. 709, followed.

Petition for revision of an order of the Sessions Judge, Rawalpindi, dated the 8th September 1925, modifying that of the Magistrate, First Class, Rawalpindi, dated the 28th August 1925.

Mr. *Mukand Lal Puri*, for the Petitioners.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—There is no sufficient reason for interfering with the convictions, but I set aside the orders passed under s. 106, Cr. P. C., as being illegal inasmuch as the offence under s. 452, Indian Penal Code, of which the petitioners have been convicted is not one involving breach of the peace [see *Abdulla* v *Emperor* (1).] I decline to interfere with the sentence of fine imposed on Dayal Singh. With regard to the remaining four petitioners, as they are on bail and have undergone the sentences of imprisonment imposed on them except for a period of three and four days, it is unnecessary to recommit them to Jail, and I accordingly reduce the sentence imposed on each of them to the period of imprisonment which he has already undergone.

R L. *Sentence reduced.*

(1) 63 Ind. Cas. 869; 2 L. 279; 22 Cr. L. J. 709.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1019 OF 1923.

November 9, 1923.

Present:—Mr. Justice Fforde.

SARDARA—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Examination of witnesses, mode of—Medical witness, whether can prove statement made in another trial.

A medical witness, like any other witness in a case, must be examined orally in the presence of the accused and cannot in lieu of such examination be allowed to prove statements made by him at the trial of other accused persons in the absence of the accused against whom his evidence is being recorded. [p. 139, col. 2; p. 140, col. 1.]

Criminal appeal from an order of the Magistrate, First Class, with s. 30 powers at Sargodha, dated the 30th August 1923.

Mr. *Mukand Lal Puri*, for the Appellant.

Lala *Amar Nath Chona*, for the Government Advocate, for the Respondent.

JUDGMENT.—The appellant has been convicted under ss. 304/149 of the Indian Penal Code and sentenced to five years' rigorous imprisonment. Unfortunately a great deal of evidence recorded has been illegally admitted. Two medical witnesses were called for the purpose of proving the nature of the injuries received by the deceased. Instead of giving their evidence orally as they were bound in law to do, they were allowed to prove statements made at the trial of other accused persons in the absence of the present appellant. Such a mode of giving evidence is illegal for three reasons. One is that the witness has not been examined and given his evidence orally; the second is that the statement which he purports to put in evidence is not admissible under these circumstances, and thirdly, it is given in the absence of the accused. The medical evidence, therefore, is not legally before me and must be ignored. The witnesses as to the circumstances of the offence of which the appellant has been convicted have, however, proved that the appellant took a prominent part in attacking the deceased though he did not strike the first blow which felled him and which probably caused his death. A number of witnesses have deposed to an active participation by the appellant in the fracas in question and their veracity has not been impeached, the defence of the appellant being that he was not present at all on the occasion in question. Unfortunately the Magistrate, who tried the case, at the conclusion of the oral testimony of the prosecution witnesses allowed a statement made by these witnesses in a trial to which the appellant was not a party and at which he was not present, to be brought upon the record. This procedure is entirely illegal. Were there no evidence upon the record which would enable me to come to a clear finding independently of the testimony which has been illegally introduced, I should be compelled to set the present conviction aside. There is, however, as I have already said, a great deal of evidence which conclusively proves the guilt of the accused of the offence with which he has been charged. As he does not, however, appear to have struck the blow which caused the death of the deceased, and as the fracas in question appears to have been an affray in which the friends of the deceased appear to have taken a very active (though possibly not an illegal) part, inasmuch as it appears from the investigation of the record that a number of the assailant party received injuries varying in severity, I am inclined to consider that the sentence inflicted in this case is too severe. Accordingly while upholding the conviction I reduce the sentence to one of three years' rigorous imprisonment and omit the solitary confinement. Otherwise the appeal stands dismissed.

Z. K. *Sentence reduced.*

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 43 OF 1926.
March 12, 1926.
Present :—Sir Shadi Lal, KT., Chief Justice.

BISHAMBAR AND OTHERS—COMPLAINANTS —PETITIONERS
versus
RAM CHAND AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 344—Complainant's witnesses not present—Adjournment—One accused, absence of—Costs.

A complainant should not be burdened with costs for an adjournment occasioned by his failure to produce evidence when one of the accused also happens to be absent on that day.

Case reported by the District Magistrate, Hoshiapur, with his No. 3601 dated the 26th December 1925.

FACTS.—The complainants-petitioners were ordered to pay Rs. 30 as compensation to the accused on an adjournment of the case to the 30th of September, 1925 by Sardar Gurdial Singh, Magistrate First Class, on the 3rd of September, 1925. It appears from the record that on the 3rd of September 1925 all the accused were not present, and that the Court could not in any case have proceeded. The facts are fully discussed in my order dated the 3rd of December, 1925; which is appended in original.

GROUNDS.—That as the adjournment was not due to the default of complainants-petitioners, the order for the payment of compensation should not have been passed.

Mr. *N. C. Pandit*, for the Respondent.

ORDER.—There can be no doubt that the complainants had committed default in producing their evidence, and that the Trial Magistrate would have been justified in ordering them to pay costs of the adjournment, had it not been for the fact that one of the accused was not present on the date in question, and that an adjournment was necessary in order to procure the attendance of the absent accused.

In these circumstances I set aside the order directing the complainants to pay Rs. 30 to the accused as costs of the adjournment.

R. L. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 990 OF 1925.
January 29, 1926.
Present:—Mr. Justice Harrison and Mr. Justice Fforde.

DINI—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 172—Police diaries, use of—Penal Code (Act XLV of 1860), s. 300 Excep. I—Provocation, grave and sudden.

To disbelieve defence story on the ground that it is nowhere mentioned in the Police *zimnis* amounts to using the *zimnis* in such a way as to strengthen the case for prosecution and it is against the provisions of the Cr. P. C. [p. 141, col. 2.]

If a man comes home and finds a person actually misbehaving with a relation of his, there is a provocation grave and sudden and his blood can hardly be expected to cool down in the course of a few seconds. [*ibid.*]

Criminal appeal from an order of the Sessions Judge, Ferozepore, dated the 7th September 1925.

Diwan *Ram Lal*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.

Harrison, J.—Dini sweeper has been found guilty in this case under s. 302, Indian Penal Code, of murdering Jowala Singh, *Jat*, by striking him on the head with a *gandhali*. The facts as found by the Sessions Judge are that this sweeper returned unexpectedly to the house, where he and his brother lived, and there found Jowala Singh with *Musammat* Har Kaur, his brother's wife. Jowala Singh ran away pursued by Dini, but was caught after he had run 50 *karams*, or about 90 yards, was struck down with a *gandhali* and then killed by blows on the head. The Sessions Judge has considered the question of provocation and has come to the conclusion that there was no such grave and sudden provocation as would bring the offence within the purview of the first Exception to s. 300.

The defence put forward was that the deceased died in consequence of his falling against a tree while being pursued by Dini, and we agree with the Sessions Judge in finding that this is wholly untrue, more than one blow having been struck on his head. We disagree from the Sessions Judge's finding that the weapon used was a *gandhali*. It is true that the evidence for the prosecution is to this effect, but it is contradicted by the medical evidence. We accept that medical evidence, which is very clear on the subject and find that the death was caused by blows with a blunt weapen and that the introduction of the *gandhali* is a piece of malicious exaggeration. The witnesses for the prosecution who are all *Jat* Sikhs, have told a story about a long standing intrigue between Jowala Singh and this sweeper woman and as suggesting further enmity the father of the deceased, Thulla Singh, P. W. No. 11, has asked us to believe that on one occasion his son who was apparently in the habit of gambling with Dini was struck by him; on a second he struck Dini, and he, Thulla Singh, went as a peacemaker and tendered Rs. 40 as blood money, which was accepted by the sweeper. This fable is a good indication of the bitter and unthinking animosity which is entertained by the witnesses for the prosecution. There is no evidence regarding the previous intimacy of Jowala Singh with this woman beyond the very vague assertion made by these interested witnesses. Their story of what happened on the fatal day is that Jowala Singh was driving his cattle home, that without any excuse or provocation of any sort Dini, advanced to meet him, and that without putting up any sort of fight he ran away was overtaken and killed. This story has not been believed by the learned Sessions Judge. On the other hand the story put forward by the defence has also been disbelieved, namely, that Dini came and found Jowala Singh actually having intercourse with his brother's wife. The reason the Sessions Judge has given for disbelieving this story is that it is no where mentioned in the *zimnis*. This reason amounts to making use of the *zimnis* in such a way as to strengthen the case for the prosecution and to show that the rival story told by the defence is untrue, a course forbidden by the provisions of the Cr. P. C. A further reason for finding that the Exception does not apply is that the chase is described as long, and presumably the hot blood of Dini should have cooled down during the long chase. The distance was 50 *karams*, or less than 100 yards, and if a man comes home and finds a person actually misbehaving with his relation, his blood can hardly be expected to have cooled in the course of 15 or 20 seconds.

After taking everything into account we are of opinion that it is sufficiently established that this sweeper Dini was filled with sudden rage brought about by grave and sudden provocation, that he lost his self-control and that his act in killing Jowala Singh amounted to culpable homicide not amounting to murder.

We accept the appeal in so far as to alter the conviction to one under s. 304-1, and reduce the sentence to seven years' rigorous imprisonment.

Fforde, J.—I agree.

R. L. *Appeal accepted.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1762 OF 1925.

January 29, 1926.

Present:—Mr. Justice LeRossignol.

GANDOO—ACCUSED—PETITIONER

versus

EMPEROR THROUGH AMRITSAR POLICE —RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 109—Attempt to avoid Police patrol—Security.

An attempt to avoid a Police patrol cannot bring the case of a shop keeper residing in a town within the ambit of s. 109, Cr. P. C.

Petition, for revision of an order of the District Magistrate, Amritsar, dated the 28th July 1925, affirming that of the Magistrate, First Class, Amritsar, dated the 15th June 1925.

Mr. *Devi Dayal* and Lala *Amar Nath Chopra*, for the Petitioner.

JUDGMENT.—Even on the facts found, the petitioner should not have been ordered to find security under s. 109, Cr. P. C. He is a resident and shopkeeper at Amritsar and an attempt to avoid a Police patrol does not bring a person within the ambit of s. 109, Cr. P. C.

I accept the petition and discharge the petitioner from his security.

R. L. *Petition accepted.*

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 1871 of 1925.

January 29, 1926.

Present:—Mr. Justice Campbell.

GHASITA—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 323, 334—Blow, striking of, under provocation—Offence.

It is not correct to say that a person who strikes a blow under provocation commits no offence.

Case reported by the District Magistrate, Sheikhupura, with his No. 111/12 of 1925.

FACTS.—Two constables, Bahadur Singh and Pir Shah, went to Chak No. 117 R. B. (accused's village) to see whether the people were performing ward and watch duties in the village and discovered that it was not done. They took Khazan Singh with them and went to the house of the accused's father the village *chaukidar*. They shouted the *chaukidar* to come out. His son, the accused, obeyed, but when he came out, Bahadur Singh and the accused exchanged abusive language. The accused struck Bahadur Singh with a stick. The accused was sent up to take his trial under s. 332, Indian Penal Code. The Trial Magistrate disbelieved the prosecution version that Bahadur Singh was in uniform at the time, and under s. 323, Indian Penal Code, sentenced the accused to a fine of Rs. 25 or in default to undergo one month's simple imprisonment.

GROUNDS.—Two foot constables, Bhadur Singh and Pir Shah, had gone to the accused's village to see whether the people were performing ward and watch duties. They discovered that no one was patrolling the village. They went to the house of the accused's father, who is a *chaukidar* of the village. It is alleged that the accused came out and after abusing the constables gave Bahadur Singh a blow of his *dang* which hurt Bahadur Singh.

Three witnesses have been produced in support of this story. Fazla, Wasawa Singh and Khazan Singh *lambardar*. Fazla and Wasawa Singh saw nothing Khazan Singh says that Bahadur Singh abused the accused and the latter struck him. This shows that even if we believe the statement of this witness, no offence has been committed because the accused struck the blow under provocation. The prosecution have entirely failed to establish any case against the accused, and he deserves acquittal.

Lala *Prakash Chand*, for the Petitioner.

ORDER.—The learned District Magistrate is in error when he says that no offence is committed by an accused person who strikes a blow under provocation. The maximum fine payable under s. 334, Indian Penal Code, is Rs. 500 and the present petitioner has been fined Rs. 25 only.

The only two witnesses who profess to have seen the incident do not establish in the accused's favour that he acted under grave and sudden provocation and the accused's story about the constable being injured by being pushed against the door is absurd.

I see no ground for interference, and dismiss the petition.

R. L. *Petition dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1769 OF 1925.

January 30, 1926.

Present:—Mr. Justice Campbell.

SARAJ DIN—COMPLAINANT—PETITIONER

versus

KHALIL SHAH AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 520—Scope.

An order by an Appellate Court under s. 520, Cr. P. C., staying or modifying, altering or annulling an order of a Subordinate Court can be made only when the order of the subordinate Court is one relating to property and made under ss. 517, 518 or 519, Cr. P. C.

Petition for revision of an order of the Additional Sessions Judge, Lahore, dated the 29th September 1925, reversing that of the Magistrate, First Class, Lahore, dated the 31st March 1925.

Lala *Parkash Chandra*, for Mr. *D. N. Mehra*, for the Petitioner.

Bakhshi *Sain Das*, for the Respondent.

JUDGMENT.—This revision petition concerns a child *Musammat* Iqbal Begam or Ghulam Fatima. Three persons, Khalil Shah, *Musammat* Mehr Bibi and *Musammat* Janat Bibi were prosecuted under s. 363, Indian Penal Code, at the instance of Siraj Din, who alleged that the girl was his daughter and had been kidnapped by the accused persons. The Magistrate who tried the case found, firstly, that *Musammat* Ghulam Fatima was the daughter of Siraj Din and had been kidnapped some 3½ years before the case; secondly, that Khalil Shah and *Musammat* Mehr Bibi were innocent persons who in good faith had received the child from the third accused *Musammat* Janat Bibi; and thirdly, that *Musammat* Janat Bibi was not proved to have kidnapped the child but that she had not been able to account for her possession of the child and that she had not come by her honestly On these findings, Khalil Shah and *Musammat* Mehr Bibi were discharged and *Musammat* Janat Bibi was acquitted, and an order was passed that the child should be returned to her parents Siraj Din and *Musammat* Rahim Bibi.

Khalil Shah and *Musammat* Mehr Bibi appealed to the Sessions Judge against the order making over the child to Siraj Din and *Musammat* Rahim Bibi, and the learned Additional Sessions Judge accepted the appeal and set aside the order as being without jurisdiction. Siraj Din has come to this Court with a petition for revision.

The first objection to the lower Appellate Court's order is that it itself was passed without jurisdiction, and this is quite clear. The learned Additional Sessions Judge purported to act under s. 520, but that section, on his own showing, did not apply, since the order was not one relating to property and was not passed under s. 517, 518 or 519 of the Cr. P. C. I accept the petition and set aside the order of the Additional Sessions Judge.

The question remains whether I should interfere on revision with the order of the Magistrate, but in the circumstances, I am not prepared to do so. The order was passed on the 31st March 1925 and was carried into effect immediately. The learned Session Judges's order for restoration to Khalil Shah has not been executed and there is no allegation made on behalf of Khalil Shah, who is represented before me by Counsel that the girl is being ill-treated or suffering in any way from the fact that she is in the custody of Siraj Din and his wife who claim to be her parents. Khalil Shah must in the circumstances be left to assert any rights that he may claim by an application to a Civil Court for guardianship or by such other proceedings in a Civil Court as he may be advised to institute.

R. L. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 1793 OF 1925.

January 29, 1926.

Present:—Mr. Justice Martineau.

DAYA RAM—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 112, 115—Copy of order not sent with notice—Notice, defective—Effect.

Where it appears that the person proceeded against under s. 110, Cr. P. C., was sufficiently informed as to the allegation against him an order passed against him on such proceedings cannot be set aside on the sole ground that the provisions of ss. 112 and 115 of the Code were not strictly complied with.

Case reported by the Sessions Judge, Karnal, with his No. 461-J of 2nd November 1925.

FACTS.—The applicant, Daya Ram *lambardar* of village Sagri, has been restricted for one year to his village under the Habitual Offenders' Act by order of the Revenue Assistant (Magistrate, First Class) Karnal. He appealed to the District Magistrate but the appeal was rejected by order dated 10th August 1925. He has now applied to this Court for revision.

GROUNDS.—The only ground for revision in which I see any force is that the notice forming the basis of the proceedings under s. 110, Cr. P. C., is defective and not valid. The substance of the charge against the applicant in the notice is given below:—

"*Adi sarqa maweshi us ki shohrat kharab hai marduman us ki adat se khaif hain aur sangin jaraim karne ka adi hai-wala mal sarqa wa naqab zan waghaira hai.*"

The words "*wala mal sarqa*" are unintelligible and convey no meaning at this place. This notice should have been accompanied with a copy of the order passed by the Magistrate when starting the proceedings, as required by s. 115 of the Cr. P. C, but no such copy seems to have accompanied this notice when it was served upon the applicant. In the order dated 21st of July 1924 on which this notice was issued there is no mention of cattle lifting; while in the notice the words "*sarqa maweshi*" indicate that he is charged also with theft of cattle. The order is very vague and indefinite and does not comply with the provisions of s. 112 of the Cr. P. C. What the contents of the order should be is described in detail in *In re Kutti Goundan* (1) which is cited by the applicant's Counsel. The Magistrate's non-compliance with the law contained in ss. 112 and 115 of the Cr. P. C. vitiates the trial.

The proceedings are, therefore, submitted to the High Court for revision with a recommendation that the order restricting the applicant be set aside and a new trial ordered after issue of a proper notice.

Lala *Parkash Chand*, for the Petitioner.

Lala *Gobind Ram Khanna*, for the Crown.

ORDER.—It seems to me clear that Daya Ram was sufficiently informed as to what the allegation against him was, and I decline to interfere. Let the records be returned.

R. L. *Records returned.*

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(1) 86 Ind. Cas. 49; A. I. R. 1925 Mad. 189; 47 M. L. J. 989; (1925) M. W. N. 57; 26 Cr. L. J 673.

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 154 OF 1926.

March 19, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice.

EMPEROR—PETITIONER

versus

MOHNA—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 345—Compromise with some of several accused—Effect on others.

The compounding of an offence with some of the accused does not effect the acquittal of the rest.

Case reported by the District Magistrate, Amritsar, with his No. 252, dated the 19th January 1926.

GROUNDS.—Harnam Singh, Tahal Singh, Chanchal Singh and Sunder Singh were convicted of an offence under ss. 325 and 149, Indian Penal Code. Mohna was an absconder in this case. On appeal in the Sessions Court a compromise under s. 345 Cr. P. C., was permitted by the Sessions Judge, between the injured party Bakshish Singh and the four convict-appellants. This compromise did not include and was not made with Mohna, absconder. The four appellants were acquitted. After this Mohna surrendered himself and was put on his trial. The Magistrate has acquitted him on the strength of *Chandra Kumar Das* v. *Emperor* (1). This ruling is out of date. A compromise only involves the acquittal of those with whom the compromise is made. The Magistrate's order is since the revision of the Cr. P. C. by Act XVIII of 1923 absolutely wrong in law.

ORDER.—The compounding of an offence with one or more of several accused persons has not the effect of acquittal in respect of the remaining accused between whom and the complainant no composition has been arrived at. This was the view adopted by this Court, and the matter has now been set at rest by the amendment of s. 345, Cr. P. C., by the Cr. P. C. Amendment Act, XVIII of 1923.

I accordingly accept the recommendation made by the District Magistrate and setting the order of the Court of first instance direct that the accused be tried in accordance with law.

R. L. *Order set aside.*

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(1) 7 C. W. N. 176.

LAHORE HIGH COURT.

First Civil Appeal No. 1452 of 1923.
February 19, 1925.
Present:—Justice Sir Henry Scott-Smith, Kt, and Mr. Justice Martineau.
Sayad MUBARAK ALI SHAH—
Plaintiff—Appellant
versus
The SECRETARY of STATE for INDIA—Defendant—Respondent.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal—Copy of decree essential—Land Acquisition Act (I of 1894), s. 26—District Judge's award, whether decree—Two appeals against same decree—Decree filed only in one appeal, whether sufficient for other appeal.

As under s. 26 of the Land Acquisition Act the award of a District Judge contains both a decree and a judgment and as it is essential that a copy of the decree appealed against should accompany memorandum of appeal, an appeal against the award is not properly filed without this memorandum. Therefore, where two appeals are filed by the same Vakil on the same day and from the same award of a District Judge, it is not a sufficient compliance with the provisions of O. XLI, r. 1, C. P. C., if instead of filing a copy of the award with the memorandum of each appeal it is filed only with one of them and a note is made on the other to the effect that the award has been filed with the other appeal.

Rijan Thakur v. *Charitar Thakur*, 69 Ind. Cas. 686; 1 Pat. 670; A. I. R. 1992 Pat. 580; 4 P. L. T. 290, referred to.

Muhammad Din v. *Zeb-un-nisa*, 77 Ind. Cas 541; 3 L. 215; A. I R. 1922 Lah. 390 and *Qasim Ali Khan* v. *Bhagwanta Kuar*, 42 Ind. Cas. 888; 40 A. 12; 15 A. L. J. 801, relied upon.

First appeal from a decree of the District Judge, Lahore, dated the 26th March 1923.

Dr. Sir Mian *Muhammad Shafi*, Kt., and Mr. *Rafi*, for the Appellant.

Kanwar *Dalip Singh*, Government Advocate and Lala *Mehr Chand Mahajan*, for the Respondent.

JUDGMENT.—These are two appeals by the same appellants as in Civil Appeals Nos. 2939 and 2940 of 1922 disposed of by us to-day.

They are from an award of the District Judge upon a reference by the Collector under the Land Acquisition Act, and relate to a subsequent acquisition of land made in pursuance of the notification dated the 23rd of February 1922.

The land in dispute in the present appeals is situated between that in dispute in the other appeals and Waris Road. The land of Hakim Muhammad Sharif in the present case is only 7/8ths of 1 *kanal* 3 *marlas*, in other words about 1 *kanal*; that of Sayad Mubarak Ali Shah is about 11 *kanals*. The appellants have been awarded Rs. 2,000 per *kanal* whereas Bashir Ahmad, whose land is immediately on Waris Road, has been awarded Rs. 2,500 per *kanal*. As regards the appeal of Sayad Mubarak Ali Shah, a preliminary objection has been taken by the learned Government Advocate to the effect that no copy of the award of the District Judge has been filed along with the appeal. Under s. 26 of the Land Acquisition Act as amended in 1921, the award of a District Judge shall be deemed to be a decree and the reasons for the award to be a judgment, within the meaning of the C. P. C. The award of the District Judge, therefore, from which these appeals have been brought contains both the decree and the judgment. In O. XLI, r. 1 of the C. P. C., it is laid down that "Every appeal shall be preferred in the form of a memorandum signed by the appellant or his Pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded." It is, therefore, essential that a copy of the decree appealed from shall accompany the memorandum of appeal. It cannot be dispensed with whereas a copy of the judgment may be dispensed with if the Court so directs.

The answer to this objection by Mr. Rafi, on behalf of Mubarak Ali Shah, is that both his appeal and that of Hakim Muhammad Sharif were filed on the same day by the same Vakil and that to Sayad Mubarak Ali Shah's appeal the following note was appended: "a copy of the lower Court's order and of award of the Acquisition Officer has been filed with the appeal in *re Hakim Muhammad Sharif* v. *Secretary of State*, filed to-day." He, therefore, urges that there has been a substantial compliance with the provisions of O. XLI, r. 1, of the C. P. C.

In *Rijan Thakur* v. *Charitar Thakur* (1) separate appeals were preferred by different appellants from the same decision and it was held that each must be accompanied by a copy of the judgment unless the High Court dispensed with it. There was nothing said in that case about the High Court having any power to dispense with a copy of the decree. The case reported as *Muhammad Din* v. *Zeb-un-Nisa* (2) was one in which the Court held that, "the appeal had not been properly filed within the provisions of O XLI, r. 1 of the C. P. C., as the memorandum of appeal was not accompanied by a copy of the decree." A similar case was that reported as *Qasim Ali Khan* v. *Bhagwanta Kuar* (3).

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(1) 69 Ind. Cas. 686; 1 Pat. 670; A. I. R. 1922 Pat 580; 4 P. L. T. 290

(2) 77 Ind. Cas. 541; 3 L. 215; A. I. R. 1922 Lah. 390

The references were no doubt heard together and disposed of by one judgment, but they were separate references under the Land Acquisition Act and the appeals were quite distinct. It was absolutely essential that a copy of the decree should accompany each memorandum of appeal, and the Appellate Court has, in our opinion, no power to dispense with such a copy. We, therefore, consider that the objection to Sayad Mubarak Ali Shah's appeal has force and that there is no properly filed appeal before the Court.

As regards Hakim Muhammad Sharif's appeal, we have mentioned already that the plot of land is only 1 *kanal* in area and it is quite unsuitable as a building site. Moreover, in the other case, he has been awarded compensation for severance from land, there acquired from his other land. We, therefore, do not consider that he is entitled to anything more than he has been awarded and we dismiss both the appeals with costs.

S. D. *Appeals dismissed.*

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(3) 42 Ind. Cas. 888; 40 A. 12; 15 A. L. J. 801.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 111 OF 1925.

January 25, 1926.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

B. N. LANG—APPELLANT

versus

JASVANTLAL HATHICHAND—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 38, 41—Decree transferred for execution—Re-call by Court transferring.

A Court can make an order withdrawing its own decree which it has transferred to another Court for execution. [p. 147, col. 1.]

Appeal against the judgment of Mr. Justice Mirza.

Mr. *Kanga*, Advocate-General, for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.—On September 10, 1925, an order was made in Chambers on the application of the Official Assignee, in whom had vested by virtue of an order made under s. 17 of the Presidency Towns Insolvency Act, all the estate and property of a certain insolvent Mulchand Ratanchand, that the Prothonotary should withdraw without execution the decree of the High Court in Suit No. 1755 of 1922 in favour of one Chandulal Hathibhai against the insolvent, dated June 13, 1922, which had been transmitted by this Court for execution to the Political Agent at Sadra in Mahikantha Agency on June 5, 1923.

The decree-holder then filed an application that this *ex parte* order should be vacated, and the Judge after hearing arguments directed that the order should be vacated, and that the Official Assignee should pay the applicant's costs.

We cannot agree with that order. The property of an insolvent, who has been adjudicated under an order of this Court under s. 17 of the Presidency Towns Insolvency Act, vests in the Official Assignee wherever it may be situated. It is an entirely different question, with which this Court is not at present concerned, whether the Official Assignee will be able to get possession of the property so vested in him if it is situated outside British India. The fact remains that according to the law of this country in which the insolvency petition rests, all the insolvent's property belongs to the Official Assignee. But whether the property vests or not, it is perfectly clear that under s. 53 of the Act this Court was entitled, and was bound, on the application of the Official Assignee, to withdraw any attachment already levied by it on the insolvent's property. The section runs thus:

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Official Assignee, except in respect of assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication and before he had notice of the presentation of any insolvency petition by or against the debtor."

So that if a person is adjudicated insolvent in this Court there can be no doubt that this Court, subject to the exceptions mentioned in the section, must raise any attachment issued by itself against his property, on the application of the Official Assignee, and whether the property of the insolvent outside British India vests or not, this Court cannot allow any creditor of the insolvent to take advantage of attachment proceedings resting in this Court as against the Official Assignee.

It was conceded before the learned Judge that as the decree was a decree of this Court, although it was transmitted for execution under an order of this Court to be executed by another Court, still that order could be withdrawn at any time by this Court on any legal or equitable ground. That was a very wise concession to make, because it contained a perfectly correct exposition of the law applicable to the case. Unfortunately the appellant in this Court was advised to retract what was previously conceded. It is true that under s. 41 of the Code, a Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure. But it cannot possibly be deduced from the provisions of that section that once the Court which originally passed the decree has sent it for execution to another Court, it has no power to order that the decree be returned. For instance, if the decree had been satisfied elsewhere, and the judgment-debtor informed the Court which passed the decree and asked that execution proceedings in the Court to which the decree had been sent should be stayed and the decree returned, it is clear that the Court could make an order withdrawing its own decree from the Court to which it has been sent. In any circumstances, the Court which makes an order transferring its decree for execution to another Court, must also have the power to bring the decree back. The points raised by Counsel for the respondent applicant must be decided against him, and the appeal must be allowed with costs throughout. Costs to include costs of the Rule. Order of September 10 restored.

R. L *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 358 AND 359 OF 1923 AND APPEAL FROM APPELLATE DECREE NO. 2516 OF 1923.

August 18, 1925.

Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice Duval.

BARADA PROSAD ROY CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

TARAK NATH MANDAL AND ON HIS DEATH HIS HEIR AND LEGAL REPRESENTATIVE BHABA SINDHU MANDEL—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 13—Landlord's fee, failure to pay—Notice, service of, absence of—Auction-purchase, effect on.

Neither failure to pay landlord's fee, nor mere failure to serve notice under s. 13 of the Bengal Tenancy Act invalidates the purchase of a tenure at an auction-sale. [p. 148, col. 1.]

Appeals against an order of the Subordinate Judge, Second Court, 24-Parganas, dated the 25th May 1923, reversing that of the Munsif, Fourth Court, at Diamond Harbour, dated the 10th May 1921.

Babu *Hemendra Chandra Sen*, for the Appellants.

Mr. *Sarat Chandra Basu* (with him Babu *Surya Kumar Aich*, for the Respondents.

JUDGMENT.

Greaves, J.—Appeals Nos. 358 and 359 are by the defendants. In the suits out of which these appeals arise, namely, 484 and 485...the plaintiff sued for recovery of *khas* possession of certain land on declaration of his title thereto. The plaintiff based his title on a purchase in the year 1911 in execution of a money decree against two persons Rati Kanta and Kshetra, the purchas being of a *jama* which these two persons held under the *zemindar*. The defence in these suits was that in the year 1915 the *zemindar* had brought a rent suit against Rati Kanta and Kshetra the recorded tenants and brought the tenure to sale and himself purchased it thereafter settling it with the defendants. In the year 1911 sale it was not expressly stated that the property was a tenure and it appears that no landlord's fee was paid and no notice was given to the landlord under the provisions of s. 13 of the Bengal Tenancy Act. Under these circumstances it is urged before us in this appeal that the title which the defendants obtained by a settlement from the landlord in 1915 should prevail against the prior purchase of the plaintiff in 1911, the suggestion being that as the landlord's fee was not paid and the notice was not given, the tenure did not pass at the sale in 1911. The first Court dismissed the suit holding that in 1911 there had been no sale of the tenure as the landlord's fee had not been paid and the notice had not been served. The second Court held agreeing with the first Court that the property was a tenure but held that the fact that the fee was not paid and the notice was not given did not affect the passing of the tenure and that accordingly the plaintiff's right by virtue of his purchase in 1911 prevailed over the subsequent purchase in 1915. So far as the question of non-payment of the landlord's fee is concerned this point is clearly unarguable having regard to the provisions of Bengal Council Act I of 1903. Section 1 of the Act provides that no transfer which has heretofore been made or which may hereinafter be made under *inter alia* s. 13 of a permanent tenure shall be deemed to be invalid merely on the ground that the landlord's fee prescribed by the section has not been paid. But it is stated that notwithstanding this provision the failure to serve the notice brings about the result that the tenure has not passed. Now turning to s. 13 of the Bengal Tenancy Act it seems to me that the payment of the landlord's fee and the payment of the fee for service of notice are really one and the same transaction and I think that it cannot have been the intention of the Legislature to provide that the mere failure to serve the notice has the effect of invalidating the sale of the tenure. I think, therefore, for these reasons that the point raised in the appeal is not a good one and that the mere failure to serve the notice in 1911 and to pay the landlord's fee did not affect the passing of the tenure at the sale in 1911 that being so the landlord's purchase in 1915 can have no effect and with it must fail the settlement of the defendants by him as tenants on the land.

The other appeal which is before us No. 2316 of 1923 must also be dismissed having regard to the decision just given in the other appeals. In the result, these appeals fail and are dismissed with costs. We fix the hearing fees at two gold *mohurs* for the two miscellaneous appeals.

Duval, J.—I agree.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1787 OF 1925.

January 19, 1926.

Present :—Mr. Justice Addison.

SHAHAB DIN—DEFENDANT—APPELLANT

versus

Musammat UMRAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Extension of custom by deductions—Personal law, falling back upon, when no custom proved—Muhammadan Law—Inheritance—Descendants of brother's daughter.

It is outside the province of a Court to extend custom by the process of deduction from the principles which seem to underlie custom which have been definitely established. [p. 149, col. 1]

Dalipa v. *Dallu,* 4 L. L. J. 336, followed.

Among parties generally following Customary Law it is permissible to fall back as a last resort on their personal law for the decision of a point on which no definite rule of custom applicable to the parties can be found. [p. 149, col. 2.]

Tabi v. *Saudagar Singh,* 78 Ind. Cas. 932; A. I. R. 1924 Lah. 698; 1 L. C. 290, followed.

Under Muhammadan Law the descendants of brother's daughter of the deceased who died during the lifetime of the deceased are not entitled to succeed in the presence of other daughters of deceased's brother. [*ibid.*]

Gobinda v. *Nandu,* 74 Ind. Cas. 644; 5 L. 450; A. I. R. 1922 Lah. 217, distinguished.

First appeal from a decree of the Additional Judge, Lahore, dated the 23rd January 1925, modifying that of the Third Class, Sub-Judge, Chunian, dated the 29th February 1924.

Lala *Har Bhajan Das,* for the Appellant.
Lala *Ganga Ram,* for the Respondents.

JUDGMENT.—The parties to this second appeal are Muhammadan *Jats.* There were two brothers Sattar and Barkhurdar. Sattar died leaving several daughters and was succeeded by his brother Barkhurdar. Barkhurdar then died childless and in 1913 he was succeeded by *Musammat* Umran and *Musammat* Amir Bibi two of the daughters of his brother Sattar who predeceased him. No share was given to the sons of a third daughter *Musammat* Bhagan who had died during the lifetime of Barkhurdar. It would seem that they did not come forward at that time to claim any share. Then in 1917 *Musammat* Amir Bibi died and was succeeded by her two daughters, *Musammat* Karam Bibi and *Musammat* Hayat Bibi. In 1919 *Musammat* Umran instituted a suit against these two daughters, of *Musammat* Amir Bibi claiming that she was entitled to all the land left by

Barkhurdar. This suit was dismissed in June 1922. Then on the 21st December 1922 the son and grandsons of *Musammat* Bhagan, who were given nothing in 1913, sued for possession of one-third of the land left by Barkhurdar on the ground that they were heirs along with *Musammat* Umran and *Musammat* Amir Bibi. In April 1923 *Musammat* Umran brought a second suit again claiming that she alone was entitled to succeed to Barkhurdar. Her suit was tried along with the suit brought by the descendants of *Musammat* Bhagan. *Musammat* Umran's suit was dismissed and the suit brought by the descendants of *Musammat* Bhagan was decreed. On appeal to the Additional District Judge he held that there was no provision in Customary Law recognising a right of inheritance in favour of the descendants of daughters of a brother of the last male proprietor, *i. e.*, he held that none of the daughters of Sattar were entitled to succeed under Customary Law. He, therefore, accepted the appeals before him and dismissed the suit of the descendants of *Musammat* Bhagan as they had not established that by custom they were entitled to succeed to Barkhurdar, while they were not heirs under Muhammadan Law. Against this decision these second appeals have been filed.

It has been clearly held in *Dalipa* v. *Dallu* (1) that in that case it had not been established that by custom a brother's daughter had a right of succession in the absence of all male collaterals and that it was outside the province of the Court to extend custom by the process of deduction from the principles which seem to underlie customs which have been definitely established. In the present case there is no evidence on Issue No. 8 whether *Musammat* Bhagan's descendants were entitled to succeed to one-third of the land though she died in the lifetime of Barkhurdar. Further, it was held in *Tabi* v. *Saudagar Singh* (2) that among parties generally following Customary Law it was permissible to fall back as a last resort on their personal law for the decision of a point on which no definite rule of custom applicable could be found. Now, under Muhammadan Law which is the personal law of the parties it was admitted that *Musammat* Amir Bibi and *Musammat* Umran would certainly have succeeded to Bakhurdar's estate and would have excluded *Musammat* Bhagan's descendants, and this was what actually happened in 1913, no objection being taken to this till 1922.

Appellants' Counsel, however, referred me to *Gobinda* v. *Nandu* (3) where it was held that there was no reason for holding that custom excluded a daughter's son from inheritance on the ground of his mother having predeceased her father. In that case, however, there was no dispute between the daughter's son and a daughter who was living at the time when the succession opened out. In that case also the personal law of the parties was the Hindu Law.

In my judgment, therefore, the descendants of *Musammat* Bhagan failed to prove that they were entitled by custom to succeed to one-third of the land left by Barkhurdar. The defendants clearly pleaded that they were the heirs both by custom and by law. It is clear that they are not the heirs by custom, but as shown above they are entitled to fall back on their personal law under which the descendants of *Musammat* Bhagan are not entitled to succeed. The decision of the learned Additional Judge of Lahore is, therefore, correct and I dismiss both these appeals with costs.

R. L. *Appeals dismissed.*

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(1) 4 L. L. J. 336.

(2) 78 Ind. Cas. 932; A. I. R. 1924 Lah. 698; 1 L. C. 290.

(3) 74 Ind. Cas. 614; 5 L. 450; A. I. R. 1922 Lah. 217.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 115 OF 1925.
January 27, 1926.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

NOWROJI PUDUMJI SIRDAR—
APPELLANT
versus
KANGA & SAYANI—RESPONDENT.

Bombay High Court, Original Side Rule 494—Bombay Pleaders Act (XVII of 1920)—Attorney—Taxation of bill for work done as Pleader in mofussil—Work done on appellate side of High Court—Taxation of bill.

Before the operation of Bombay Pleaders Act, 1920,

a Solicitor would be entitled to have his bill for professional work done in the *mofussil* taxed by the Taxing Master on the original side of the High Court. But a bill for the work done on the appellate side of the High Court could not be so taxed.

Appeal against the judgment of Mr. Justice Mirza.

Mr *Kanga*, Advocate-General, (with him Mr. *Tendulkar*), for the Appellant.

Mr. *B. J. Desai*, (with him Mr. *Coltman*), for the Respondents.

JUDGMENT.—Messrs. Kanga and Sayani, a firm of Solicitors practising in Bombay, obtained an order on November 26, 1924, that the Taxing Master of this Court should tax the applicant's bill of costs, charges and expenses between attorney and client in the matter of professional services rendered by them to Sirdar Nowroji Pudumji. The bills were very numerous. It is conceded that any bills lodged according to that order which were connected with work done by members of the Solicitors' firm who happened to be Pleaders, on the appellate side of the High Court, would have to be excluded. The remaining bills mostly deal with work done by Messrs. Kanga and Sayani for the opponent in the Mofussil Courts.

On September 28, 1925, the opponent took out a summons against Messrs. Kanga and Sayani for an order that the Taxing Master should not proceed with the taxing of the bills referred to in the summons. The chief ground on which the summons was taken out was that the bills were in respect of work which had nothing to do with the original side of the High Court. And it was also contended that when Mr. Kanga, one of the partners of Messrs. Kanga and Sayani, rendered professional services in the Poona Court, he did so as a Pleader, and not as a member of a Solicitors' firm.

We see no reason why a Solicitor practising in Bombay and performing professional services for a client regarding business in the *mofussil*, should not be entitled to send a bill to his client for such professional services, and if the client declines to pay, why he should not be entitled to come to the Court and ask for a common order to get the bills taxed by the Taxing Master. It may be that hereafer attorneys will come within the provisions of the Bombay Pleaders Act (Bombay Act XVII of 1920) with regard to any work done in the Mofussil Courts. We are not concerned with that Act at present, as the work for which the respondents are charging was done before that Act came into force. Nor are we now concerned with the difficulties which may arise when the Taxing Master is taxing the bills. We need only say we think that r. 494 justified the order made on the Taxing Master to tax the bills of Messrs. Kanga and Sayani excluding those relating to work done on the appellate side of the High Court. The appeal must be dismissed with costs. No order as to costs of the summons.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS No. 405 OF 1924.

January 19, 1926.

Present:—Mr. Justice Martineau and Mr. Justice LeRossignol.

In the matter of THE INDIAN INCOME TAX ACT, 1922

AND

In the matter of AN APPLICATION BY MESSRS. KESRI DAS AND SONS UNDER s. 66 (2) OF THE SAID ACT.

Income Tax Act (XI of 1922), ss. 13 proviso, 22 (4), 23 (2)—Returns by assessee incomplete or incorrect—Procedure in assessment.

When a return furnished by an assessee in compliance with a notice under s. 22 (4) of the Income Tax Act, is found by the Income Tax Officer to be incorrect, the proper procedure for him is not to compute the income as he thinks fit but to serve the assessee with a notice under s. 23 (2) requiring him on a date to be specified therein, either to attend at the Income Tax Officer's Office or to produce or to cause to be produced any evidence on which he intends relying in support of his return. Non-compliance with this procedure makes an assessment illegal. [p. 151, col. 1.]

Proviso to s. 13, Income Tax Act, applies only where no method of accounting has been regularly employed or where the method employed is such that in the opinion of the Income Tax Officer, the income, profits and gains cannot properly be deduced therefrom. [*ibid.*]

Mr. *C. H. Oertel*, for the Petitioner.

Mr. *Dev Raj Sawhney*, for the Respondent.

ORDER.—The petitioners manufacture and sell aerated waters and carry on a grocery business. They furnished a return of their income for the year 1922-1923 and produced their accounts The Income Tax Officer in an order of the 20th October 1923 said that no regular accounts were produced and that it was doubtful whether those seen by the Inspector were genuine, and remarking that the business was prosperous and profitable he proceeded to give an estimate, not based on any evidence, of the sales and profits, as well as of the income derived from the rest of the petitioners' house property, considerably in excess of the figures stated in the petitioners' return; he assessed the total income at Rs. 22,000. On appeal the Assistant Commissioner allowed an additional Rs. 2,000 for the cost of the petitioners' establishment, but otherwise upheld the order of the Income Tax Officer. The petitioners then applied to the Commissioner to refer certain questions of law to this Court. The application was rejected, but this Court on being moved by the assessees under s. 66 (3) of the Income Tax Act, directed the Commissioner to state the case, and a reference has now been made by him in accordance with that direction.

The learned Commissioner has dealt at considerable length with the various points eight in number mentioned by the petitioners in their application to him. We think it is unnecessary to enumerate them or to discuss them in detail. The only real question for decision is whether after the petitioners had furnished a return of their income and had produced their accounts in compliance with a notice under s. 22 (4) of the Act, the Income Tax Officer, when not satisfied that the accounts were correct, was justified in computing the income in such a manner as he thought fit. In support of the Income Tax Officer's order the learned Commissioner relies upon the proviso to s. 13, but that proviso applies only where no method of accounting has been regularly employed or where the method employed is such that in the opinion of the Income Tax Officer the income, profits and gains cannot properly be deduced therefrom. The Income Tax Officer, in his order assessing the petitioners, said nothing about the method of accounting employed by them, but expressed a doubt, for which he gave no reasons, as to the genuineness of their accounts. Section 13, therefore, has no application at all, but the section applicable is s. 23 (2), which requires the Income Tax Officer, if he has reason to believe that the return made is incorrect or incomplete, to serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income Tax Officer's Office or to produce or to cause to be produced any evidence on which such person may rely in support of the return. In this case the Income Tax Officer did not serve such a notice on the petitioners, nor does he appear to have pointed out to them any defects or irregularities in the accounts so that they might be able to explain them, but he made a purely arbitrary assessment without having given them an opportunity of supporting the return which they had furnished.

Such an assessment was, in our opinion, illegal and we answer the question of law above stated in the negative and direct that the petitioners be paid their costs by the Crown.

R. L. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 940 OF 1924.

December 2, 1925.

Present:—Mr. Justice Waller and Mr. Justice Madhavan Nair.

SALAR BAG SAHEB—DEFENDANT No. 1—RESPONDENT No. 1—PETITIONER

versus

KARUMANCHI KOTTAYA—PLANTIFF—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144, O. IX —Dismissal of suit in default—Application for restoration also dismissed in default—Application to restore application, whether maintainable.

An application under O. IX, C. P. C., to set aside an order of dismissal of a suit in default, is not an application in suit but is an independant one coming under s. 141, C. P. C. Such an application, therefore, is covered by O. IX and can be restored under that order if dismissed in default.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order, dated the 23rd November 1924, of the Court of the District Munsif, Batatla, in I. A. No 1711 of 1924 in O. S. No. 73 of 1923.

Mr. *Ch. Raghava Rao*, for the Petitioner.

Mr. *G. Lakshmanna*, for the Respondent.

JUDGMENT.

Waller, J.—The facts are these. Respondent's suit was dismissed for default. He applied to have it restored under O. IX, Sch. I, C. P. C., and that application also was dismissed for default. He then applied again under O. IX to have the application restored and it was restored. The other party comes up in revision on the ground that the provisions of O. IX, do not govern applications made under the order itself.

Authority on the point is divided. The Calcutta High Court has held one way [*Bepin Behari Saha* v. *Abdul Barik* (1)] the Patna High Court the other [*Ramgulam Singh* v. *Sheo Deonarain Singh* (2)] Phillips, J., in a case exactly parallel to this has recently followed the Calcutta view [*Venkata Narasimha Rao* v. *Hemadu Suryanarayana* (3)]. In *Kalliakkal* v. *Palani Koundan* (4), Devadoss, J., and I held that O. IX, does not apply to proceedings in execution of decrees. It is now argued that we stated the proposition too widely, in other words, that all that was laid down in *Thakur Prasad* v. *Fakir Ullah* (5) was that O. IX did not apply to execution petitions. If, however, it does not apply to the petitions themselves, it is difficult to see how it can apply to applications incidental to and arising out of them.

What we are now considering is a different point. No doubt, the Privy Council decision is open to a limited construction, but what obviously was intended to be excluded by the Legislature from the operation of s. 141, C. P. C., was any proceeding in a suit. This is shown by the explanation added to s. 647 by Act VI of 1892. As pointed out by Phillips, J., the proceeding we are dealing with is not a proceeding in a suit, for the suit has been dismissed. I would follow his decision and dismiss the petition with costs.

Madhavan Nair, J.—The decision of Phillips, J., in *Venkata Narasimha Rao* v. *Hemadu Suryanarayana* (3) on identical facts covers the present case. I also would follow that decision and dismiss this petition with costs.

V. N. V.

N. H. *Petition dismissed.*

(1) 35 Ind. Cas. 613; 44 C. 950; 21 C. W. N. 30; 24 C. L. J. 446.
(2) 51 Ind. Cas. 152; 4 P. L. J. 287.
(3) 92 Ind. Cas. 802; 50 M. L. J. 75.
(4) 92 Ind. Cas. 533; 23 L. W. 227.
(5) 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.).

LAHORE HIGH COURT.

CIVIL APPEAL No. 851 OF 1925.
January 28, 1926.
Present:—Mr. Justice Martineau and Mr. Justice LeRossignol.

MEHL SINGH—DEFENDANT—APPELLANT
versus
AMAR NATH AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagor paying off earlier mortgage—Charge, keeping alive of—Presumption—Improvements by mortgagor paying off earlier mortgage—Priority of charge.

Where there are several mortgages on a property the owner of the property may, if he pays off an earlier mortgage, keep it alive for his benefit and come in before the later mortgagee In the absence of an indication to the contrary, it is to be presumed that the owner intends to keep alive the previous charge if it would be for his benefit.

Malireddi Ayyareddi v. *Adusumilli Gopalakrishnayya*, 79 Ind. Cas. 592; 47 M. 190; 22 A. L. J. 45; 46 M. L. J. 164; A. I. R. 1924 P. C. 36; 19 L. W. 215; 26 Bom. L. R. 204; 34 M. L. T. 1; 2 Pat. L. R. 99; 10 O. & A. L. R. 269; (1924) M. W. N. 290; 39 C. L. J. 204; 28 C. W. N. 1025 51 I. A. 140; L. R. 5 A. (P. C.) 49; 1 O. W. N. 27 (P. C.), *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*, 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 513; 5 Ind. Dec. (N. S.) 692 (P. C.), *Dinobundhu Shaw Chowdhury* v. *Jogmaya Dasi*, 29 C. 154; 29 I. A. 9; 6 C. W. N. 209; 12 M. L. J. 73; 4 Bom. L R. 238; 8 Sar. P. C. J. 217 (P. C.) and *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh*, 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68 (P. C.), followed.

Where the earlier mortgage-deed paid off by the owner contains a clause by which the mortgagee is entitled to be re-imbursed at the time of redemption for any expenditure incurred by him during the currency of the mortgage, the owner is entitled to the benefit of that condition and the sum which he spent on improving the property must be allowed as a prior charge.

Appeal from a decree of the District Judge, Gujranwala, dated the 7th January 1925, setting aside that of the First Class Senior Sub-Judge, Gujranwala, dated the 29th August 1924.

Bakhshi *Tek Chand* and Lala *Nawal Kishore*, for the Appellant.

Mr. *G. C. Narang* and Lala *Amar Nath*, for the Respondents.

JUDGMENT.—Five shops belonging to Jodh Singh, defendant No. 1 and his brother Rattan Singh were mortgaged by them in 1917 to Maya Ram with possession for Rs. 3,000. In 1918 Jodh Singh mortgaged his ½ share to the plaintiff's predecessors-in-title for Rs. 900. No mention was made in the second mortgage-deed of the prior mortgage. In 1920, Jodh Singh and Rattan Singh sold the shops to the 2nd defendant, Mahal Singh for Rs. 3,000. The mortgage to Maya Ram was mentioned in the sale-deed, but not the mortgage to the plaintiffs. The latter have now sued on their mortgage-deed for the recovery of the amount due to them by the sale of half of the mortgaged property and have been given a decree.

Mahal Singh had after his purchase paid to Maya Ram, the amount due on his mortgage, namely, Rs. 3,299-6-0, and made improvements in the property on which it has been found that he spent Rs. 2,626, and he claimed to be entitled to a prior charge in respect of half of each of these sums. The Trial Court held that he was entitled to priority in respect of both items, but the lower Appellate Court has held that he has a prior charge only in respect of the payment made to Maya Ram. He has filed a second appeal and the plaintiffs have lodged cross-objections.

In *Malireddi Ayyareddi* v. *Adusumilli Gopalakrishnayya* (1), it was held by the Privy Council that where there are severel mortgages on a property the owner of the property may, if he pays off an earlier mortgage, keep it alive for his benefit and then come in before the later mortgagee. It was also held that in the absence of an indication to the contrary it is to be presumed that the owner intended to keep alive the previous charge, if it would be for his benefit, and the same principle has been laid down in other decisions of the Privy Council reported as *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (2) and *Dinobundhu Shaw Chowdhury* v. *Jogmaya Dasi* (3) and *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (4). We agree, therefore, with the lower Appellate Court that the appellant must be taken to have intended to keep the mortgage in favour of Maya Ram alive for his benefit, there being nothing to show the contrary, and that he is entitled to priority in respect of the sum which he paid to Maya Ram on account of Jodh Singh's share.

With regard to the expenditure on improvements, it is to be observed that Maya Ram's mortgage-deed contained a clause by which he was to be re-imbursed at the time of redemption for any expenditure incurred by him during the currency of the mortgage. The appellant, who on payment of the amount due to Maya Ram stood in the latter's shoes, is entitled to the benefit of that condition and the sum which he spent on improving the property must be allowed as a prior charge.

We accordingly dismiss the cross-objections and accepting the appeal, we set aside the decree of the lower Appellate Court and restore that of the Trial Court. The plaintiffs will pay the appellant's costs in this Court and the lower Appellate Court. Costs in the Trial Court will be paid as directed by that Court.

R. L. *Appeal accepted.*

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(1) 79 Ind. Cas. 592; 47 M. 190; 22 A. L. J. 45; 46 M. L. J 164; A. I. R. 1924 P. C. 36; 19 L. W. 215; 26 Bom. L. R. 204; 34 M. L. T. 1; 2 Pat. L. R. 99; 10 O. & A L. R. 269; (1924) M. W. N. 290; 39 C. L. J. 204; 28 C. W N. 1025; 51 I. A. 140; L. R. 5 A. (P. C.) 49; 1 O. W. N. 27 (P. C.).

(2) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

(3) 29 C. 154; 29 I. A. 9; 6 C. W. N. 209; 12 M. L. J. 73; 4 Bom. L. R. 238; 8 Sar. P. C. J. 217 (P. C.).

(4) 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 8 (P. C.).

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 934 OF 1916.

November 9, 1925.

Present:—Mr. Justice Mirza.

ANANDRAO BHICAJI SABNIS—PLAINTIFF

versus

NAPU PATRAMUL—DEFENDANT.

Attorney—Costs, charging order for—Decree-holder's claim—Priority.

The attorney's right to a lien for his costs is ancillary to the right he has of recovering his costs against his client. Where the attorney is unable to show that he cannot get payment from his client where others besides the client are interested in the fund, the Court would not exercise its discretion in favour of attorney against the other parties so interested. [p. 155, col. 1.]

Mr. *Judah*, for the Applicants.

Mr. *Jinnah*, for the Plaintiff.

JUDGMENT.—The applicants by this summons ask for a declaration that they are entitled to a charge to the extent of Rs. 3,600 on a sum of Rs. 1,715-8-4 and on another sum of Rs. 2,226-6-0 which sums are directed to be paid to the 1st defendant by the 2nd defendant and the plaintiff respectively by a decree of this Court. The applicants are attorneys of this Court and represented both defendants Nos. 1 and 2 in the proceedings which terminated in an order in favour of their client defendant No. 1. The applicants estimate their costs against defendants Nos. 1 and 2 jointly to amount to Rs. 7,000. They have already received from defendant No. 2 a sum of Rs. 3,400 by way of advances and are now seeking to secure themselves for the payment of the balance of costs due to them by obtaining a charging order on the amounts payable under the decree to the 1st defendant by defendant No. 2 and by the plaintiff respectively. The plaintiff is a decree-holder against the 1st defendant in Suit No. 1447 of 1914. He has attached the decree in favour of the 1st defendant against defendant No. 2 and claims to set off against his own decree the amount awarded to defendant No. 1 against him in the present suit. He has not attached the decree of defendant No. 1 against himself. The applicants claim priority against the plaintiff.

This was a partnership action filed by the plaintiff against the defendants for dissolution of a partnership between them and for the usual partnership accounts. By a decretal order of reference dated April 13, 1917, the matter was referred to the Commissioner of this Court. On April 1, 1925, the Commissioner made his report whereby he found that a sum of Rs. 3,627-9-4 was due to the 1st defendent in respect of his one-third share in the said partnership. The Commissioner further found that a sum of Rs. 3,181-4-4 was due to the 2nd defendant in respect of his one-third share in the partnership. The Commissioner found also that the plaintiff had overdrawn his share and was liable to refund Rs. 2,540-10-8. The Commissioner further found that the 2nd defendant had in his hands on behalf of the partnership a sum of Rs. 4,271-3-0. The plaintiff filed exceptions to the Commissioner's report. His exceptions were allowed in respect of two items thereby decreasing his liability by a sum of about Rs. 900. The final decree was made on July 20, 1925, but as the decree drawn up was not in accordance with the judgment, the decree as drawn up and sealed was rectified by an order dated September 7, 1925. The decree as finally drawn up and rectified provided that the 2nd defendant do receive out of Rs. 5,214-1-6 then in his hands Rs. 3,498-9-2 in payment of the balance of his one-third share and do pay the balance of Rs. 1,715-8-4 to the 1st defendant on account of his one-third share. The decree further provided that the plaintiff do pay to the 1st defendant Rs. 2,225-5-0 for the balance of his share. The decree further directed that in the event of there being no assets of the partnership to pay the costs of the action, the plaintiff, the 1st and the 2nd defendants do each pay a one-third equal share of the costs. The increased figures in the final decree are due to the addition of interest subsequent to the Commissioner's findings.

The usual order for costs in a partnership action is to make the costs of all parties come out of the partnership assets. It is common ground here that the partnership had no assets beyond the moneys in the hands of the defendant No. 2 and what the plaintiff owed to it in respect of his overdrawn share. The intention of the decree, in my opinion, was that costs should be paid out of the partnership assets but it has been cumbrously expressed. Instead of adopting the course of ordering the plaintiff to refund to the partnership the amount he had overdrawn and ordering the 2nd defendant to refund to the partnership the amount in his hand so as to put all the partners on an equal footing, the decree provided that defendant No. 2 should pay over to the defendant No. 1 the balance of the fund in his hands after deducting therefrom what was due to himself for his own share, and that the deficit due to defendant No. 1 should be made good by the plaintiff paying over to him direct the amount which he owed to the partnership. Costs of all parties would then be pooled up and each partner would pay an equal one-third part of such costs. By adopting this method the result would be the same as if costs were originally paid out of the partnership assets and distribution had taken place afterwards. In the event of the assets being found insufficient to pay up all the costs, the partners would be personally liable for the balance in equal shares. Had the usual course been followed of ordering costs out of the partnership assets, defendant No. 1 would not receive the two sums mentioned under the decree but they would in the first instance be appropriated towards payment of the costs of the partnership action.

The plaintiff contends that defendant No. 2 is a substantial party and that the applicants can recover from him all the costs due to them jointly from defendents Nos. 1 and

2. It is common ground that defendant No. 1 has no moneys beyond the sums ordered to be paid to him under the decree. The plaintiff further contends that the applicants are not acting *bona fide* but have adopted these proceedings at the instance of defendant No. 2 in order to minimise the liability of defendant No. 2 to them in respect of costs. The applicants took out this summons after they were apprised of the plaintiff's intention to attach these moneys in the hands of the 2nd defendant by the plaintiff's attorney's letter dated September 17, 1925, annexed to the affidavit of Doraswami Naidu in support of the summons. The attachment was levied on Septemer 30, 1925, and the summons was obtained on October 2, 1925.

The two sums of money sought to be charged in favour of the applicants were obtained by the applicants' exertions and ordinarily they would be entitled to a lien or charge on these moneys in preference to other creditors The order giving such a charge no doubt is not *ex debito justitiæ* but purely discretionary. Such discretion, however, is usually exercised by the Courts in favour of attorneys. The attorney's right to a lien for his costs is ancillary to the right he has of recovering his costs against his client Where the attorney is unable to show that he cannot get payment from his client where others beside the client are interested in the fund, the Court would not exercise its discretion in favour of the attorney against the other parties so interested. In the case of *Harrison* v. *Cornwall Minerals Railway Co.* (1) the Court disallowed the attorney's application for a charge on a fund where the clients were able to pay their costs as between attorney and client but had desired the attorney to obtain them out of a fund in which others were interested in order to minimise their own liability. Under the circumstances the Court considered the attorney's application not to be *bona fide* and, therefore, disallowed it. In the present case it would appear that the 1st defendant is unable to pay any part of the costs due to the applicants. He has so far paid them nothing by way of advances. All the costs so far paid to the applicants are paid to them by the 2nd defendant. There is no evidence before me that the present application is instigated by the 2nd defendant. In para. 2 of his affidavit Mr. Paruck states:—"After this notice was served the summons has been taken out by the plaintiff's attorneys to thwart the execution proceedings." In para. 3 Mr. Paruck states:—"The 2nd defendant ..is able to pay the full amount of the costs of the applicants." No affidavit in rejoinder is filed and these statements are not controverted.

On the materials before me, if the plaintiff were an outsider who had attached the decree in favour of defendant No. 1 *bona fide*, I would be inclined to refuse a charging order giving priority to the applicants to his detriment. The applicants have not satisfied me that they would be unable to recover the balance of their costs from the 2nd defendant and that unless I made the order they are seeking, those costs would be irretrievably lost to them. The plaintiff is interested in the fund inasmuch as he is a decree-holder in another suit and has the right to attach the amount. But I cannot overlook the fact that the plaintiff is a party to the present decree which is binding upon him. The terms of the decree, to my mind, are clear that the costs of the suit should be paid in equal shares by each of the three partners. The plaintiff cannot seek indirectly to throw the burden of costs coming to the share of the 1st defendant upon the 2nd defendant. The defendants are jointly and severally liable for costs to the applicants. If the applicants are seeking to divide the burden equally between the two, that, in my opinion, would not be a sufficient reason, in the circumstances of the present case, to induce the Court to refuse them a charging order in priorty to the plaintiff's attachment on a decree in favour of their client obtained through their exertion.

It has been well said that equality is equity. I see nothing *mala fide* or wrong in the conduct of the attorneys in asking for the order. The summons, in my opinion, asks for too wide an order in favour of the applicants. If there are other attaching creditors of the 1st defendant against the decree their claims will not be affected by the order which I propose to pass. Under the decree the plaintiff would probably be entitled to some contribution towards the costs of his attorneys from defendant No. 1. Were he to ask for a charging order in respect of those costs it will be open to him to apply that the applicants' lien should not be allowed to prevail against that claim.

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(1) (1884) 53 L. J. Ch. 596; 50 L. T. 452; 32 W. R. 748; 48 J. P. 724.

The summons will be made absolute as against the plaintiff in respect of his subsisting attachment and also in respect of the decree in favour of defendant No. 1 against the plaintiff. Parties to tack on their costs to their respective claims. Counsel certified.

R. L. *Summons made absolute*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS No. 549 OF 1924.
January 19, 1926.
Present:—Mr. Justice LeRossignol and Mr Justice Martineau.
BAIJ NATH—PETITIONER
versus
COMMISSIONER, INCOME TAX, LAHORE—RESPONDENT.

Income Tax Act (XI of 1922), s. 22—Assessment—Procedure.

An Income Tax Officer should be governed in his procedure by judicial considerations. He should base his assessment on legal and not on mere hearsay evidence.

Reference made by the Commissioner of Income Tax, under s. 66 of the Income Tax Act, 1922.

Lala *Jagan Nath Aggarwal*, for the Petitioner.

Mr. *Carden Noad*, Government Advocate, for the Respondent.

ORDER.—This is a Reference by the Commissioner of Income Tax, under s. 66 of the Income Tax Act of 1922.

The assessee was originally assessed on an income of Rs. 12,000 which, on appeal, was reduced to Rs. 7,220 and on review by the Commissioner to Rs. 4,500.

We agree with the petitioner that the Income Tax Officer should be governed in his procedure by judicial considerations. He should base his assessment on legal and not mere hearsay evidence, which may be the evidence of his officers or of members of the public, but without evidence that items which do not appear in an account should find a place therein, he is not entitled to assume on mere general hearsay that those items should appear in the account.

Should he, however, find on good evidence that even one substantial item is missing, he would be entitled to treat the whole account as unreliable.

In this case, we find it unnecessary to express our views more specifically for we see that the final assessment was made on the admission of the assessee, and also that the Commissioner holds, as a fact, that the assessee refused a notice under s. 23 (2) to appear and meet the criticisms levelled against his accounts.

Petitioner shall pay the costs of this hearing.

R. L. *Order accordingly.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 2539 OF 1924.
December 10, 1925.
Present:—Mr. Justice Buckland.
MANICKLAL DEY CHAUDHURI—PLAINTIFF
versus
KADAMBINI DASSI—DEFENDANT.

Transfer of Property Act (IV of 1882), ss. 111 (h), 113—Rent, receipt of, after notice to quit—Waiver of notice.

Where rent is accepted after the notice to quit, whether before or after a suit has been filed, the landlord thereby shows an intention to treat the lease as subsisting and there is a waiver of the notice to quit. [p. 157, col. 1.]

Mr. *B. N. Ghose*, for the Plaintiff.

Mr. *M. N. Kanjilal*, for the Defendant.

JUDGMENT.—This is a suit to recover possession from the defendant of the premises No. 16, Prem Chand Boral Street and for damages at the rate of Rs. 130 a month.

The plaintiff is a tenant from the superior landlord of the premises in question and the defendant is his sub-tenant. The case made in the plaint is that on the 11th June 1924 the sub-tenant was given notice to vacate premises on 17th July 1924. The defendant failed to vacate the premises and the suit was filed on 28th August 1924.

The facts are admitted. The defendant has paid Rs. 130 a month, month by month to the Rent Controller. No question arises under the Calcutta Rent Act and whether this is the proper amount payable as rent is immaterial. Subsequently and after the suit had been filed, the plaintiff withdrew from the Rent Controller the money so deposited by the defendant. The whole point in the case is whether or not by withdrawing from the Rent Controller the amount so deposited, the notice to quit has been waived.

It was also suggested by learned Counsel for the plaintiff that as his client had alleged in the plaint that the defendant was a woman of the town and had been using the premises for immoral purposes and as this is admitted by the defendant there was no contract at all as the contract was void under s. 23 of the Indian Contract Act. But that is not the case with which the plaintiff came to Court and, in my opinion, he is not entitled to make it upon his plaint. The only question, therefore, is that which I have already stated as to whether or not the notice to quit has been waived.

Section 113 of the Transfer of Property Act deals with this point. It provides that notice given under s. 111 cl. (*h*) which is applicable to the notice given in this case is waived by any act on the part of the person giving it showing an intention to treat the lease as subsisting. Had rent been withdrawn from the Rent Controller prior to the filing of the suit there could be no question that this section would operate and that there would be a waiver of the notice to quit.

It is however argued that inasmuch as the money was withdrawn from the Rent Controller after the suit had been filed there was no waiver. Now under s. 112 which deals with a similar position in connection with forfeiture under s. 111 (*g*) it is expressly provided that where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture such acceptance is not a waiver.

It is argued by analogy that in the circumstances there is no waiver. To that I think the answer is that where rent is accepted after the notice to quit whether before or after a suit has been filed the landlord thereby shows an intention to treat the lease as subsisting. One cannot logically say that the fact of accepting rent by itself shows an intention to treat the lease as subsisting if no suit has been filed and a different intention if a suit has been filed. The intention shown by the act itself must be the same in either case. Therefore, by accepting the rent the plaintiff, in my opinion, showed an intention to treat the lease as subsisting and acceptance of rent was a waiver of the notice to quit notwithstanding the fact that a suit had already been filed for the purpose of ejecting the tenant.

It has also to be observed that under s. 112 the acceptance of rent after suit has been exactly provided for and it may well be argued that had it been intended that acceptance of rent after suit should not operate as a waiver in the case of a notice to quit one would have expected that a proviso similar to that in s. 112 would have been incorporated in s. 113.

In my opinion the plaintiff must fail and the suit must be dismissed with costs on scale No. 2.

R. L. *Suit dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 88 OF 1925.

March 2, 1926.

Present:—Mr. Justice Walsh and Mr. Justice Dalal.

RAJ BAHADUR—DEFENDANT—APPELLANT

versus

NARAYAN PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Legal representative, question of—Res judicata.

Where the question of a legal representative is decided by a Court under O. XXII, r. 5, C. P. C., its re-adjudication in a subsequent regular suit is barred by the rule of *res judicata*. [p. 158, col. 1.]

Parsotam Rao v. *Janki Bai*, 28 A. 109; A. W. N. (1905) 208, not followed.

Raoji Bhikaji v. *Anant Laxman*, 46 Ind. Cas. 750; 42 B. 535; 20 Bom. L. R. 671, referred to.

First appeal from an order of the Additional Judge, Bareilly, dated the 16th February 1925.

Mr. *S. B. Johari*, for the Appellant.

Mr. *B. Malik* and Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The suit of the plaintiff Narain Prased was dismissed by the Trial Court of the Subordinate Judge on the ground that it was barred by the principle of *res judicata*. On appeal the learned Additional District Judge disagreed with this finding and remanded the suit for trial on the merits. This appeal is filed from the order of remand. One Chhotey Lal had two sons and the widow of one of them *Musammat* Ganeshi by name made certain transfers in favour of the defendant of this suit Raj Bahadur. *Musammat* Ganeshi had a daughter *Musammat* Katori who was an heir to the property on the death of her mother the life holder. She instituted a suit in 1917 (Suit No. 117 of 1917) for a declaration that the transfers were beyond the power of a Hindu widow and sought a declaration that they were not binding on her. During the pendency of the suit she died on the 12th November 1917. The plaintiff of this suit Narain Prasad applied to the Court to be brought on the record as representative in interest of *Musammat* Katori on the ground that *Musammat* Katori had given birth to a son who died the day after he was born and Narain Prasad was successor-in-interest of his wife through that son. The Court in which *Musammat* Katori's suit was being tried was entitled to determine the question whether Narain Prasad was or was not legal representative of *Musammat* Katori (O. XXII, r. 5). The finding of the Court was that no son was born to *Musammat* Katori and that Narain Prasad was not her legal representative. The suit, therefore, abated and was dismissed. Prior to the dismissal of the suit Narain Prasad who claimed the property and the sons of Durga Prasad brother of *Musammat* Ganeshi's deceased husband had referred the question in dispute to arbitration and an award was passed in favour of Narain Prasad. This award had been passed before the dismissal of *Musammat* Katori's suit.

We are of opinion that the proceedings in the suit of *Musammat* Katori subsequent to her death bar the present suit of the plaintiff. The Court which heard *Musammat* Katori's suit was entitled to decide the question whether Narain Prasad was or was not the legal representative of *Musammat* Katori and the decision would be binding on the parties. On behalf of the respondent here reference was made to the case of *Parsotam Rao* v. *Janki Bai* (1). The facts of the case do not appear very clearly from the judgment and it is not clear whether the learned Judges desired to decide or not that once the question of a legal representative was decided by a Court under O. XXII, r. 5 it could be readjudicated upon in a regular suit. Reference is there made to some vital issue arising in that case whether two Hindu brothers were separate or were members of a joint Hindu family. If the learned Judges desired to decide that a question once determined under O. XXII, r. 5 would not operate as *res judicata* we are not prepared to follow that opinion, with all respect. In a Bombay case *Raoji Bhikaji* v. *Anant Laxman* (2) a Bench of that Court held that where a party died between the passing of a preliminary decree and a final decree in a suit for partition and the cause of action survived the Court was bound to determine the question of the successor-in-interest of the deceased party under O. XXII, r. 5 and decide such dispute without referring the parties to a separate suit.

As to the award Narain Prasad ought to have pleaded it in support of his right to be brought on the record as representative-in-interest of *Musammat* Katori. The words of s. 11 of the C. P. C. in Explanation IV are :—"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It must, therefore, be taken that in the suit of *Musammat* Katori a Court having jurisdiction decided that Narain Prasad was not her representative-in-interest either through her son or on the basis of an award given by arbitrators in a dispute between himself and the sons of Durga Prasad. We have already held that such a finding is binding on the parties.

We decree the appeal, restore the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs of all the Courts.

R L. *Appeal decreed.*

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(1) 28 A. 109; A. W. N. (1905) 208.

(2) 46 Ind. Cas. 750; 42 B. 535; 20 Bom. L. R. 671.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 1960 OF 1925.

January 27, 1926.

Present:—Mr. Justice Jai Lal.

THAKAR DAS—DECREE-HOLDER—APPELLANT

versus

GHULAM MAHOMMAD—JUDGMENT-DEBTOR—RESPONDENT.

Evidence Act (I of 1872), s. 102—Judgment-debtor claiming to be member of agricultural tribe—Burden of proof—Doubt, benefit of.

The burden of proving that the judgment-debtor is a member of an agricultural tribe within the meaning of the Punjab Alienation of Land Act is on him especially when in Settlement Records he is shown as belonging to one of the non-agricultural tribes.

Law does not recognise the principle of giving the benefit of doubt to a party on whom the burden of proof lies.

Miscellaneous appeal from an order of the District Judge, Multan, dated the 30th April 1925, reversing that of the Senior Sub-Judge, Muzaffargarh, dated the 31st October 1924.

Lala *Har Gopal*, for the Appellant.

Sheikh *Iftikhar Ali*, for the Respondent.

JUDGMENT.—The only question involved is whether the respondent judgment-debtor is a *Kharal*, an agricultural tribe under the Alienation of Land Act, or whether he is a *Pawli*. In the latter case his land would be liable to attachment and sale in execution of the decree passed against him in favour of the appellant. The learned District Judge has not dealt with this case properly. He has held that the appellant was "entitled to the benefit of any doubt that may exist with regard to his caste," and that he was a member of an agricultural tribe until the contrary was proved. Now this was not the proper way to approach this case. The caste of the respondent is entered as *Pawli* in the current Settlement Records. The burden of proving that he is a *Kharal* would, under ordinary circumstances, lie upon the judgment-debtor. In this case there is a further presumption in favour of the appellant by virtue of the entries in the Settlement Record. The learned District Judge should have come to a definite finding. In a case like this the law does not recognize the principle of giving the benefit of the doubt to a party on whom the burden of proof lies. I must, therefore, set aside the order of the District Judge and remand the case to him for re-decision on the merits. It will be open to the learned Judge to record further evidence of the parties, if he considers that the evidence on the record is not sufficient to enable him to give a definite finding. Costs will abide the result. Court-fee on the memorandum of appeal will be refunded.

R. L. *Case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 39
OF 1924.
December 22, 1925.
Present:—Justice Sir Hugh Walmsley,
KT., and Mr. Justice Chakravarti.
REGISTERED JESSORE LOAN Co.,
LTD.,—DEFENDANTS—APPELLANTS
versus
GOPAL HARI GHOSE CHOUDHURY
—PLAINTIFF AND ANOTHER—DEFENDANT
—RESPONDENTS.

Contract Act (IX of 1872), ss. 69, 70, scope of—Contribution—Equity—Liabilities of parties, determination of.

The right of contribution has its foundation in and is controlled by the principles of justice, equity and good conscience. It does not arise from contract, although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between the parties jointly liable *ex-contractu*. [p. 160, col. 2.]

Matungini Debi v. *Brojeswar Banerjee*, 27 Ind. Cas. 22; 20 C. L. J. 205, relied upon.

A Court as a Court of justice, equity and good conscience may, in certain circumstances, although such circumstances do not bring the case strictly within the purview of ss. 69 and 70 of the Contract Act, allow contribution if the claim appears to be either just or equitable. [p. 160, cols. 1 & 2.]

In a suit for contribution, the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. [p. 161, col. 2.]

Appeal against a decree of the Subordinate Judge, Jessore, dated the 10th December 1923.

Messrs. *S. C. Roy Choudhury*, *K. M. Ghose* and Babu *Mahendra Chandra Ghose*, for the Plaintiff.

Babu *Hemendra Chandra Sen*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the defendant No. 12—the Registered Jessore Loan Company, Ltd., against a judgment and decree of the learned Subordinate Judge of Jessore, dated the 10th December 1923, by which the suit of the plaintiff for contribution was decreed in full. The question raised in this appeal is a question of law applicable to the facts of this case which are not disputed and they are as follows: The plaintiff and the defendants other than the defendant No. 12 were the owners of a permanent tenure. The defendant No. 12 purchased the share of the defendants Nos. 13, 14 and 15 which was 1 anna odd *gundas* in execution of a mortgage decree in his favour on the 20th June 1921. The said defendant No. 12 is now also the mortgagee of a 3 anna odd *gunda* share which belonged to the defendant No. 1. The plaintiff's share in the tenure was 3 annas 4 *gundas*. In execution of a decree for arrears of rent obtained by the landlords, the property was put up to sale and was purchased by the defendant No. 12 on the 20th January 1923 for Rs. 25,000. The plaintiff thereupon deposited the decretal money together with the usual compensation to the purchaser amounting to Rs. 17,000 odd and the sale was set aside. The plaintiff brought the suit claiming contribution from the several defendants in proportion to their respective shares and contended that the defendant No. 12 was liable to contribute to the extent of the two shares in which, as already stated, he was interested, namely, the share of the defendants Nos. 13, 14 and 15 and the share of the defendant No. 1. The decree was passed without contest against the defendants other than the defendant No. 12. The defendant No. 12 alone contested the suit and resisted the claim of the plaintiff on two grounds. It was contended on his behalf, first, that the share of the defendants Nos. 13, 14 and 15 which the defendant No. 12 purchased in execution of the mortgage decree against the said defendants was not liable for the rent at the time when the defendant No. 12 purchased the same; in fact, the arrears of rent for which the decree was obtained fell due before this purchase. It was next contended that, so far as the share of the defendant No. 1 was concerned, the defendant No. 12 was no more than a mere mortgagee of that share as the sale of that share had already been set aside; and, therefore, it was said that the defendant No. 1 remained liable, if there was any liability for contribution to the extent of his share. Now, the learned Subordinate Judge, as already stated, passed a decree without contest against the defendants other than the defendant No. 12 and they do not question the decree made against them. It is the defendant No. 12 alone who has preferred this appeal.

The learned Advocate who appeared for the defendants-appellants contended, first, that neither s. 69 nor s. 70 of the Indian Contract Act were applicable to the facts of the present case; and, therefore, he said that the plaintiff was not entitled to any contribution from the defendant No. 12 upon the payment made by him. It was stated that the elements necessary to attract the operation of s. 69 did not exist in the present case nor did the provisions of s. 70 apply to this case. As regards this point, I need hardly say that the liability to contribution is not entirely contained in the two sections of the Contract Act referred to above, although generally speaking a large number of such cases do come within the purview of those two sections. The Court as a Court of Justice, equity and good conscience may, in certain circumstances—although such circumstances do not bring the case strictly within the purview of these two sections, allow contribution, if the claim appears to be either just or equitable. I need hardly cite more than one case in which the question was discussed, namely, the case of *Matungini Debi* v. *Brojesuar Banerji* (1). Mr. Justice Mookerjee in delivering the judgment in that case said as follows:—"The right of contribution has its foundation in and is controlled by the principles of justice, equity and good conscience. It does not arise from contract, although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between the parties jointly liable *ex-contractu*. Every joint debtor who has been compelled to pay more than his share of the common debt, has the right of contribution from each of the co-debtors. The principle is that one who has discharged a common liability can recover from his co-obligors only for the excess that he has paid over his share, and each co-obligor is liable to contribute only in proportion to his share of the common debt or obligation." Now, the same case is also authority for the proposition that, in cases such as the present one is, both ss. 69 and 70 of the Contract Act are applicable. I shall presently refer to the distinction, which the learned Advocate for the appellants has drawn as to why the same rule should not be applied to the facts of the present case.

Taking s. 69 first, it enacts that "a person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it is entitled to be reimbursed by the other." It is argued that the present plaintiff cannot be said to have been interested in the payment because he was also liable to pay the money. It was also argued that the defendant No. 12 was not bound to pay the money because he was neither a party to the decree for rent nor was the period for which the rent was claimed subsequent to his purchase. It appears to me that this contention is not sound. The plaintiff was interested in the payment of this decretal amount. He was interested because it affected his property. He was further interested because there was the decree against him and he was interested to see that that amount was paid. A person may be interested in a payment, though he may be liable for or bound to pay only a part of the money. Here the plaintiff was not bound to pay the whole of the money. The share, according to the plaintiff, which the defendant No. 12 held was liable for the money and, therefore, s. 69 applies. I think, therefore, the argument that the plaintiff was not interested within the meaning of s. 69 is not tenable nor is the argument that the defendant No. 12 was not bound to pay the same tenable, because, although the said defendant was neither a party to the decree nor were the arrears due for a period subsequent to his purchase, he was bound in law to pay the same as the property which he purchased was liable for the payment of that money. The section does not speak of mere personal liability. There is abundant authority for the proposition which I have relied upon. Take the case of *Manindra Chandra Nandy* v. *Jamahir Kumari* (2) which the learned Advocate for the appellant cited in support of his contention. In that case, Mr. Justice Ghose in delivering the judgment of the Court said that a mortgagee who purchased a tenure in execution of his mortgage-decree purchased it subject to the liability for the rent with which the tenure was charged. It may be pointed out that rent is the first charge—a charge which is superior to the charge of the mortgagee himself. The learned Judge pointed out in that case that the reason for this view was that when a mortgagee in execution of his decree purchased the tenure the price that he paid must have been in view of the liability for the arrears of rent to which the tenure was subject. Therefore, in the persent case, the share which the defendant No. 12 purchased in execution of his mortgage decree was liable for the amount of the decree for rent, although the period for which the rent was due was anterior to his purchase. Other cases may also be cited in support of the same view: but it is not necessary to do so. I shall only quote the words used in the case to which I have just referred, namely, the case of *Manindra Chunder Nundy* v. *Jamahir Kumari* (2). It was held there that "a mortgagee who purchases a property at an execution sale is under a liability to pay the rent due upon the property at the time of the purchase and, therefore, cannot claim under s. 69 of the Contract Act contribution from the mortgagor." The defendant No. 12 was, therefore, legally bound to pay a part of the money due on the decree.

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(1) 27 Ind. Cas. 22; 20 C. L. J. 205

Now, taking s. 70 of the Contract Act, the argument advanced by the learned Advocate on behalf of the defendants-appellants was that the defendant No. 12 was not benefited by the payment and, therefore, s. 70 had no application to the case. It was conceded that the payment made by the plaintiff was not a voluntary payment and, therefore, he did lawfully pay the money; but as the plaintiff's deposit set aside the sale of the entire property, it was argued that the defendant was not benefited, because, in the result, he lost the benefit of his purchase of the entire property and was left only with the share which he held before. In my opinion, there is a fallacy in this argument. The character in which the plaintiff sued the defendants and the character in which the defendant No. 12 was charged with the liability was the character of co-sharers as between themselves; and, as the property was saved by the deposit. the defendant No. 12 was benefited to the extent of his share. Whether his purchase in execution of the rent decree was a better bargain or not has no real effect on the question.

In my opinion, it is not necessary, therefore, to invoke any principle of equity or justice in the present case as I think that both ss. 69 and 70 of the Contract Act are applicable to the facts of the case so far as the share which the defendant No. 12 purchased in execution of his mortgage decree is concerned, namely, the share which originally belonged to the defendants Nos. 13 to 15.

But as regards the share which belonged to the defendant No. 1, I think the position is different. The learned Subordinate Judge has made a joint decree against the defendant No. 1 and the defendant No. 12 so far as this share is concerned. This was obviously wrong. In a suit for contribution, the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. That is not the only error in the decree. It appears that, so far as the share of the defendant No. 1 is concerned, the defendant No. 12 was no more than a mere mortgagee—not a mortgagee in possession but an ordinary mortgagee. The property no doubt was liable for the rent due on it; but the liability was primarily the liability of the defendant No. 1. So long as the defendant No. 12 did not purchase in enforcement of his mortgage against the defendant No. 1, the defendant No. 1 was liable to pay the rent and, even if the defendant No. 12 was obliged to make any payment to save the property from sale in execution of a rent decree, the defendant No. 1 would be ultimately liable to pay that money to the defendant No. 12 and the defendant No. 12 would be entitled to add that money to the mortgage-debt due to him by the defendant No. 1. Therefore, so long as the defendant No. 1 remained the owner of the property as a mortgagor and was in possession, the liability to save the property from sale in execution of the decree for arrears of rent was his liability and not the liability of the defendant No. 12. Consequently, neither s. 69 nor s. 70 of the Contract Act would apply so far as the share of the defendant No. 1 is concerned. The plaintiff, therefore, has failed to establish any liability of the defendant No. 12 for the amount due on account of the share which belonged to the defendant No. 1.

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(2) 32 C. 643; 9 C. W. N. 670.

In this view, I think that the decree of the learned Subordinate Judge should be varied. The appeal should be dismissed so far as regards the amount due on account of the share of the defendants No. 13, 14 and 15 and it should be allowed in so far as the decree of the Court below makes the defendant No. 12 liable for the amount due in respect of the share which belonged to the defendant No. 1 who alone should be held liable. Costs will be in proportion to the respective success and failure of the parties in both the Courts. The hearing fee is assessed at Rs. 200.

There is a cross-objection by the plaintiff and it raises only one question, namely, that the learned Subordinate Judge ought to have allowed the plaintiff interest upon the amount found due to him from the date of the suit. I think that that contention is right. The plaintiff will be entitled to interest at 6 per cent. per annum on the amount found due to him by the lower Court from the date of the suit until realisation. No order is made as to the costs in the cross objection.

Walmsley, J.—I agree.

S. S. *Order accordingly.*

OUDH CHIEF COURT.

CIVIL REVISION NO. 15 OF 1926.

February 18, 1926.

Present:—Mr. Justice Ashworth.

CHANDRIKA DATT RAM PANDAY AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

SHYAM LAL—DEFENDANT—OPPOSITE PARTY.

Arbitration—Terms of reference—Private enquiry—Award, validity of.

An arbitrator must not take evidence behind the back of the parties unless the terms of the reference, construed in the light of the circumstances of the case, give him authority to do so. [p. 163, col. 1.]

Daya Kishen v. *Dharam Das*, 4 A. L. J. 159; A. W. N. (1907) 75 and *Husain Baksh* v. *Firm Lachhman Das-Mathra Das*, 64 Ind. Cas. 931; 20 A. L. J. 125; A. I. R. 1922 All. 69, referred to.

Where a reference to arbitration permits the arbitrator to come to a decision by any method that he might think fit, an award made by him after private enquiry is not invalid. [p. 163, cols. 1 & 2.]

Civil revision against an order of the Munsif, Gonda, dated the 26th January 1926, in Small Cause Court Suit No. 2196 of 1925.

Messrs. *Ram Nath* and *Ramapat Ram*, for the Applicants.

Mr. *S. N. Roy*, for the Opposite Party.

JUDGMENT.—This is an application under s. 25 of the Provincial Small Cause Courts Act for revision of a decree of the Munsif of Gonda acting as a Small Cause Court Judge. The facts are as follows:—The plaintiffs are two minors suing under the guardianship of their grandfather. They sue on a promissory note for Rs. 100 alleged to have been executed by the defendant in favour of their deceased father on the 14th October 1922. The defence was a denial that the defendant had borrowed the hundred rupees, and an allegation that the pro-note was a forgery and stamped with a stamp taken off some receipt. In order to explain the opportunity that the minors' father would have had to get hold of such a stamp, the defendant stated in his written statement that he (the father) used to purchase spare parts of bicycles from the defendant's shop, pay for them and get stamped receipts. In order further to show opportunity he has stated in his written statement that the father of the minors had lived with the *khazanchi* of a certain lady, who had got bicycle repairs done for her establishment by the defendant, had similarly paid for them and got stamped receipts. In order to explain why the suit was brought on a forged pro-note, the defendant said that plaintiffs' father had come to an open rupture with him about a sum of Rs. 15 which he owed the defendant. When the case came into Court the parties put in an application that the case should be referred to arbitrator, the arbitrator being Mr. Vishwa Nath, a Pleader of the Court. The application for submission to arbitration contained the sentence "It shall be referred to the said Vakil in order that he may make any decision in any way he wishes in this case and the parties will accept it." The arbitrator gave his decision in favour of the plaintiffs. The Munsif, as a Small Cause Court Judge, has set aside the award on the ground of legal misconduct, the arbitrator having frankly admitted that not being able to come to a decision on the statements made before him in the presence of the parties, he had made private enquiries from people in the neighbourhood and others. The Munsif relied upon a decision *Daya Kishen* v. *Dharam Das* (1) where it was stated that it was legal misconduct on the part of an arbitrator to make private enquiries, and to make his award on information which he had previously obtained, which the parties did not get an opportunity of checking. Counsel for the applicants in this application. on the other hand, relies upon a later ruling of the Allahabad High Court, *Husain Baksh* v. *Firm Lachhman Das-Mathra Das* (2). In the case there considered the parties had expressly authorised the arbitrator to arrive at a decision either on his own personal knowledge or in whatsoever manner he might think proper. It was held that this would justify him making private enquiry.

These decisions, it appears to me, can be reconciled only by holding that an arbitrator must not take evidence behind the back of the parties unless the terms of the reference to him, construed in the light of the circumstances of the case, give him authority to do so In this case, the written statement of the defendant sets forth what may be called a conspiracy of forgery. Reading the words that the arbitrator might make any decision in any way he wishes along with the written statement, the conclusion that I think any one would come to is that the parties wanted the arbitrator to come to a decision by any method that he thought fit. The arbitrator has explained that the statements made before him in the presence of the parties were not sufficient to convince him. I consider that the terms of the reference justified him in making private enquiries. The next question is whether this is a case in which I should use the discretionary power of revision in a Small Cause Court case. I consider that it would be a grave miscarriage of justice if the arbitrator's award given in the circumstances stated was not allowed to be effective. Accordingly I allow this application in revision with costs to the applicants.

N. H. *Application allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1676 OF 1924.

January 19, 1926.

Present:—Mr. Justice Martineau.

RAM GOPAL AND OTHERS—DEFENDANTS —APPELLANTS

versus

FIRM BHAN RAM-MANGAL CHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Debts—Goods supplied for family business—Co-parceners, liability of.

Where a debt represents money due for goods supplied for a Hindu joint family business, it is one for necessity and binding on the co-parceners.

Bishen Singh v. *Kidar Nath*, 62 Ind. Cas. 800; 2 L. 159, followed.

Second appeal from an order of the District Judge, Hissar, dated the 22nd March 1924, confirming that of the Munsif, Second Class, Sirsa, dated the 28th December 1922.

Pandit *Nanak Chand*, for the Appellants.

Mr. *Aziz Ahmad*, for the Respondents.

JUDGMENT.—My order of the 3rd February 1925, remanding the case for a finding as to whether the debt for which the bond was given by Ram Singh had been incurred for the benefit of the family, will be read as a part of this judgment. The finding of the Courts below is that the debt is not proved to have been so incurred.

Mr. Aziz Ahmad for the respondents points out that the learned District Judge has found that the cloth-shop opened by Ram Singh was a family concern, and he contests the correctness of the learned District Judge's view that even if the debt represented the price of the cloth supplied to the Firm Ram Pershad-Ram Singh, it was for the plaintiffs to prove that Ram Singh had purchased the cloth for the benefit of the family. The learned Judge is, no doubt, wrong on this point. If the money was due for cloth supplied for the family business all the co-parceners would be liable [*Bishen Singh* v. *Kidar Nath* (1).]

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(1) 4 A. L. J. 159; A. W. N. (1907) 75.

(2) 64 Ind. Cas. 934; 20 A. L. J. 125; A. I. R. 1922 All. 69.

But the learned Judge has not found, nor does the evidence prove, that the debt was, in fact, incurred in connection with the family business. The conclusion arrived at by the lower Courts that the debt has not been proved to have been incurred for the benefit of the family must, therefore, be accepted.

The result is that I accept the appeal and dismiss the suit as against the appellants, who will get their costs from the plaintiffs in all the Courts. The decree passed against Ram Singh will stand.

R. L. *Appeal accepted.*

(1) 62 Ind. Cas. 800; 2 L. 159.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 262 AND 263 OF 1924.
October 28, 1925.
Present:—Mr. Justice Devadoss
and Mr. Justice Waller.
IN C. R. P. No. 262 OF 1924.
VELLURI NARASINHA RAO, PROPRIETOR OF PEDAMAMIDIPALLI—PETITIONER
versus
THE *Ryots* OF PEDAMAMIDIPALLI
RESPONDENTS.
IN C. R. P No. 263 OF 1924.
VALLURI SRIVAT SANKA RAO,
PROPRIETOR OF KALAGAMPUDI
—PETITIONER
versus
THE *Ryots* OF KALAGAMPUDI—
RESPONDENTS.

Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Civil Procedure Code (Act V of 1908), s. 115—Madras Estates Land Act (I of 1908), ss. 30, 171, 172—Orders of Board of Revenue—Revision to High Court, whether competent—Record of Rights—Fair and equitable rent, determination of—Section 30, whether can be disregarded.

The High Court has revisional jurisdiction over the orders of the Board of Revenue passed under ss. 171 and 172 of the Madras Estates Land Act. [p. 164, col. 2.]

Burla Appanna v. *Anala Latchayya*, 79 Ind. Cas. 372; 47 M. 230; 45 M. L. J. 735; 33 M. L. T. 92; 18 L. W. 849; A. I. R. 1924 Mad. 119 and *Ramaswami Goundan* v. *Kali Goundan*, 52 Ind. Cas. 634; 42 M. 310; 36 M. L. J. 571, followed.

Kartik Chandra Ojha v. *Gora Chand Mahto*, 20 Ind. Cas. 420; 40 C. 518; 17 C. L. J. 593, relied on.

Kokku Parthasarathy Naidu v. *Chintalacherru Koteswara Rao*, 78 Ind. Cas. 98; 47 M. 369; 46 M. L. J. 201; 19 L. W. 402; (1924) M. W. N. 272; A. I. R. 1924 Mad. 591, distinguished.

A Revenue Officer acting under Ch. XI of the Madras Estates Land Act to determine the fair and equitable rent should take into consideration the existing rate of rent, the rise in prices, the time when the rate was last settled and the present state of things as regards the facilities of irrigation and other circumstances which would enable him to settle what is a fair and equitabte rent. Whatever may be the rate of rent, if he considers that it is not fair and equitable he is entitled to alter it and in doing so he is not bound by the rule in s. 30 of the Act that the increase cannot be more than annas 2 in the rupee. [p. 167, cols. 1 & 2.]

Where there is no remedy to the party aggrieved by an order of the Board of Revenue, the High Court would be justified in exercising revisional jurisdiction. [p. 167, col. 2.]

Per *Devadoss, J.*—All Courts which are governed by the C. P. C. are Civil Courts and therefore the High Court as having the right of superintendence over all the Civil Courts in the Presidency has power over such Civil Courts as are erected by any enactment. [p. 167, col. 1.]

Petitions under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the proceedings of the Board of Revenue, Land Revenue, and Settlement B. P. No. 1441 Mis., dated the 29th June 1923, in Settlement of Rent Appeals Nos. 2 and 3 of 1923, respectively preferred against the proceedings, dated the 28th September 1922, of the Revenue Officer for the settlement of rents in the villages of Pedamamidipalli and Kalagampudi (Narasapur, Kistna District) in O. P. Nos. 1 and 2 of 1922 of Pedamamidipalli and O. P. Nos. 1, 4 and 18 of 1922 of Kalagampudi.

Mr. *V. Ramadoss*, for the Petitioner.

Mr. *A. Venkatarayaliah*, for the Respondents.

Mr. *C. V. Ananthakrishna Aiyar*, for the Board of Revenue.

JUDGMENT.

Devadoss, J.—The Revenue Officer for the settlement of rents in the villages of Kalagampudi and Pedamamidipalli, Narasapur Taluk, Kistna District made a Record of Rights under Ch. XI of the Estates Land Act. The appeal of the proprietor of ...Pedamamidipalli to the Board of Revenue against the Record of Rights made by the Revenue Officer has been dismissed. He now moves the High Court to revise the order of the Board of Revenue.

Two points arise for decision in this case (1) Has the High Court revisional jurisdiction over the orders of the Board passed under ss. 171 and 172 of the Estates Land Act? and (2) If the question of jurisdiction is answered in the affirmative, should the

High Court exercise its revisional jurisdiction in this case.

The first point has been fully argued by Mr. Ramadoss for the petitioner and Mr. Venkatarayaliah for the respondents. We have also heard the Government Pleader to whom we gave notice to appear for the Board of Revenue as it was represented to us that a number of civil revision petitions were pending in the High Court in which the question of jurisdiction was involved. After a careful consideration of the arguments in the case, I see no reason to change my view expressed in *Burla Appanna* v. *Anala Latchayya* (1). I do not wish to repeat here the reasons which I gave in that case but will deal briefly with the arguments of the learned Government Pleader.

His contention is that the Board of Revenue is not a Civil Court and jurisdiction is given to it under the Estates Land Act to hear appeals from and to revise, the orders of the Collector and the Settlement Officer and the High Court cannot revise the orders of the Board of Revenue either under s. 115, C. P. C., or under s. 107 of the Government of India Act, 1915. His argument is based upon the observations made by the learned Chief Justice in *Abdul Sattar Sahib* v. *Special Deputy Collector, Vizagapatam* (2). In that case it was held that the High Court could not interfere in revision with the order of a Land Acquisition Officer who refused to refer a case to the District Court under s. 18 of the Land Acquisition Act. As the decision is that of a Full Bench I am bound by it, but I may be permitted to remark, why could not the High Court interfere with the order of a Land Acquisition Officer if he refused to refer a case to the District Court when the High Court has jurisdiction to determine any question that may arise on a reference being made? In other words, if the Land Acquisition Officer makes a reference to the District Court, an appeal lies from the District Court to the High Court; but if he does not refer the case to the District Court, the High Court is said to have no power to direct him to refer the case to the District Court. If a Collector refused to refer a case to the Civil Court, he does something which he ought not to do, and the High Court which has the power to hear and determine matters on a reference being made to the District Court cannot be said to have no power to direct the Collector to do what he is bound to do. However, as that case has no application to the present, I refrain from making any further comment. The decision in *Kokku Parthasarathy Naidu* v. *Chintalachervu Koteswara Rao* (3) has no application to the present case. According to that decision, where the Legislature erects a Tribunal for the purpose of determining any question which arises under a particular enactment, the High Court cannot interfere with the decision of that Tribunal, unless the High Court is empowered under the enactment which erected the Tribunal to hear appeals from such Tribunal or unless the enactment erecting the Tribunal makes it a Civil Court within the meaning of cl. 16 of the Letters Patent of the Madras High Court.

When a Settlement Officer makes a Record of Rights under Ch. XI of the Estates Land Act, he determines the right of the parties; in other words he determines the rights and liabilities of both the landholder and the *ryot*. His proceedings are governed by the C. P. C., *vide* s. 192. Part B of the Schedule of the Estates Land Act, No. 21 provides an appeal to the District Court against an order under s. 137 for the repair of an irrigation work and Nos. 22 and 23 provide for an appeal to the District Court in the case of applications by *ryots* to execute works in default of the landholder and for the recovery of the costs of the repair of an irrigation work. From a perusal of Parts A and B of the Schedule, it is apparent that wherever civil rights of the parties *i. e.*, landholder and *ryot*, are determined, an appeal is provided to the District Court. In the case of matters which are entirely within the cognizance of the Revenue Officer, an appeal is provided to the Collector and against his decision a second appeal is provided under s. 190 to the Board of Revenue. A Record of Rights is as important as, if not more important than the terms of a *patta*, and s. 173 gives liberty to a party to sue to set aside an order of the Settlement Officer in certain cases. Under s. 172 the Board of Revenue may, on an application of its own motion, direct the revision of any Record of Rights or any portion thereof. The mere fact that an appeal lies to the Board of Revenue is no argument for saying that the High Court has no power under the Act to revise the orders of a Collector or Settlement Officer acting under Ch. XI. The Calcutta High Court has consistently held that in the case of orders of Collectors or Revenue Officers determining the rights of the landlord and tenant, the High Court has power to interfere in revision with them. In *Kartik Chandra Ojha* v. *Gora Chand Mahto* (4) it was held that "Proceedings on applications for enhancement of rent under s. 27 of the Chota Nagpur Tenancy Act are judicial proceedings...The High Court has jurisdiction to interfere in cases where the Courts of Collectors have either exceeded the jurisdiction or failed or refused to exercise the jurisdiction vested in them by the Chota Nagpur Tenancy Act." The learned Judges observed at page 522* "From the very nature of the proceedings themselves, and also from the provisions of the Act as contained, for instance, in Ch. XVI it is clear that proceedings on applications for enhancement of rent are judicial proceedings and in view of the express provisions of s. 224 (2) which allows in certain cases a second appeal to this Court, it cannot, in our opinion, be contended that Deputy Commissioners in the performance of their judicial duties under the Chota Nagpur Tenancy Act are not Courts subject to the appellate jurisdiction of this Court".

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(1) 79 Ind. Cas. 372; 47 M. 250; 45 M. L. J. 735; 33 M. L. T. 92; 18 L, W. 849 A. I. R. 1924 Mad. 119.

(2) 84 Ind. Cas. 616; 47 M. 357; 46 M. L. J. 209; [illegible] W. N. 224; 19 L. W. 445; A. I. R. 1925 Mad. [illegible]

(3) 78 Ind. Cas. 98; 47 M. 369; 46 M. L. J. 201; 19 L. W. 402; (1924) M. W. N. 272; A. I. R. 1924 Mad. 591.

The learned Judges held that notwithstanding that the Board of Revenue had revisional jurisdiction over the orders of Collectors, the High Court had revisional jurisdiction over such orders. In *Ram Dayal* v. *Ramadhin* (5) a Bench of the Allahabad High Court held that the High Court has no power under s. 622 to revise an order of a Collector under s. 183 of the North West Provinces Rent Act, XII of 1881 on appeal from an Assistant Collector of the Second Class. The argument of Straight, J., who delivered the judgment of the Court is that if it were held that the High Court had jurisdiction to revise such orders; it might create a dilemma inasmuch as the Board of Revenue also had revisional jurisdiction. The question is whether the High Court could, and not, whether it should, interfere with an order of a Collector after the Board of Revenue had interfered with it. The question does not depend upon any dilemma arising in the exercise of revisional jurisdiction by the High Court as well as by the Board of Revenue. It would be a matter for consideration in each case whether the High Court should exercise its powers or not. If it considers that the case is not a proper case for the exercise of its revisional powers, it would refrain from doing so, but if it is a proper case, the High Court would interfere with such orders.

In one portion of the argument the learned Government Pleader almost suggested that if the Board of Revenue declined to interfere with the order of a Collector then the High Court might interfere but if the Board of Revenue did interfere with such order, the High Court had no power to interfere. Such an argument, though not put forward in so many words by the Government Pleader is on the face of it untenable. It is not seriously contended that *Ramaswami Goundan* v. *Kali Goundan* (6) was not correctly decided. The same learned Judges who decided *Ramaswami Goundan* v. *Kali Goundan* (6) decided *Paramaswami Aygangar* v. *Alamu Nachiar Ammal* (7).

In considering this question, the aim and the scope of the Estates Land Act should be considered. Under the old Rent Recovery Act (VIII of 1865) the High Court had no revisional jurisdiction over the orders of Revenue Courts. Under the Estates Land Act, I of 1908, appeals are provided to the District Court against the orders of Revenue Courts and the C. P. C. is made expressly applicable to the proceedings of the Revenue Officers and Revenue Courts by s. 192. Under s. 202 the High Court is empowered to make rules consistent with the Estates Land Act declaring that any portion of the C. P. C. shall not apply to suits between landholder and *ryot* as such or to any specified classes of such suits or shall apply to them subject to modifications specified in the rules: These are innovations which are made in the present enactment and the object of the legislation was to determine the respective rights and liabilities both of the landholder and the *ryot*. In all cases where the rights of the landholder or the *ryot* are affected an appeal is given to the District Court. It would be against the scope of the Act and the specific provisions of s. 199 to hold that the High Court has no revisional jurisdiction over the orders of the Board of Revenue. It is unnecessary in this connection to consider whether the Board of Revenue is a Court subordinate to the High Court. All Courts which are governed by the C. P. C. are Civil Courts and, therefore, the High Court as having the right of superintendence over all the Civil Courts in the Presidency has power over such Civil Courts as are erected by any enactment. The Board of Revenue is authorised under r. 21 framed by the Governor in Council under s. 215 of the Estates Land Act to hear appeals from the decision of the Collector under Ch. XI. The mere fact that appeals lie to the Board of Revenue would not take away the power of the High Court to revise the orders of the Collector or of the Board of Revenue. It is nowhere said and there is no provision in the Act or in the rules framed under the Act, that the orders of the Board of Revenue are final. The argument advanced in *Ram Dayal* v. *Ramadhin* (5) cannot apply to this case, for the Board of Revenue in this case is only an appellate authority and not a revisional authority. For the above reasons given by me in *Burla Appanna* v. *Anala Latchayya* (1), I answer the question in the affirmative.

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(4) 20 Ind. Cas. 420; 40 C. 518; 17 C. L. J. 593.

(5) 12 A. 198; A. W. N. (1890) 59; 6 Ind. Dec. (N. S.) 875.

*Page of 40 C.—[*Ed.*]

(6) 52 Ind. Cas. 634; 42 M. 310; 36 M. L. J. 571

(7) 49 Ind. Cas. 11; (1919) M. W. N. 10
J. 632; 9 L. W. 26; 42 M. 76,

Second point.—The Revenue Officer had to determine what was a fair and equitable rent. He thought he was bound by the provisions of s. 30 of the Estates Land Act in determining under Ch. XI what was fair and equitable rent. The provisions of s. 30 of the Act apply to enhancement of rent at the instance of the landholder. Under Ch. XI either the landholder or the *ryot* may apply to the Government for an order directing that a survey be made and a Record of Rights be prepared by the Revenue Officer in respect of an estate or a portion of an estate. In making the Record of Rights, the Revenue Officer has to be guided by considerations which are not necessarily the same as those arising under s. 30. A Revenue Officer acting under Ch. XI should take into consideration the existing rate of rent, the rise in prices, the time when the rate was last settled and the present state of things as regards the facilities of irrigation and other circumstances which would enable him to settle what is a fair and equitable rent. Whatever may be the rate of rent, if he considers that it is not fair and equitable he is entitled to alter it; and in doing so he is not bound by the rule in s. 30 that the increase cannot be more than annas 2 in the rupee. Under Ch. XI the Revenue Officer may reduce the rent and may settle different rates of rent for land of different value or different fertility. The Revenue Officer, therefore, has not exercised the jurisdiction which he had in determining what is fair and equitable in the circumstances of the case. The High Court does not interfere as a rule with the orders of Courts subordinate to it, over which it has revisional jurisdiction in cases where there is another remedy open for the party than by revision. Section 173 provides for suit by a party who feels aggrieved by the Record of Rights, but none of the cls. (*a*) to (*f*) of sub-s. (3) applies to the present case. The parties have no right of suit in this case and, therefore, this is a case in which the High Court would be justified in exercising revisional jurisdiction.

I, therefore, set aside the order of the Revenue Officer for the settlement of rents and direct him to make a proper record of the rent in the light of the remarks made above. Petitioner will have the costs of this application. The costs of further proceedings will abide the result.

Waller, J.—On the first point I think that the matter is concluded by *Ramaswami Goundan* v. *Kali Goundan*(6), a decision from which I see no reason to dissent. On the second I agree that the Revenue Officer in settling a fair and equitable rent is not bound by the provisions of s. 30 of the Act. It is obvious that there is no right of suit in regard to the question raised. If there is, we should not be justified in interfering in revision.

I concur in the order proposed.

V. N. V.

N. H. *Order set aside.*

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LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 625 OF 1924.
January 27, 1926.
Present:—Mr. Justice Broadway.
KARIM BAKHSH AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
MOHAMED SHAFI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Possession, suit for—Building on another's land—Delay in suit—Proper relief.

If a person deliberately builds on another's land, the latter is entitled to recover possession of the land unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to acquiesce in the erection on his building. Mere delay in bringing a suit is not in itself sufficient to deprive the owner of his strict rights.

Premji Jivan Bhata v. *Haji Cassum Juma Ahmed*, 20 B. 298; 10 Ind. Dec. (N. S.) 758 and *Jethalal Hirachand* v. *Lal Bhai Dalpatbhai*, 28 B. 298; 6 Bom. L. R. 86, referred to.

Second appeal from a decree of the Senior Sub-Judge, Gujranwala, dated the 1st December 1923, reversing that of the Munsif, Gujranwala, dated the 15th December 1922.

Moulvi *Ghulam Mohy-ud-din*, for the Appellants.

JUDGMENT.—This second appeal has arisen out of a suit brought by Karim Bakhsh and others for possession of a plot of land measuring 46 feet by 3½ feet. It was alleged that the plaintiffs were the owners of a vacant site adjacent to another vacant site which belonged to Hafiz Abdul Ali *alias* Jhandu, a gentleman who had been born blind. This Jhandu had purchased this site in 1915 and had erected a house thereon. Later he died and his minor sons sold the house so built in 1919 to Nawab Changar. In 1920, the plaintiffs discovered that this house had been erected partly on a strip of land belonging to them, in other words that Jhandu had encroached on the plaintiffs' site. The Trial Court held that the encroachment had, as a matter of fact, been made, but as the suit had not been brought for five years, they were only entitled to damages which he assessed at Rs. 100. The learned Senior Subordinate Judge, on appeal by both parties to him, while agreeing with the view taken by the Trial Court as to the factum of the encroachment reduced the damages to Rs. 50. The plaintiffs have come up to this Court in second appeal through Mr. Ghulam Mohy-ud-din and the respondents have put in cross-objections but no appearance has been made either to support them or to oppose this appeal.

The case first came up for hearing on the 4th March 1925, before Mr. Justice Abdul Raoof, who remanded it to the Court below for findings on three issues which are:—

(1) Was Jhandu under the mistaken belief that he was building upon his own land?

(2) Did the plaintiff stand by and allow Jhandu to proceed to build on the land in dispute?

(3) Was the plaintiff present in Gujranwala and was the building constructed in his presence?

The Courts below have now submitted their findings on the points referred to them and have agreed in holding that Jhandu was well aware that he was encroaching on the plaintiffs' land when he erected his house, that the plaintiffs did not stand by and allow Jhandu to proceed with the building, and that the plaintiffs were not present in Gujranwala when the building was constructed and did not know of its erection. On these findings Mr. Ghulam Mohy-ud-din has urged that the plaintiffs-appellants are entitled to the decree asked for by them and has further urged that this is not a case which can be met in equity by the award of damages. In *Premji Jiwan Bhate* v. *Haji Cassum Juma Ahmed* (1) it was held that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This, it was found, was the law in England. Sargent, C. J., further pointed out that the law in this country was the same with the exception that the party building on the land of another was allowed to remove the building. Further it was held that delay in bringing a suit was not in itself sufficient to create an equity in favour of the person building so as to deprive the owner of his strict rights. This case was considered by a Division Bench of the same Court in *Jethalal Hirachand* v. *Lalbhai Dalpatbhai* (2) where certain English authorities were discussed and it was held that the mere fact that since the encroachment a certain amount of time had elapsed before the suit was brought was not sufficient to deprive the owner of the land of his strict rights.

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(1) 20 B. 298; 10 Ind. Dec. (N. S.) 758.

(2) 28 B. 298; 6 Bom. L. R. 86.

In the present case it has been found as a fact that Jhandu encroached upon this land knowing that he was encroaching. From this finding it is impossible for me to differ in second appeal even if I wished to do so. It appears, however, that the person employed by Jhandu to erect this house was examined as a witness and as shown in the reports of the Courts below this witness stated that Jhandu was well aware that he was encroaching but says that the plaintiffs had agreed to let him have the land, the present case, therefore, is stronger than the Bombay cases cited above for] there the persons making the encroachment did so under the mistaken belief that they were building on their own land. Here it has been found that Jhandu built on another man's land knowing that he was doing so. It would be putting a premium on actions such as this if a party were to be allowed deliberately to build on another person's land and then force him practically to sell the land to him on receipt of compensation therefor, and, I, therefore, think that in the present case the award of damages was not correct.

I, therefore, accept this appeal with costs and grant the plaintiffs a decree for possession of the site in suit. The defendants will be allowed to remove their materials therefrom within six months from the date of this decree failing which the plaintiffs will be entitled to have the said building removed at the expense of the defendants-respondents. The cross-objections are dismissed.

R. L. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1784 OF 1925.
March 5, 1926.
Present:—Mr. Justice Kanhaiya Lal
and Mr. Justice Boys.
Chaudhri JHABBA SINGH—PLAINTIFF
—APPELLANT
versus
CHHAJJOO—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 92 (4)—Lease registered – Subsequent arrangement for giving credit out of rent, proof of.

Though a subsequent oral agreement varying the terms of a registered lease cannot be proved, an arrangement to give credit to the extent of a certain amount out of the rent owing to certain groves having been cut by the lessor may be proved.

Mayandi Chetti v. *Oliver*, 22 M. 261; 8 M. L. J. 196; 8 Ind. Dec. (N. S.) 186 and *Karampalli Unni Kurup* v. *Thekku Vittil Muthorakutti*, 26 M. 195, distinguished.

Beni Madhub Gorani v. *Lalmoti Dassi*, 6 C. W. N. 242, *Manindra Chandra Nandi* v. *Durga Sundari Dasya*, 32 Ind. Cas. 185; 20 C. W. N. 680, *Ariyaputhira Padayachi* v. *Muthukumarasawmy Padayachi*, 15 Ind. Cas. 343; 37 M. 423 at p. 431; 12 M. L. T. 425; 23 M. L. J. 339; (1912) M. W. N. 854 and *Kattika Bapanamma* v. *Kattika Kristnamma*, 30 M. 231; 17 M. L. J. 30, referred to.

Second appeal from a decree of the District Judge, Moradabad, dated the 26th May 1925.

Mr. *Iqbal Ahmad*, for the Appellant.

JUDGMENT.—These appeals arise out of three suits brought by lessor for the recovery of arrears of *theka* money due by a lessee for the years 1328, 1330 and 1331 *Faslis*. The *theka* was granted on the 5th of May 1918 by a registered lease, which secured to the lessor a rent of Rs. 1,125 per year. Three years after the grant of the lease, two groves standing in the village, comprised in the lease, which apparently yielded some profit to the lessee, were cut by the lessor with the consent of the lessee; and the arrangement between them was that the lessor shall give credit on account of the groves cut to the extent of Rs. 246 per year towards the rent secured by the lease.

The question for consideration here is whether such an arrangement can be proved in variation of the terms of the original lease; or in other words whether the oral evidence to prove such an arrangement is excluded by s. 92 (4) of the Indian Evidence Act, 1872. It is a well-established rule that a subsequent oral agreement, varying the terms of a registered lease, or suggesting that the rent payable was really less than what was stated in the registered *kabuliyat* or lease cannot be proved. But in the present case the agreement was virtually an agreement to give credit to the extent of Rs. 246 per year out of the rent owing to certain groves having been cut by the lessor and the profits of the lease-hold property having been consequently reduced.

The Counsel for the plaintiffs-appellants has referred to the decisions in *Mayandi Chetti* v. *Ooliver* (1) and *Karampalli Unni*

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(1) 22 M, 261; 8 M. L. J. 196; 8 Ind. Dec (N. S) 186.

Kurup v. *Thekku Vittil Muthorakutti* (2). In none of these cases was any payment made in cash or kind to operate as a *pro tanto* discharge of the liability secured by the lease. All that was set up was an oral agreement to reduce the rent; but nothing was paid which could be treated as an equivalent to the rent agreed to be remitted. In *Beni Madhub Gorani* v. *Lalmoti Dassi* (3) and in *Manindra Chandra Nandi* v. *Durga Sundari Dasya* (4) oral evidence was admitted to show that despite the execution of a registered *kabuliyat* the tenant had paid rent at a lower rate than that stated in the *kabuliyat*, and the acceptance of that rent by the lessor was relied on as establishing that the intention of the parties was that the *kabuliyat* was from the first not be acted upon or that there had been a waiver of the strict terms of the lease. As pointed out in *Ariyaputhira Padayachi* v. *Muthukumarasawmy Padayachi* (5) a liability created by a registered instrument may be proved to have been extinguished by letting in admissible evidence (including oral evidence) of payment of that liability or by letting in admissible evidence of any other transaction which operates as a mode of payment. In *Kattika Bapanamma* v. *Kuttika Kristnamma* (6) it was held that while a subsequent oral agreement to modify the terms of a registered maintenance deed cannot be proved, the fact that in particular years the obligee was in possession of certain lands of the obligor and paid herself the maintenance amount out of the profits of the lands can be proved. Treating the transaction as a mode of payment or a discharge or waiver of a portion of the rent, due to the profits of the groves, comprised in the lease and cut by the lessor, having been reduced, there was no reason for refusing to allow evidence in proof of such a discharge or waiver. No question of set-off really arises. The appeals are dismissed under O. XLI, r. 11, C. P. C.

R. L. *Appeal dismissed.*

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(2) 26 M. 195.
(3) 6 C. W. N. 242.
(4) 32 Ind. Cas. 185; 20 C. W. N. 680.
(5) 15 Ind. Cas. 343; 37 M. 423 at p. 431; 12 M. L. T. 425; 23 M. L. J. 339; (1912) M. W. N. 854.
(6) 30 M. 231; 17 M. L. J. 30.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 150
OF 1924.
December 4, 1925.
Present:—Mr. Justice Cuming
and Mr. Justice B. B. Ghose.
NANDALAL GANGULI—JUDGMENT-
DEBTOR—APPELLANT
versus
Srimaty NRITYAKALI DEVI—DECREE-
HOLDER—RESPONDENT.

Calcutta Improvement (Appeals) Act (XVIII of 1911), s. 5— Execution of order—Jurisdiction of Chief Judge, Small Cause Court—Munsif, jurisdiction of—Civil Procedure Code (Act V of 1908), s. 6, application of.

Under s. 5 of the Calcutta Improvement (Appeals) Act the jurisdiction to execute the order of the President of the Tribunal by the Chief Judge of the Small Cause Court of Calcutta is not limited to an order which may come within his pecuniary jurisdiction.

Proceedings before the President of the Calcutta Improvement Tribunal not being a suit, s. 6 of the C. P. C. does not apply to any order passed by the President which may, therefore, be executed by a Munsif irrespective of the consideration of his pecuniary jurisdiction.

Appeal against an order of the Additional Subordinate, Judge, 24-Perganas, dated the 19th of March 1924, affirming that of the Munsif, First Court at Alipur, dated the 27th of August 1923.

Babus *Hira Lal Chakrabarty* and *Shyamadas Bhattacharji*, for the Appellant.

Babu *Baranasibasi Mukerji*, for the Respondent.

JUDGMENT.

Cuming, J.—The facts of the case out of which this appeal has arisen are as follows: the respondent has obtained a certain award in an apportionment case from the President of the Calcutta Improvement Tribunal. The appellant in this case raised objections in the apportionment case and the President of the Tribunal decided against him. The appellant appealed to this Court and this Court dismissed the appeal and gave costs to the respondent. The respondent then applied to execute his decree for costs to the Calcutta Small Cause Court. As the appellant had no property within the jurisdiction of the Calcutta Small Cause Court the execution there was infructuous and it was transferred by the Small Cause Court to the Court of the First Munsif, Alipur, for disposal. Various objections were raised in that Court to the execution of the decree. But they were overruled and the learned Munsif proceeded to execute the decree as prayed for by the respondent.

The appellant then appealed to the District Court and the District Court at first decided the appeal in his favour, but on review set aside his order allowing the appeal and upheld the order of the Munsif. Against this order the present appeal has been preferred.

The respondent objects that no appeal lies to this Court. It is unnecessary to decide whether or not any appeal lies, because after hearing the appeal we are of opinion that the appeal has no merit in it.

The learned Vakil for the appellant has put forward two grounds. He first of all contends that the Small Cause Court had no jurisdiction to entertain the application for execution, because the value of the suit, as he describes it, was beyond the pecuniary jurisdiction of that Court. Now this decree for costs was sent to the Chief Judge of the Small Cause Court of Calcutta under s. 5 of the Calcutta Improvement (Appeals) Act. Section 5 provides as follows: "The Chief Judge of the Court of Small Causes of Calcutta shall, on application, execute any order passed by the Court on appeal as if it was a decree made by himself." The Court referred to in this section is the High Court of Judicature at Fort William in Bengal. The section, as will be clear from a perusal of it does not in any way limit the pecuniary jurisdiction of the Chief Judge of the Small Cause Court of Calcutta. The words used are "execute any order passed by the Court on appeal." It is quite clear from these words that his jurisdiction to execute any order of the Court is not limited to an order which may come within his pecuniary jurisdiction. The contention that the value of the claim in appeal was Rs. 15,000 and was beyond his pecuniary jurisdiction thus is decided against the appellant.

The next point urged by the learned Vakil is that the First Munsif of Alipur to whose Court the decree was transferred had no jurisdiction to execute the decree, his contention being that the value of the suit as he described it was Rs. 15,000 and that the pecuniary jurisdiction of the Munsif of Alipur does not extend beyond Rs. 2,000 and in support of his contention he relies on s. 6 of the C. P. C. which provides as follows: "Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction." He contends that the execution proceedings are to be regarded as the continuation of the suit, and hence as the subject-matter of the suit was Rs. 15,000 the Munsif, First Court at Alipur had no jurisdiction to execute the decree for costs. The simple answer to this contention is that the proceedings before the President of the Calcutta Improvement Tribunal was not a suit. Therefore this contention equally fails.

The result is the appeal fails and is dismissed with costs. Hearing-fee five gold *mohurs*.

Ghose, J.—I agree.

M. B.

R. L. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1473 of 1923.

February 23, 1926.

Present:—Mr. Justice Dalal.

Lala SOHAN LAL—DEFENDANT—APPELLANT

versus

Lala MAKHAN LAL—PLAINTIFF—RESPONDENT.

Landlord and tenant—Ex-proprietary tenant.

An ex-proprietary tenant is not a tenant of the one particular proprietor who purchases *sir* land but is a tenant of the whole proprietary body.

Debi Pershad v. *Bhagwan Din*, 16 Ind. Cas. 399; 10 A. L. J. 437; 35 A. 27, followed.

Bhagwant v. *Arjun*, 32 Ind. Cas. 617; 14 A. L. J. 209 distinguished.

Second appeal from a decree of the District Judge, Agra, dated the 1st of August 1923.

Mr. *Panna Lal*, for the Appellant.

Mr. *N. P. Ashthana*, for the Respondent.

JUDGMENT.—In my opinion the learned District Judge has taken the correct view of the law on the subject. The plaintiff is the owner of about half share in a certain *khewat* and sued the defendant, the other co-sharer, for rendition of account and recovery of balance due to him. It so happens that the plaintiff is purchaser of the share of one Chandan who was the original proprietor and held all the land in *sir*. Chandan on the sale of his property became ex-proprietary tenant and a rent of Rs. 26 was then fixed for his holding. The defendant does not hold *sir* land but collects rent to the extent of Rs. 92 from tenants for the balance of the land. The plaintiff's claim was that he should obtain half of Rs. 26 *plus* Rs. 92 after giving deduction for Rs. 26 realized by him. The learned District Judge accepted this position as correct. The defendant has appealed and on his behalf it was argued here that the plaintiff should be satisfied with the rent which he received from the ex-proprietor. Such a view is distinctly negatived by the Full Bench ruling of this Court in the case of *Debi Pershad* v. *Bhagwan Din* (1). It was held there that an ex-proprietary tenant was not a tenant of the one particular proprietor who purchased the *sir* land but was a tenant of the whole proprietary body. Following this ruling Chandan is a tenant both of the plaintiff and the defendant, and similarly the other tenants would be tenants of both the parties. The parties will, therefore, be entitled to divide the rents of Chandan as well as of the other tenants between themselves.

Mr. Panna Lal, the learned Counsel for the appellant, referred me to a Bench ruling in the case of *Bhagwant* v. *Arjun* (2). There all the proprietors were *sir*-holders. In the present case if the defendant had been a *sir*-holder of the land it is obvious that there would have been no need for a settlement of account between the parties.

I dismiss the appeal with costs.

R. L. *Appeal dismissed.*

(1) 16 Ind. Cas. 399; 10 A. L. J. 437; 35 A. 27.

(2) 32 Ind. Cas. 617; 14 A. L. J. 209.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 268 OF 1925.

March 9, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

MUL RAJ—DECREE-HOLDER—APPELLANT

versus

KISHORI LAL—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Order entering satisfaction of decree*—*Fresh application.*

An order in execution entering satisfaction of decree unless set aside operates as *res judicata* and bars a fresh application for execution.

Letters Patent Appeal against the judgment of Mr. Justice Jai Lal, passed in Civil Appeal No. 750 of 1925, dated the 25th June 1925, affirming that of the District Judge, Ludhiana, dated the 23rd December 1924.

Mr. *Bihari Lal*, for the Appellant.

Lala *Ram Lal*, for the Respondent.

JUDGMENT.—On the 30th October 1922, the Court executing the decree passed an order that the decree had been fully satisfied. That order has never been set aside and operates as *res judicata*. The present application for execution has, therefore, been rightly rejected.

We accordingly dismiss the appeal with costs.

R. L. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULES Nos. 950, 951 AND 952 OF 1925.

January 6, 1926.

Present:—Justice Sir George Claus Rankin, KT.

SAFITANNESSA KHATUN AND OTHERS—PETITIONERS

versus

MEGH LAL GOPE AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, application of—Execution proceedings — Mistaken application—Relief, grant of, in revision.

The provisions of O. IX, C. P. C., are not applicable to execution proceedings.

The High Court will not interfere in revision to direct the lower Court to treat a mistaken application under O. IX, C. P. C., as one for review under O. XLVII of the Code, where there was another remedy open to the applicant which he could have availed of.

Rule against an order of the Munsif, Jamalpur, dated the 2nd May 1925.

Babu *Birendra Kumar De*, for the Petitioners.

Babu *Profulla Chunder Nag*, for the Opposite Party.

JUDGMENT.—In this case the auction-purchaser who had been in possession of the property purchased for a substantial period—it is alleged for some three years—found that the Court had made an order under r. 90 of O. XXI setting aside the sale upon the application of a person who claimed to be a mortgagee and who claimed that at the time of the sale no notice had been served upon him. The auction-purchaser claimed that the mortgagee had got the sale set aside by suppressing the service of all notices of the application under r. 90. When he came to learn of the order made setting this sale aside, he applied to the Munsif under O. IX as a person who had not been properly served and against whom an *ex parte* decree had been made in his absence. The Munsif dismissed that application on the ground that O. IX was inapplicable to execution proceedings and that position seems, so far as the Vakil for the petitioner is concerned, to be uncontested before me.

There has been a great difference of opinion on the matter but what is said on the part of the petitioner now is that the Court can give relief under s. 115 by making an order treating the application to restore under O. IX as though it has been an application for review made under O. XLVII. If this Court makes an order that the one application should be deemed to be considered as the other, then it is said the applicant may have his rights determined. It appears to me that it is a very strong thing, when the Munsif has quite rightly decided that he has no jurisdiction to entertain the application that was in fact made, without any error on the part of the Munsif and without any illegality on his part, to make an order under s. 115 directing that the application should be deemed to have been a different application. I do not make any comment upon the other cases in which that course has been thought correct, but having regard to the fact that in this case there was an appeal under r. 92 granted by the Code, I do not see my way to make any such order as I am asked to make. It seems to me that the case of the present applicant may or may not be a very hard one, but that it would be making bad law and establishing a very doubtful practice, if I were to try to assist him by directing in my revisional jurisdiction that the application under O. IX should be treated as an application for review.

For these reasons, I think this application fails and the Rule must be discharged with costs, hearing-fee one gold *mohur*.

This order will govern Revision Cases Nos. 951 and 952 which are also discharged with costs, hearing-fee one gold *mohur* in each case.

N. H. *Rule discharged.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2557 OF 1925.
February 20, 1926.
Present:—Mr. Justice Campbell.
THE FIRM JAGAN NATH-BAIJ NATH, THROUGH BAIJ NATH—PLAINTIFFS—APPELLANTS
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 72—Risk Note Form H—Time covered by note—Loss of consignment, meaning of—Wilful neglect, meaning of—Onus.

Risk Note Form H limiting the liability of Railway Administration not only covers the time of actual transit but covers the whole period during which the goods remain with the Railway. [p. 174, col. 1.]

When the goods in the custody of the Railway become rotten and are destroyed under the orders of the Station Master, it must be said that the owner has suffered loss of the whole consignment. [p. 174, col. 2.]

Madras and Southern Maharatta Ry. Co. v. *Mattai Subba Rao*, 55 Ind. Cas. 754; 43 M. 617; (1917) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49, approved.

A person is said to be guilty of wilful neglect when he intentionally and of set purpose does something which ought either to be done in a different manner or not at all or omits to do something which ought to be done. [*ibid.*]

Firm of Doulat Ram v. *Secretary of State*, 32 Ind. Cas. Cas. 551; 9 S. L. R. 177, followed.

The onus of proving wilful neglect lies upon a plaintiff suing a Railway for compensation for loss of goods consigned under a Risk Note. [*ibid.*]

Firm of Doulat Ram v. *Secretary of State*, 32 Ind. Cas. 551; 9 S. L. R. 177 and *Great Indian Peninsula Ry.* v. *Datti Ram*, 90 Ind. Cas. 812; 5 Pat. 118; (1925) Pat. 305, referred to.

Second appeal from a decree of the Additional District Judge, Lahore, dated the 9th May 1925, reversing that of the Subordinate Judge, Fourth Class, Lahore, dated the 9th October 1924.

Mr. *J. G. Sethi*, for the Appellants.

Mr. *C. H. Carden Noad*, Government Advocate, for the Respondent.

JUDGMENT.—In this case 66 baskets of betel leaves were booked to the plaintiff from Bassien Road to Lahore. They were placed at Bassien Road in a motor-truck and when the truck arrived at Lahore on the 4th of June the Railway Officials thought that it contained a motor-car and placed it in the motor siding to await the owner of the car. Meantime the plaintiff presented his Railway receipt two or three times at Lahore Station and was told that his betel leaves had not arrived. The plaintiff's consignment was despatched under Risk Note "H" according to which, in consideration of a reduced rate of carriage, the Railway was absolved from responsibility for any loss, destruction, deterioration or damage, from any cause whatever, before, during and after transit over the Railway except for the loss of a complete consignment or of one or more complete packages due to the wilful neglect of Railway Administration or to theft by or due to the wilful neglect of the Railway's servants, etc.

There was no label attached to the truck when it arrived at Lahore and eventually on the 10th of June it was opened and was found to contain the plaintiff's baskets of betel leaves. These were made over to the delivery clerk who noted that the contents of the packages were in rotten condition. The plaintiff refused to take delivery, and subsequently brought the present suit against the Secretary of State as representing the N. W. Ry., for Rs. 792 as damages. The Trial Court awarded Rs. 783-12-0 but on appeal the suit was dismissed by the Additional Judge who held that no liability attached to the Railway, firstly, because there was no loss of goods and secondly, because, if there had been, there was no wilful neglect on the part of the Railway Administratton or its servants.

The plaintiff has come to this Court on second appeal and it has been argued, firstly, that the Risk Note covered only the time of actual transit between Delhi and Lahore and did not cover the period from 4th June to 10th June during which the plaintiff's goods were damaged or destroyed, as held by the lower Appellate Court, in consequence of remaining in a closed truck in the open yard for those days. This contention has no force. The contract under Risk Note "H" formed a complete special contract between the consignor and the Railway covering the whole period during which the goods remained with the Railway. This is clear from the terms of s. 72 of the Indian Railways Act which permits responsibility of the Railway under s. 161 of the Indian Contract Act, which is the section relied upon for the appellant, to be limited by an agreement in writing in a form approved by the Governor-General in Counsel; and the words used in the Risk Note "before, during and after transit over the said Railway" are quite definite.

The second point taken is that the lower Appellate Court was wrong in holding the case not to be one of loss of goods but merely to be one of deterioration. Here I think the appellant is right. In my opinion the proper test is that applied by the learned Judges of the Madras High Court in *Madras and Southern Maharatta Ry. Co.* v. *Mattai Subba Rao* (1), namely, whether the appellants' baskets of betel leaves were of no value when delivery was tendered. On the finding of the learned Additional Judge that the betel was in a rotten condition when taken out of the truck and that later on it was destroyed under the orders of the Station Master the decision must be in favour of the appellant that he suffered loss of his whole consignment.

The third contention for the appellant is that the loss should be held to have been due to the wilful neglect of the servants of the Railway Administration. In regard to this, as already stated, the learned Additional Judge has found that the facts do not establish any wilful neglect and I agree with him. Wilful neglect was defined by the learned Judicial Commissioner's Court in Sind in *Firm of Doulat Ram* v. *Secretary of State* (2) in the following terms which are adequate for the present purpose: "A person is said to be guilty of wilful neglect when he intentionally, and of set purpose does something which ought either to be done in a different manner, or not at all, or omits to do something which ought to be done." The same judgment points out that the onus of proving wilful neglect lies upon a plaintiff suing a Railway for compensation for loss of goods consigned under a Risk Note and this since the decision of the well-known case of *Smith Lt.* v. *Great Western Railway* (3) is the rule rigidly applied by the Courts both in England and in India. The matter has been discussed at some length in *Great India Peninsula Ry.* v. *Datta Ram* (4), and the position of a sufferer such as the present appellant has been explained. Had he not sought to have his goods carried at a reduced rate under the terms of a Risk Note but had paid a higher freight to have them carried under another form of contract, the Railway would have had to assume a much fuller responsibility.

The plaintiff has proved that the betel was put in a truck intended primarily for the carriage of a motor-car, that the truck arrived in Lahore without a label and that it was not opened by the Railway servants to ascertain its contents but was shunted away as it was into the yard and kept there for several days. It is possible that he has shown bungling on the part of the Railway but he has shown nothing more. He has failed to prove that the motor-truck was used intentionally and of set purpose with the knowledge that it should not be used for freight of the description of the plaintiff's goods, or that no label was placed on the truck at the station of departure, or that the absence of a label was due to some intentional act or omissions, or that the shunting of the truck at Lahore was done of set purpose by someone who knew that the truck ought not to be put there. On the other hand the Court below had found that the truck was shunted because the Railway Officials at Lahore thought that it must contain a motor-car and did not want to open it until the owner appeared.

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(1) 55 Ind. Cas. 754; 43 M. 617; (1917) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49.

(2) 32 Ind. Cas. 551; 9 S. L. R. 177.

(3) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas 247; 38 T. L. R. 359.

(4) 90 Ind. Cas. 812; 5 Pat. 118; (1925) Pat. 305.

Without proving wilful neglect the plaintiff could not succeed. His appeal must fail and is dismissed with costs.

R. L. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 76 OF 1925.
February 18, 1926.
Present:—Mr. Justice Sulaiman and
Mr. Justice Mukerji.
OM PRAKASH AND ANOTHER—APPLICANTS
versus
Babu MOTI RAM—OPPOSITE PARTY.

Provincial Insolvency Act (V of 1920), s. 28—Joint Hindu family—Insolvency of father—Property vesting in Receiver.

Where a father in a Hindu family governed by the Mitakshara Law has been declared an insolvent, the Receiver is entitled to sell not only the share of the father that will fall to him on partition but the entire property in his hand belonging to the whole family consisting of himself and his sons. [p. 175, col. 2.]

Bawan Das v. *Chiene*, 64 Ind. Cas. 976; 20 A. L. J. 155; A. I. R. 1922 All. 79; 44 A. 316, followed.

Sat Narain v. *Behari Lal*, 84 Ind. Cas. 883; 23 A. L. J. 85; 47 M. L. J. 857; 10 O. & A. L. R. 1332; A. I. R. 1925 P. C. 18; (1925) M. W. N. 1; L. R. 6 A. (P. C.) 1; 26 P. L. R. 81; 27 Bom. L. R. 135; 21 L. W. 375; 1 L. O. 500; 1 O. W. N. 916; 6 L. 1; 29 C. W. N. 797; 52 I. A. 22 (P. C.), distinguished.

Official Assignee of Madras v. *Ramachandra Aiyar*, 68 Ind. Cas. 898; 46 M. 54; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 569; A. I. R. 1923 Mad. 55, referred to.

First appeal from an order of the District Judge, Saharanpur, dated the 28th January 1925.

Messrs. *Nehal Chand* and *N. Upadhiya*, for the Appellants.

Dr. *K. N. Katju* and Mr. *Durga Prasad*, for the Respondent.

JUDGMENT.

Mukerji, J.—This appeal arises out of certain insolvency proceedings. One Lachhman Das became an insolvent and the Official Receiver, Babu Moti Ram, took possession of a certain property of the insolvent and sold the same to a certain party. Two sons of the insolvent put in a petition before the learned District Judge praying that two-thirds of the property should not be delivered to the purchaser, but should be reserved for themselves. They said that the father had only a third share in the property, and that alone should go to the purchaser. The Official Receiver produced the case of *Bawan Das* v. *Chicne* (1) before the learned Judge, and following that case the learned Judge dismissed the petition of the sons. The sons have appealed.

It has been argued that the authority of this Court should be treated as having been overruled by a recent pronouncement of their Lordships of the Privy Council to be found reported as *Sat Narain* v. *Behari Lal* (2).

It has been said on the respondent's behalf that in this Court and in other Courts the view has always been taken that where a father in a Hindu family governed by the Mitakshara Law has been declared an insolvent, the Receiver is entitled to sell not only the share of the father that will fall on him on the partition, but the entire property in his hand belonging to the whole family consisting of himself and his sons....This view is supported by the ruling of this Court referred to above. The case of *Official Assignee of Madras* v. *Ramchandra Aiyar* (3) also takes the same view. Let us now consider the Privy Council case quoted by the learned Counsel for the appellant. A certain Hindu father, Rai Bahadur Srikishen Das had two sons. The father was declared an insolvent. Thereafter the sons brought a suit for pre-emption with respect to certain property sold in the neighbourhood. The defence raised was that the father having been declared an insolvent, the entire family property vested in the Receiver and that, therefore, the sons had no such right left in the family property as would entitle them to maintain the suit for pre-emption. Their Lordships of the Privy Council considered several sections of the Presidency Towns Insolvency Act (III of 1897) and came to the conclusion that the insolvency of the father did not deprive the sons of their right to maintain a suit for pre-emption. The following words from the judgment will bear quotation:—

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(1) 64 Ind. Cas. 976; 20 A. L. J. 155; A. I. R. 1922 All. 79; 44 A. 316.

(2) 84 Ind. Cas. 883; 23 A. L. J. 85; 47 M. L. J. 857; 10 O. & A. L. R. 1332; A I. R. 1925 P. C. 18; (1925) M. W. N. 1; L. R. 6 A. (P. C.) 1; 26 P. L. R. 81; 27 Bom. L. R. 135; 21 L. W. 375; 1 L. C. 500; 1 O. W. N. 916; 6 L. 1; 29 C. W. N. 797; 52 I. A. 22 (P. C.).

(3) 68 Ind. Cas. 898; 46 M. 54; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 569; A. I. R. 1923 Mad. 55.

"It may be that under the provisions of s. 52 or in some other way that property (property of the sons) may in a proper case be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee, and no such provision should be read into the Act."

As I read the judgment of their Lordships of the Privy Council, all that was decided was that it might be open to the creditor or the Official Assignee to proceed against the sons' shares in the family property; but so long as the shares were not sold, the sons would exercise such rights as they might possess by virtue of being the owners of their shares in the family property. As already stated their Lordships considered the provisions of the Presidency Act. In this case, we have to consider the provisions of s. 28 of the Provincial Insolvency Act (V of 1920). Section 28, cl. (2) reads as follows:—

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver..."—

The question is whether the expression "property of the insolvent" means the property which the insolvent, as the father of his sons, was entitled to call his own and sell it under certain circumstances or that share which goes to the father in the event of a partition between himself and the sons. On the authority so long prevailing in this Court, we take it that the former meaning is the proper meaning of the word "property" as used there. I find nothing in the Privy Council case which shows that this interpretation would be wrong.

Much has been said as to the inconvenience that would arise from the course that has so long been adopted in this Court; but it is not necessary to discuss that question.

I am of opinion that the petition of the appellant was rightly dismissed, and I would dismiss the appeal with costs including costs in this Court on the higher scale.

Sulaiman, J.—I concur. There can be no doubt that the trend of the authorities so far has been to allow the Receiver in insolvency to dispose of the joint family property in lieu of the debts of the father, where the latter has been declared insolvent. I may refer only to the recent case of *Bawan Das* v. *Chiene* (1). It will, therefore, be difficult to depart from this view or to re-consider the point, unless these rulings have been overruled either expressly or by implication. The learned Advocate for the appellant relies upon the recent pronouncement of their Lordships of the Privy Council in *Sat Narain* v. *Behari Lal* (2). The only point before their Lordships was whether the effect of the insolvency of the father was to divest the sons of all their interests in the joint property so as to deprive them of their right of pre-emption as co-sharers. Their Lordships clearly held that the effect of the insolvency of the father was not at once to vest the entire property in the Official Receiver. There are, no doubt, some observations on pages 95* and 96* suggesting that, although the words "disposing power" in s. 2 may be wide enough to cover a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts yet the definition of "property" seemed to suggest that what was contemplated was an absolute and unconditional power of disposal.

There is a further point pressed before us that, when their Lordships guarded themselves from saying that the property did not become available for payment of the father's just debts, they referred to s. 52 of the Presidency Towns Insolvency Act, corresponding to which there is no express provision in the Insolvency Act. Section 2 (*d*) begins by saying that "'property' includes. . . . ." It is obvious that it does not contain an exhaustive definition of the terms "property." In the Full Bench decision of the Madras High Court in *Official Assignee of Madras* v. *Ramachandra Aiyar* (3) the learned Judges based their decision on the combined effect

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*Pages of 23 A. L. J.—[*Ed.*]

of ss. 7, 30 and 52 of the Presidency Towns Insolvency Act.

The interests of a father in the entire joint family property extend over the whole property, and it seems difficult to hold that he has no interest in the entire property because if a partition were to take place, the interests of his sons would be cut out and set apart. As, in my opinion, the case decided by their Lordships does not overrule the previous rulings of this Court and other High Courts, I find it impossible to take a different view.

By the Court.—The appeal is dismissed with costs including in this Court fees on the higher scale.

R. L. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 37-A OF 1925.

November 18, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Buckland.

NARENDRA NATH DAS—APPELLANT

versus

HARAN CHANDRA GHOSE—RESPONDENT.

[*Civil Procedure Code (Act V of 1908), Sch. II—Arbitration Act (IX of 1899), s. 8—Award, null and void—No appeal against judgment—Appeal from order dismissing application to set aside award—Reversal of award—Arbitration Act, conversion of matter to—Proceedings under Civil Procedure Code, legality of—Arbitration Act, order under, when to be made.*

An award may be set aside on the ground of nullity in appeal from an order dismissing an application for setting aside of an award, though no appeal has been preferred from the judgment. [p. 179, col. 1.]

Once the matter has been converted into one under the Arbitration Act there is no power either for the parties or the arbitrators or the Court to act under Sch. II, C. P. C., and all steps so taken must be regarded as having been taken without jurisdiction. [p. 178, col. 2.]

A Judge has no power without consent of the parties to adjudicate upon an application made under cl. (17), Sch. II, C. P. C., as though it were made under the Arbitration Act. [*ibid.*]

Appeal against an order of Mr. Justice C. C. Ghose, dated the 23rd January 1925.

Messrs. *B. Bose* and *P. N. Mullick*, for the Appellant.

Dr. *Sarat Chandra Basak* and Mr. *T. Chatterjee*, for the Respondent.

JUDGMENT.

Buckland, J.—This appeal is against the judgment of my learned brother C. C. Ghose, J., dated the 23rd January 1925 dismissing the application of Narendra Nath Das, the present appellant, to set aside an award dated the 10th September 1924 made by certain persons purporting to act as arbitrators on the reference of a dispute between him and the respondent Haran Chandra Bose.

What the dispute was or how it arose it is not in the least degree material to enquire and the facts with which we are concerned begin with the submission dated the 1st August 1915 whereby the parties submitted to three named individuals, Rama Nath Ghose, Sarat Chandra Ghose and Jnan Chandra Ghose, the settlement of their differences. The terms of the submission are as follows:—

"I Sree Narendra Nath Das and I Sree Haran Chandra Ghose, we both appoint you as arbitrators for settlement of our difference in connection with the premises No. 41 Newgipukur Lane and with our dealings between each other; whatever decision you will give will be accepted. Finis, 1st August 1915."

I may at once mention that I shall refer for the narrative to documents not to be found in the record of this appeal to which our attention has been directed by consent of learned Counsel for the parties.

Nothing appears to have been done by the arbitrators for a period of some four years in the course of which the arbitrator Jnan Chandra Ghose died.

On the 12th August 1919 an application was made to this Court under cl. (17) of Sch. II of the C. P. C. on behalf of Haran Chandra Ghose for an order (*inter alia*) that the surviving arbitrators might be requested to produce the submission and that it be filed; and that if necessary a third arbitrator might be appointed by the Court.

Such an application was clearly not one to be made in the circumstances. Any order which in the event of the death of the 3rd arbitrator should be made could only be made under the Arbitration Act and then only if the conditions as to written notice prescribed by s. 8 had been fulfilled, which does not appear to have been the case. This seems to have been recognised by the learned Judge who heard the application to some extent for he made an order giving the applicant liberty to amend the cause title so as to intitule the application in the matter of the Arbitration Act, in the matter of which he directed that the application should be treated as having been made. He further ordered that the surviving arbitrators should be at liberty to act in the reference and gave them liberty to appoint an umpire if necessary, and finally he directed the arbitrators to make their award within two months with liberty to enlarge the time by another two months.

The Court Minutes show that learned Counsel for the appellant objected that evidence justifying an order under s. 8 was necessary.

The surviving arbitrators on the 18th January 1920 purported to appoint Babu Sailendra Kumar Palit as the third arbitrator and umpire and the arbitrators then entered upon the reference and eventually on the 10th September 1924 made their award—the award being made and signed by the three persons as arbitrators.

No amendment of the cause title had, however, been made meantime as directed and the arbitrators intituled the appointment and their award in the matter of Sch. II of the C. P. C., thus perpetuating the initial error.

The award was filed in November 1924, at whose instance does not appear, but no notice of the application to file it was given to the appellant as is required by cl. 20 (3) of Sch. II assuming that to have been applicable.

A notice dated the 24th November 1924 intituled in the same manner, was, however, given to the appellant, that the award had been filed and that the Court would proceed to give judgment on such award on the 8th December 1924.

This notice appears to have been given on a form intended to be used where judgment is to be given on an award in a reference made in a suit to which cls. 1 to 16 are applicable, for cls. 17 to 21 do not apply to submissions to which the Arbitration Act applies.

Subsequently, on the 28th January 1924 judgment was given upon award.

The appellant now impugns the award on the ground that it is without sanction, in that he never submitted to the arbitration of the three persons who purport to have made it, and that so far as it purports to have been made under or by virtue of the order of the 12th August 1919 such order was made without jurisdiction.

As to the first of these two points it is clear, apart from any contention as to waiver, to which I shall return, that his connection is correct. It suffices to read the submission which is to three named arbitrators other than the three persons who purported to make the award, nor does it contain any provision for substitution.

As regards the order of the 12th August 1910 I am equally confident that the respondent cannot rely upon it.

The learned Judge had no power without consent of parties to adjudicate upon an application made under cl. 17 of the Second Schedule as though it were made under the Arbitration Act. But assuming he had such power, there was nothing in the petition to show that such antecedent steps had been taken as would entitle the applicant to an order under s. 8. Again, assuming that such evidence was before the Court, the only order possible in the circumstances was one appointing a third arbitrator, whereas the order gave liberty to the surviving arbitrators to act in the reference and to appoint an umpire if necessary. In my opinion such order was made without jurisdiction and it conferred no power on the arbitrators whose award is impugned to make it.

Again, however, assuming that the application was properly converted into one under the Arbitration Act and that the order was such as could properly be made thereunder, the parties and arbitrators subsequently acted throughout as though these clauses of the Second Schedule of the C. P. C., which under the Arbitration Act do not apply to cases to which that Act applies, still governed the proceedings.

As it was all subsequent proceedings should have followed the Arbitration Act and the rules made thereunder, which provide that an award shall be filed and thereupon may be enforced as a decree. This was not the course pursued and had it been the position of the appellant might have been more difficult. Once the matter was converted into one under the Arbitration Act there was no power either for the parties or the arbitrators or the Court to act under the Schedule and all steps so taken must be regarded as having been taken without jurisdiction.

This disposes of the contention of the

respondent's Advocate that not having appealed against the judgment on the award the appellant cannot succeed. We may not be able to set aside that judgment but if the award which is directed to be carried out is set aside there will be nothing left to be enforced and any technical difficulty will not stand in the way of the appellant.

Lastly it is contended that by attending before the arbitrators the appellant must be taken to have consented to the appointment of the third arbitrator, whether or not the order was made without jurisdiction and that he waived all irregularities in the appointment. This argument would have considerable force if the appellant had attended the reference without protest. But it was pointed out on his behalf that he protested at the earliest opportunity, *viz.*, on the application resulting in the order of 12th August 1919, all subsequent proceedings of the arbitration purport to have been held in consequence of that order and for the appellant to have protested to the arbitrators would have availed him nothing. Having made his protest he was entitled to attend at the reference and make this best of the position as far as he could.

In my opinion the award should be set aside on the ground that it is a nullity by reason of the fact that the reference was held by the arbitrators without authority to decide the matter in dispute. The result, therefore, will be that the appeal should be allowed—the appellant is entitled to his costs both of the appeal and before the Court of first instance.

Sanderson, C. J.—I agree with the judgment which has just been delivered by my learned brother, and I do not think it necessary to add anything.

R. L. *Appeal allowed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 360 OF 1925.

November 17, 1925.

Present:—Mr. Justice Misra.

SARJU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHEORAJ—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (v) (b)—Land assessed to revenue—Suit for possession by cancellation of deed—Court-fee payable.

A suit for possession of land assessed to revenue by setting aside the sale in favour of the defendant falls under s. 7 (*v*) (*b*) of the Court Fees Act and the Court-fee payable is on five times the revenue.

Haidari Begam v. *Gulzar Bano*, 25 Ind. Cas. 395; 36 A. 322; 12 A. L. J. 481, referred to.

Appeal from a decree of the Additional Subordinate Judge, Rae Bareli, dated the 16th April 1925, upholding an order of the Munsif, Rae Bareli, dated the 19th December 1924.

Mr. *Hargovind Dayal Srivastava*, for the Appellants.

JUDGMENT.—This was a suit for possession brought by the plaintiffs-appellants, in which the main relief claimed was that of possession. The plaintiffs amended their plaint and added the words "by setting aside the sale." Both the Courts below have dismissed the suit and the plaintiffs have now come to this Court in second appeal. The matter at present before me is in connection with the office report as to what is the correct amount of Court-fee which ought to be paid in the present suit. The Court-fee which has been paid by the plaintiffs is on five times the Government revenue. The office reports that the claim being for possession by cancellation of a sale, Court-fee paid on five times the Government revenue is not sufficient, and that a Court-fee of Rs. 10 should have been paid, the relief claimed being of a declaratory nature. The amount claimed from the appellants after deducting annas 6, which he has already paid, is a sum of Rs. 9-10-0.

I have heard the learned Counsel for the appellants.

I am of opinion that the Court-fee paid in this case is sufficient and that the appellants should not be called upon to pay any further Court-fee on the ground that their claim involves a declaratory relief as well. In suits for possession the real relief which the plaintiff claims is the relief for possession and if in awarding that relief to the plaintiff the Court has to go into the question as to whether the title of the defendant, based on a certain transfer or auction sale is invalid, the suit cannot be considered to be a suit other than a suit for possession. Similarly where the plaintiff claims possession of a certain property and states in his plaint that he claims for possession by cancellation of a sale in favour of the defendant he cannot be considered to be asking for two reliefs and thus be liable to pay Court-fee on each of these two reliefs. He is practically claiming one relief and that relief is a relief for possession and if in order to give him that relief it is necessary to consider along with that the title of the defendant and to declare that title to be ineffective the suit must, still for the purposes of the payment of the Court-fee, be treated as one for possession. I am supported in this view by a judgment of the Allahabad High Court in *Haidari Begum* v. *Gulzàr Bano* (1). In that suit the plaintiff claimed possession of the property which was in the possession of a Muhammadan lady. The defence raised was that the plaintiff had no title and secondly that she was not entitled to a decree for possession without payment of Rs. 80,000, the amount of dower-debt due to the defendant. The Court of first instance decreed the suit for possession, holding that payment of defendant's dower could not be considered a condition precedent to the plaintiff's obtaining a decree. The defendant appealed paying a Court-fee on the value of the property. The point for decision that arose in the case was as to whether the defendant should pay Court-fee merely on the value of the property or whether on Rs. 80,000, the amount of the dower-debt, claimed by her. It was decided that the real relief which the plaintiff claimed was a relief for possession and consequently the Court-fee which the plaintiff was liable to pay was on that relief.

I am, therefore, of opinion that the Court-fee paid by the plaintiffs in this case is sufficient.

R. L. *Office informed.*

(1) 25 Ind. Cas. 395; 36 A. 322; 12 A. L. J. 481.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 458 OF 1925.

March 3, 1926.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Boys.

BOHRA NATHA MAL—OBJECTOR—APPELLANT

versus

JHUNAI LAL—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), ss. 6, 7—Minor—Limitation begun before birth—Benefit of minority.

A minor cannot take advantage of his minority or plead ss. 6 and 7 of the Limitation Act where limitation had already begun to run before his birth. [p. 181, col. 1.]

Ranodip Singh v. Parmeshwar Pershad, 86 Ind. Cas. 249; 47 A. 165; A. I. R. 1925 P. C. 33; 48 M. L. J. 29; 21 L. W. 236; 2 O. W. N. 1; 23 A. L. J. 176; 27 Bom. L. R. 175; 12 O. L. J. 74; 26 P. L. R. 113; L. R. 6 A. (P. C.) 47; (1925) M. W. N. 262; 27 O. C. 343; 29 C. W. N. 666; 52 I. A. 69 (P. C.), followed.

Execution first appeal against a decree of the Subordinate Judge, Aligarh, dated the 21st July 1925.

Mr. *Shabd Saran*, for the Appellant.

JUDGMENT.—The appeal is frivolous. In execution of a mortgage-decree obtained by Jhunai Lal against Madan Lal certain property was proclaimed for sale. Madan Lal had two brothers Onkar Das and Murli Dhar, out of whom Onkar Das had been adopted in another family and Murli Dhar had died leaving a son Natha, who is a minor. On the death of Madan Lal Onkar Das and Natha were impleaded as his legal representatives in the execution proceeding. Onkar Das filed an objection claiming that as his adoption was found to be invalid he reverted to his natural family and continued to live jointly with Madan Lal and that the mortgages made by Madan Lal, on foot of which the decree in execution had been obtained, were not binding on him. That objection was disallowed. A regular suit was then filed by him for a declaration of his title to the disputed property, which was dismissed on the 9th February 1923 on the ground that it was barred by time and that Onkar Das had failed to establish that he was the owner of the property in dispute and had been in possession of it within limitation, or that he had been living jointly with Madan Lal at the time of the mortgages in question.

The present objection was filed in the same execution proceeding by Natha, reiterating what had been urged by Onkar Das before. The Court below has disallowed the same. Its finding in this case is that there had been a separation between Murli Dhar, the father of Natha and Madan Lal in 1903, in evidence whereof a deed of partition was executed and registered by Madan Lal and Murli Dhar on the 14th December 1903, that Murli Dhar had subsequently ratified the partition in the course of certain alienations which had been made by him in respect of some of the properties allotted to his share, and that the decision in the suit filed by Onkar Das, to which Natha was also a party as a defendant, operated as *res judicata*.

It is urged on behalf of Natha that Murli Dhar was a minor on the date of the partition aforesaid. But there is nothing to show that he was a minor at that time. On the other hand the deed of partition appears to have been executed and registered by Madan Lal and Murli Dhar personally, as if they were adults; and both parties subsequently made alienations of different portions of the properties allotted to their respective shares in pursuance of that partition. The property in dispute was allotted to Madan Lal. In the face of that deed of partition it cannot be said that Murli Dhar and Madan Lal were living jointly or that Natha, the son of Murli Dhar was entitled to question a transaction entered into by Madan Lal after separation.

In the application filed by Natha on the 15th November 1922 he described himself as 12 years old. The mortgages in question were effected in 1906 and 1908 so that he was not apparently even in existence when the mortgages were made, and in view of the decision of their Lordships of the Privy Council in *Randip Singh* v. *Parmeshwar Pershad* (1), Natha cannot take advantage of his minority or plead ss. 6 and 7 of the Indian Limitation Act, when limitation had already begun to run before his birth. The Court below moreover finds that Natha has not been in possession of the property in dispute from over 12 years and has no interest in it. The question of *res judicata* hardly arises. The appeal is dismissed.

R. L. *Appeal dismissed.*

(1) 86 Ind. Cas. 249; 47 A. 165; A. I. R. 1925 P. C. 33; 48 M. L. J. 29; 21 L. W. 236; 2 O. W. N. 1; 23 A. L. J. 176; 27 Bom. L. R. 175; 12 O. L. J. 74; 26 P. L. R. 113; L. R. 6 A. (P. C.) 47; (1925) M. W. N. 262; 27 O. C. 343; 29 C. W. N. 666; 52 I A. 69 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 587 OF 1924.
January 20, 1926.
Present:—Mr. Justice LeRossignol and
Mr. Justice Martineau.
Musammat LAKHO—DEFENDANT—
APPELLANT
versus
LACHHMAN DAS—PLAINTIFF—
RESPONDENT.

Hindu Law—Debts—Joint family property—Widow's right of residence and maintenance.

Where a debt is incurred for a family purpose and necessity, a Hindu widow's right to maintenance and residence in the family property must be postponed to the just claims of her late husband's creditors.

First appeal from a decree of the Senior Sub Judge, Rawalpindi, dated the 17th December 1923.

Lala *Gabind Ram Khanna*, for the Appellant.

Messrs. *M. S. Bhagat* and *Dev Raj Sawhney*, for the Respondent.

JUDGMENT.—This appeal arises out of an action for the recovery of the sum of Rs. 5,861 which was alleged to be due on a mortgage-debt secured on a house. The Trial Court decreed the claim with the exception of a small sum of penal interest. The suit was against one adult and one minor son of the mortgagor and also against his widow, *Musammat* Lakho, who challenged their liability on the mortgage on the ground that the mortgaged property was joint family property and the debt was incurred without necessity for an illegal purpose and the right of the widow to reside in the house was paramount.

The Court below found that though the house was joint family property, the debt was properly incurred for a family purpose and for necessity, and that the right of the widow to maintenance and residence had to be postponed to the just claims of her late husband's creditor. The sons of the mortgagor have preferred no appeal against the decree of the Court below, and the only appellant is *Musammat* Lakho who has paid on the appeal a Court-fee of only Rs. 10.

This gives rise to the first contention for the respondents that the appeal is not properly stamped, inasmuch as the appellant urges in her grounds of appeal that the debt was bad and consequently prays to be relieved in respect of the whole of the plaintiff's claim. Counsel for the appellant admitting the force of this contention urges that he has no intention to urge that the debt was improperly incurred by the mortgagor, but limits his appeal to the prayer that even if the debt was properly incurred, the right of the widow to residence in the family house is paramount. In support of his contention he has referred us to Gour's Hindu Law which, however, far from supporting his thesis is directly in his disfavour. In Mulla's Principle of Hindu Law on page 472, 4th Edition, and again on page 488 it is written: "Debts contracted by a Hindu take precedence of the right to maintenance and debts contracted by a Hindu take precedence even of the widow's claim for maintenance;" and on page 490 "If the sale of the family dwelling house is for a family necessity the widow is liable to be evicted even though the purchaser had notice at the time of purchase that she was in occupation of the house."

For these reasons we hold this appeal to be without force and dismiss it with costs.

R. L. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 77 OF 1925.

November 18, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Buckland.

MITSUI BUSSAN KAISHA, LTD.—
DEFENDANTS—APPELLANTS
versus
HOGARTH SHIPPING CO. LTD.—
PLAINTIFFS—RESPONDENTS.

Arbitration Act (IX of 1899), s. 19—Stay of suit or proceeding—Arbitration, taking place of.

The power of the Court under s. 19 of the Arbitration Act is to stay the suit or proceedings, if the conditions referred to in the section are fulfilled. If a stay is granted the arbitration then takes place by reason of the submission contained in the contract and in accordance with the provisions of the Arbitration Act. [p. 183, col. 2.]

Per *Buckland, J.*—In connection with arbitration proceedings under the Arbitration Act, all that need be considered is whether there were (1) a submission by the parties to the dispute, (2) a reference before arbitrators duly appointed by them under the submission and (3) an award properly made by such arbitrators. [p. 187, col. 2.]

Appeal against an order of Mr. Justice C. C. Ghose, dated the 18th May 1925.

Mr. *N. N. Sircar*, for the Appellants.

Messrs. *S. M. Bose*, *L. P. E. Pugh* and *W. W. K. Page*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by Mitsui Bussan Kaisha, Ltd., against the judgment of my learned brother Mr. Justice C. C. Ghose delivered on the 18th May 1925.

The judgment was delivered in respect of an application by the appellants that an award dated 14th March 1925 should be declared null and void and that it be set aside, cancelled and taken off the file of this Court.

The learned Judge dismissed the application and having regard to the peculiar circumstances of the case, he made no order as to costs.

Against this order of dismissal the appellants have appealed.

The facts are as follows :—

By a charter party dated the 26th November 1920 made between Messrs. Graham & Co. acting as agents for the owners of the good steamer called a first class steamer to carry 6,500 tons cargo 10 per cent. more or less and the appellants (charterers) it was agreed that the steamer should load at Calcutta a full and complete cargo of coal in bulk and being so loaded should proceed to Colombo and there deliver the cargo.

Clause II of the charter party provided for the time within which the cargo should be shipped at Calcutta and discharged at the port of destination and cl. 13 provided for the rate to be paid for demurrage, *viz.*, Rs. 2,000 per running days.

Clause 19 provided as follows: "Any dispute that may arise under this charter to be settled by arbitration at Calcutta or if mutually agreed at the place where the dispute occurs, each party appointing an arbitrator, and should the arbitrators be unable to agree the decision of an umpire selected by them to be final. Arbitrators and umpire are all to be commercial men and resident in Calcutta or the place where the arbitration is held. This submission may be made a rule of the High Court of Justice by either party." Clause 21 provided as follows: "For the non-performance of this agreement proved damages not exceeding the estimated amount of freight to be paid as liquidated damages."

It is to be noted that the steamer was not specifically mentioned in the charter party nor were the owners of the vessel mentioned by name.

It appears that by a letter dated the 18th January 1921, Messrs. Graham & Co. acting as agents for the owners declared the steamship. "Baron Jedburgh."

This declaration was accepted by the appellants and the vessel having arrived at Calcutta notice was given that she was ready to load on 1st February 1921. It was alleged that the appellants were not ready with the cargo and that the vessel was detained in consequence thereof and that the loading and unloading occupied more than the lay days allowed by the charter party. The result was that a claim was made for damages for detention and demurrage amounting to Rs. 42,000.

A suit was instituted on the 1st February 1924 for the purpose of recovering this sum from the appellants. In that suit the plaintiffs were, S. C. Hogarth, H. Hogarth, B. Hogarth and J. B. Henderson carrying on business in Glasgow in co-partnership as shipowners under the style and Firm of H. Hogarth & Sons.

In the plaint the plaintiffs were alleged to be the owners of the vessel "Baron Jedburgh."

It appeared subsequently (at a date to be mentioned later that) this was a mistake and the owners of the vessel were the Hogarth Shipping Company, Ltd., a Company having its registered office in Glasgow.

The learned Judge stated in his judgment that he was informed that H. Hogarth & Sons were the agents. There is no evidence on the record as to the position of H. Hogarth & Sons or their connection with the limited Company or the vessel, and I assume from what the learned Judge said in his judgment that the information, to which he referred, was given to him in the course of the hearing of the application.

The appellants, on the 26th March 1924, gave notice of an application for an order that the suit should be stayed under s. 19 of the Arbitration Act, 1899 and that the matters in dispute should be referred to arbitration in terms of the reference between the parties.

On the 8th April 1924, the Court made an order in the terms of the application *viz.*, that the suit should be stayed until the further order of the Court and that the matters in dispute be referred to arbitration in terms of the reference between the parties.

It is to be noted that the latter part of the order is not in accordance with the provisions of s. 19 of the Arbitration Act; that section provides that if the Court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration, the Court may make an order staying the proceedings.

It is material to mention this because it appears that one of the parties subsequently dealt with the matter as if the Court had ordered a reference to arbitration.

The power of the Court under s. 19 is to stay the suit or proceedings, if the conditions referred to in the section are fulfilled. If a stay is granted the arbitration then takes place by reason of the submission contained in the contract and in accordance with the provisions of the Arbitration Act.

It appears that the plaintiffs in the suit appointed Mr. L. Edwards as arbitrator and the appellants appointed Mr. A. O. Brown. We have not the terms of the appointments before us, but it is clear from the materials, which are before us, that the dispute was regarded by both parties as a claim by the owners of the vessel against the appellants, the charterers of the vessel, for demurrage and damages for detention of the vessel.

We were informed by the learned Advocates who appeared in the appeal, that the arbitrators held two sittings in September 1924, and I assume that the owner's claim, the answer thereto and the reply had been filed by that time.

On or about the 25th September, 1924 the appellants' attornies informed the plaintiffs' attornies that they had inspected the register of the S. S. "Baron Jedburgh" and that the register showed that the owners were the Hogarth Shipping Company Ltd.

Apparently, some discussion took place before the arbitrators as to the position, created by this discovery, and the matter was adjourned until January 1925.

In the meantime correspondence passed between the parties and Messrs. Pugh and Company, acting, for the owners, stated that they were authorised to represent the Hogarth Shipping Company Ltd., and that any award made in favour of the claimants would be accepted by the Company and they expressed the hope that the appellants would abandon the point which they had taken.

The appellants' attornies declined to agree to this and stated they were instructed to press the point that the proper parties were not before the arbitrators.

The result was that on the 8th January 1925 notice was given by Messrs. Pugh and Company of an application to the Court for an order that the "Hogarth Shipping Company, Ltd." be either added as co-plaintiff in the suit or substituted as plaintiffs in the place of the plaintiffs, S. C. Hogarth and Sons and that the cause title be amended accordingly. The appellants appeared on the hearing of the summons and opposed the amendment.

On the 14th January 1925, an order was made by my learned brother Mr. Justice C. C. Ghose that the plaint and the register of the suit be amended by striking out from the cause title the names and descriptions of the plaintiffs and substituting in lieu thereof the words "Hogarth Shipping Company Ltd," and by making such other amendments in the body of the plaint as might be necessary in consequence of the aforesaid amendment.

On the 14th January 1925 Messrs. Pugh and Company on behalf of the owners sent the following letter to the arbitrators Messrs. Edwards and Brown.

"On our application to-day to the High Court in the suit; filed by S. C. Hogarth and the other partners in Messrs. H. Hogarth and Sons. *v.* Mitsui Bussan Kaisha, Ltd., it has been ordered that 'The Hogarth Shipping Company Limited a Company registered under the English Companies Acts and having its registered office at 24 St. Enoch Square in the city of Glasgow in Scotland, should be substituted as plaintiffs in place of S. C. Hogarth and others.

"On 8th April last the High Court on the application of Messrs. Mitsui Bussan Kaisha, Ltd., ordered that all further proceedings in the suit should be stayed until the further order of the Court and that the matter in dispute be referred to arbitration in terms of the reference between the parties. The effect of the order of the High Court which had been made to-day is that the Hogarth Shipping Co., Ltd., has been substituted as plaintiffs and the order of 8th April last for reference to arbitration is now an order for reference as between the Hogarth Shipping Co., Ltd., and Mitsui Bussan Kaisha, Ltd.

"We ask you to substitute in the arbitration the name of the Hogarth Shipping Co., Ltd. in place of Messrs. H. Hogarth & Sons and to treat the claim for arbitration and the reply which we have already filed with you as filed on behalf of the Hogarth Shipping Co., Ltd.

"We are ready to proceed with the arbitration and shall be glad to know when you and your co-arbitrator propose to hold the next sitting."

It is to be noted that the writers of this letter refer to the order of 8th April 1924 by which the suit was stayed, as being an order for reference, and that, the amendment in the cause title having been made, it was now an order for reference between the Hogarth Shipping Company Ltd, and the appellants, I have already mentioned that this attitude apparently arose from a misunderstanding of s. 19, which merely gives power to the Court to stay the suit and that which thereafter governed the rights of the parties and the arbitration proceedings was the submission to arbitration contained in the charter party taken together with the provisions of the Arbitration Act, which relate to the various steps and proceedings which may be taken.

A copy of this letter was sent to the attornies for the appellants; and, on the 15th January 1925 they sent the following reply: "We are in receipt of your letter of the 14th instant enclosing copies of your letters to the two arbitrators. We do not agree with the construction placed by you on the effect of the substitution order passed yesterday by Mr. Justice Ghose. The course suggested can only be done by a fresh reference to arbitration or by the new plaintiff obtaining an order from Court for making the alterations in the submission."

To this Messrs. Pugh & Co. replied by the letter of the 16th January which is as follows, "We are in receipt of your letter No. SP-38401 of the 15th instant.

"The arbitrators have acknowledged receipt of our letters to them of the 14th instant and have fixed the date of the next meeting.

"At the last meeting you stated before the arbitrators that the claimants should be the Hogarth Shipping Co., Ltd, and not S. C. Hogarth and others. To meet this technical objection we have obtained the order of substitution.

"We do not agree with your views and shall attend before the arbitrators on the date fixed by them.

"We also enclose copies of our letters to the two arbitrators of to-day's date."

It is not clear when the arbitrators held their next sitting, but I think it was on the 30th January 1925. In the meantime it appears that on the 24th January notice on behalf of the appellants was given to Pugh and Co. on behalf of the plaintiff Company of an application for an order that the suit be expedited in terms of the prayer in the petition.

The prayers in the petition were, among others, as follows: "That the written statement be filed by the 31st January 1925. That affidavit of documents of both parties be filed by the 7th February 1925 and mutual inspection be given immediately thereafter.

"That the suit do appear on the top of the Commercial Cause Warning List on 1st March 1925."

Upon the hearing of the application an order, which in my experience is unusual and which on the face of it seems to be inconsistent, was made.

It is dated the 28th January 1925 and is as follows: "It is ordered that the application of the defendant Company pursuant to the said Master's Summons be and the same is hereby dismissed. And it is further ordered that the defendant Company do pay to the plaintiff Company its costs of and incidental to this application to be taxed by the Taxing Officer of this Court. And it is further ordered that the defendant Company be at liberty to file their written statement subject to all just exceptions and the Warrant of Attorney in favour of Messrs. Orr. Dignam and Company."

It is clear that the application of the appellants for leave to file the written statement and for expedition of the trial of the suit was dismissed with costs, yet the same order contains a provision that the appellants should be at liberty to file the written statement and the Warrant of Attorney in favour of the appellants' attornies subject to all just exceptions.

The terms of the order are inconsistent and, in my judgment, the last portion of the order ought not to have been made. The application to file the written statement was dismissed with costs: presumably on the ground that the suit had been stayed; and, in view of that order, the provision giving leave to the appellants to file the written statement contained in the latter part of the order, in my opinion, was wrong and without any meaning.

The arbitrators then proceeded with the arbitration and made their award on the 14th March 1925.

The award is as follows: "The Hogarth Shipping Company, Ltd., Mitsui Bussan Kaisha, Limited. We, having been appointed arbitrators to decide the disputes between the parties in respect of the claim of the owners for demurrage and detention of the S. S. 'Baron Jedburgh', under charter party dated the 29th of November 1920, and having read the papers filed before us, and having heard the Solicitors for both parties and the evidence of the witnesses called before us, and having extended the time for our award to the 15th of March 1925, do hereby award as follows.

"That the charterers pay the owners of the steamer Rs. 42,000 (forty-two thousand rupees) *plus* Solicitors' costs at Rs. 1,200 (one thousand two hundred rupees) and arbitrators' fees and expenses at Rs. 2,969 (two thousand nine hundred and sixty-nine rupees)."

It is to be noted that it is headed "The Hogarth Shipping Co. Ltd., *v.* Mitsui Bussan Kaisha, Ltd" and recites that the arbitrators had been appointed by the parties in respect of a claim by the owners of the steamship for demurrage and detention.

The appellants applied to have the award set aside, and the application was dismissed as already stated.

Three main points have been urged on behalf of the appellants in this Court.

The first is that no arbitrators were appointed to decide any dispute between the present parties to the suit, *i. e.*, as between the Hogarth Shipping Co., Ltd., and the appellants. As far as the Shipping Company is concerned, I am of opinion that the letter of the 14th January 1925 from Pugh and Company to the arbitrators involved an appointment of the Shipping Company's arbitrator to decide the dispute between the Shipping Company and the appellants and even if any confirmation of the original appointment was required, which I do not think was necessary, it was supplied by the above-mentioned letter. It was, however, urged that the appellants had never appointed an arbitrator to act in any dispute between the Hogarth Shipping Co., Ltd., and themselves.

In my judgment the contention is not sound. I have already mentioned that the name of the owners of the vessel was not mentioned in the charter party. It was Graham & Company who declared the "S. S. Baron Jedburgh" and in so doing they were acting as agents for the owners of the vessel; this declaration was accepted by the appellants.

The dispute which arose, was undoubtedly as to the claim for demurrage and detention. This claim could only be made by or on behalf of the owners of the vessel, having regard to the terms of the charter party. This was the only dispute between the parties. I am of opinion that when the suit was instituted and when the arbitrators were appointed, the dispute was recognized by both parties as one between the owners of the vessel and the appellants.

When the suit was stayed, the arbitrators were appointed by both parties to decide the only dispute which had arisen, *viz.*, the dispute as to demurrage and detention between the owners of the vessel and the appellants. But through a "*bona fide*" mistake, under which both parties were labouring the owners were wrongly described as the Firm of Hogarth & Sons.

When the mistake was discovered, this was corrected. I am not concerned to say, whether the steps taken by the plaintiffs' advisers to amend the cause title of the suit were necessary or correct.

I am satisfied on the evidence that though the appellants protested against the arbitrators proceeding with the arbitration on another ground, to which I shall refer presently, they did not protest at the time that the arbitrators had not been appointed in the dispute between the owners of the vessel, *viz.*, the Hogarth Shipping Co., Ltd. and the appellants.

Further, I am prepared to hold that even if they had protested, the protest would have been of no avail, for as I have already said, the dispute, as to which the arbitrators had been appointed by both parties, was a dispute between the parties to the charter party, *viz.*, the owners of the vessel on the one hand, and the appellants on the other; and, if that be the true view of the position, the power of the arbitrators could not be revoked when they had been once appointed except by leave of the Court, unless a different intention was expressed in the submission. It should be noted in connection with this part of the case, that our attention has not been drawn to any evidence showing that the appellants purported to revoke the appointment of their arbitrators.

In my judgment the appointment of the arbitrators in the dispute between the owners of the vessel and the appellants remained a valid and binding appointment after the discovery was made that the names of the owners have been wrongly stated. In my opinion, therefore, the first point fails.

The second ground on which reliance was placed on behalf of the appellants was that a suit by the Hogarth Shipping Co., Ltd., against the appellants was pending in the High Court which had not been stayed and that consequently the arbitrators were *functi officio* and had no jurisdiction to proceed with the reference. There is no doubt that this objection was taken on behalf of the appellants before the arbitrators, and it remains to be considered whether this is a sufficient ground for setting aside the award.

Reliance was placed on the decisions in *Doleman & Sons* v. *Ossett Corporation* (1) and *Ram Prasad Surajmull* v. *Mohan Lal Lochminarain* (2). The argument was to the effect that though the suit, brought in the name of the Firm of H. Hogarth & Sons, had been stayed by an order of the Court, the suit, in which the Hogarth Shipping Co., Ltd,, were the plaintiffs had not been stayed and was pending in January 1925 and that consequently the arbitrators were *functi officio*.

I am not able to accept this contention.

There was one suit only: *viz.*, No. 358 of 1924: it was brought in the name of H. Hogarth & Sons, it being alleged that they were the owners of the vessel "Baron Jedburgh," the claim was made on the basis that the owners of the vessel were entitled to demurrage and damages for detention of the vessel.

It was then discovered that the owners of the vessel had been wrongly described. There is no doubt that this was due to a "*bona fide*" mistake, and consequently O. 1, r. 10 (1) of the C. P. C. would apply and the Court had jurisdiction to amend the cause title by substituting the Hogarth Shipping Co., Ltd., for the Firm of H. Hogarth & Sons. The sub-section provides that this may be done at any stage of the suit and on such terms as the Court thinks fit.

It was argued that when the order of amendment was made, the suit became a new suit and that it had not been stayed. In my judgment it would be contrary to reason on the facts of this case to hold that the suit had not been stayed or that the Hogarth Shipping Co., Ltd., were desirous of prosecuting their claim in this Court, or that the Court when making the order for substitution intended that the suit should proceed. In my opinion the order of the 14th January 1925 was merely an order for the correction of a *bona fide* mistake by means of amendment of the cause title and by substituting as plaintiffs the real owners of the vessel, in the Suit No. 358 of 1924 which was to remain stayed until further order of the Court by reason of the order of the 8th April 1924. That this was the intention is clear from the subsequent order of the Court, when it dismissed the application of the appellants for direction as to the filing of their written statement and for the expeditions of the trial of the suit. This application must have been dismissed on the ground that the suit had been stayed. As already stated, the addition to that order that the appellants should have liberty to file the written statement subject to all just exceptions was wrong, meaningless and of no avail, in view of the dismissal of the appellants' application with costs.

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(1) (1912) 3 K. B. 257; 81 L. J. K. B. 1092; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

(2) 60 Ind. Cas. 895; 47 C. 752; 38 C. L. J. 67,

In my judgment, therefore, the suit had been stayed and was not pending so as to deprive the arbitrators of jurisdiction in the reference ; and, the second, point, on which the appellants relied, fails.

The third ground, on which the appellants relied, was that the arbitrators were guilty of misconduct in deciding the question of damages without taking any evidence. The arbitrators were the final Judges of questions of law and fact, and there is nothing on the face of the award to show that they made any mistake either in fact or law.

It was argued that the arbitrators had awarded damages for detention at the rate which had been agreed upon in the charter party for the demurrage days.

I do not know, whether this is so, for there is nothing on the face of the award to show that this was the principle on which the arbitrators acted. Even if the arbitrators did so act, I am not prepared to hold that they are guilty of misconduct.

In Carver on Carriage By Sea (s. 109), the following passage occurs :

"Damages for detention are generally calculated at the rate which has been agreed upon for the demurrage days if any are provided for. But either party may show that that is not the true measure of the loss to the ship-owners by the detention and in that case that rate ought not to be adopted. The shipowner should have a just compensation for his loss, and not more or less." In my opinion, that is a correct description of the position.

There is no evidence before us, to which we are entitled to refer, which goes to show that the arbitrators were guilty of any misconduct and, in my opinion, there is no substance in the third point on which the appellants relied.

In my judgment, therefore, this appeal must be dismissed with costs.

Buckland, J.—I agree with the judgment delivered by the learned Chief Justice and only desire to add a few observations on one of the points argued.

Apart from the question whether the jurisdiction of the arbitrator was ousted by a suit all that need be considered is whether the provisions of the law in relation to arbitrations to which the Arbitration Act applies were observed.

Not only do I agree that there was no pending suit ousting the jurisdiction of the arbitrator, a point which I do not propose to deal with further, but one may go on to say that the suit had nothing to do with the reference. References to the suit have, I think, somewhat obscured the correct principles of law which govern this part of the case.

The suit was stayed and except the application and order made for that purpose the law admits of no contract between proceedings in Court and proceedings before arbitrators for the purpose of arriving at a decision of a dispute between parties.

Whatever was done in the course of the suit may, therefore, be ignored for the present purpose, and all that need be considered is whether there were (1) a submission by the parties to the dispute, (2) a reference before arbitrators duly appointed by them under the submission, and (3) an award properly made by such arbitrators.

The dispute was between the owners of the vessel and the defendants. That the charter party contains a submission is indisputable. That the defendant Company appointed their arbitrator to decide such dispute is also indisputable. The defendant Company might have argued, had the point arisen, that they never appointed their arbitrator to decide any dispute between themselves and H. Hogarh & Sons, seeing that the latter were not and are not the owners and, therefore, there was no dispute between themselves and that firm, but they cannot contend that the arbitrator had no jurisdiction to decide a dispute between themselves and the other party to the submission. The letter of the 14th January 1925 from Messrs. Pugh & Co. to the arbitrators is, in my opinion, evidence of the appointment, which need not be in writing, if not the actual appointment, of Mr. Edward as the respondent Companys' arbitrator. The second of the conditions to which I have referred was, therefore, fulfilled and in due course the arbitrators made their award.

If the point is shorn of surplusage and presented, as I have endeavoured to do, in its simplest form it seems to me that all necessary conditions were fulfilled.

On the 3rd point, *viz.*, the alleged misconduct of the arbitrator I have nothing to add to what my Lord has said and I agree that this appeal should be dismissed with costs.

R. L. *Appeal dismissed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 7 OF 1925.

December 9, 1925.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Misra.

PIRTHA SINGH—PLAINTIFF—APPELLANT

versus

THE HON'BLE SIR RAJA MOHAMMAD ALI MOHAMMAD KHAN BAHADUR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Construction of documents—Judgment and decree based on compromise, interpretation of—Revenue entries, value of—Appeal—New plea.

The judgment and the decree have to be read as a whole and where they are based upon a compromise, they have to be interpreted in the light of the contents of the compromise itself. [p. 189, col. 2.]

Where the origin of an entry in the Revenue Records is not known, the entry itself might afford an indication of the rights conferred but where the origin itself is not in doubt and where according to the entry itself the fountain-source of the rights can be traced, it is not safe to rely upon the entry itself, but recourse must be had to the origin itself to discover what the rights conferred actually are. [p. 190, col. 1.]

Secretary of State for India v. *Srinivasa Chariar*, 60 Ind. Cas. 230; 44 M. 421 at p. 430; 40 M. L. J. 262; (1921) M. W. N. 111; 29 M. L. T. 181; 19 A. L. J. 201; 33 C. L. J. 280; 13 L. W. 592; 25 C. W. N. 818; 3 U. P. L. R. (P. C.) 43; 48 I. A. 56 (P. C.), relied on.

A plea will not be allowed to be set up in appeal which was neither taken up in the plaint nor was embodied in an issue and is contradicted by the party's own witness. [p. 190, col. 2.]

Appeal from a decree of the Subordinate Judge, Sitapur, dated the 10th November 1924.

Mr. *Rauf Ahmad*, for the Appellant.

Mr. *M. Wasim*, for the Respondents.

JUDGMENT.

Misra, J.—This appeal arises out of a declaratory suit. Pirtha Singh, the plaintiff-appellant, brought a suit in the Court of the Subordinate Judge of Sitapur, for a declaration to the effect that defendant No. 2, Zorawar Singh, his uncle, had executed a deed of gift of the land in suit in his favour on the 9th of January 1923 and had put him in possession thereof, and that he had applied for mutation to the Revenue Court, but his application was rejected on the 31st of May 1924 on the objection of defendant No. 1 respondent who is the proprietor of the Mahmudabad estate. The dismissal of the application by the Revenue Court is stated to have given to the plaintiff-appellant the cause of action for the present suit. In defence the Raja of Mahmudabad contended that the rights possessed by Zorawar Singh were merely heritable but not transferable rights and hence the alleged gift relied upon by the plaintiff was inoperative. The learned Subordinate Judge has accepted the contention of the defendant and dismissed the plaintiff's suit.

The plaintiff has now appealed to this Court against the decree of the learned Subordinate Judge. In appeal it is again contended that the rights possessed by Zorawar Singh were transferable rights and that the decision of the lower Court is wrong.

In order to make clear the facts of the case I think it necessary to state the history of the case, which is as follows:—

It appears that one Bechu Singh, the ancestor of the plaintiff-appellant, sued Raja Amir Hasan Khan, the father of the present defendant No. 1 respondent, the then owner of the Mahmudabad estate, for sub settlement of villages Kanchanpur, Tera, Basantpur, Gulauli, Tarabhind, Salarpur, and Bilaspur, all situate in *pargana* Mahmudabad, District Sitapur. While the case was being tried by the Settlement Officer, Bechu Singh put in an application before the said officer on the 19th of January 1867. The application was to the effect that it had been settled between the parties, *i. e.*, the applicant and the Raja Saheb, that the land measuring 900 *bighas kham* had been granted by the Raja and his wife to him as rent-free (*bila lagani*) without any power of sale or mortgage (*bila ikhtiyar bai wa* *rehn*) in favour of a stranger (*bamuqam digar*), for ever, generation after generation (*naslan bad naslan*), with effect from the commencement of *Rabi* 1274 *Fasli*, and that in consideration of this he (Bechu Singh) had agreed to withdraw his claim for the sub-settlement of the villages. It was also stated further on in that application that the plaintiff would not have the right of mortgage or sale in the land granted to him and that he was only entitled to appropriate the usufruct of it. The land in question was stated to be situate in villages Tera, Kanchanpur and Gulauli. On the 28th of March 1867 the case was taken up by the Settlement Officer, who, after stating that the plaintiff had filed a *razinama* and that the defendant had given him 302 *bighas* 12 *biswas* standard rent-free, passed the following judgment (Ex. 10):—

"The plaintiff, Bechu, who has sued for the sub-settlement of the village of Kanchanpur now files a *razinama*, in accordance with the terms of which this suit will be dismissed. A fresh suit being filed for the *sir*, in which a copy of the decree now given will be filed.

DECREE.

The Court accordingly dismisses on his own consent the plaintiff Bechu's claim to the sub-settlement of Kanchanpur and decrees to the same rent-free for ever three hundred and two *bighas* and twelve *biswas* (302 *bighas* 12 *biswas*) standard in the same village (together with all *zemindari* rights of which a note is made in the *razinama*) according to the extract of *khasra* filed and attested.

"28th March 1867.

(Sd.) HENRY BOYS."

It appears from the *fard ahkam* recorded on the 19th of January 1867, a copy of which has been filed on behalf of the defendant (*vide* Ex. A-3), that the petition above referred to was read out to Bechu Singh word for word (*harf-ba-harf*) and he verified by signifying his acceptance of the terms mentioned in the application filed by him and which had been described then as the *razinama*. The *fard ahkam* also shows that the condition stated in the petition had been accepted on behalf of the Mahmudabad estate by one Saiyad Hamiduddin who appeared as a Pleader for the estate.

In the *khewat* prepared at the last settlement the members of the family of Bechu Singh, who were then in possession of this rent-free holding, were described as holding under a decree for under-proprietary rights (*matahti*), dated the 28th of March 1867, rent-free for ever, generation after generation. It is on the strength of this evidance that the appellant contends that, the rights decreed in favour of Bechu Singh by the Settlement Court in the year 1867 were under-proprietary rights and that, therefore, Zorawar Singh, one of the successors of Bechu Singh, had full rights of transfer in regard to the land in suit. I regret I cannot accept this contention. It appears to be clear beyond any reasonable doubt that the rights mentioned in the *razinama* filed by Bechu Singh were rights, as expressly stated in that document, heritable but non-transferable. The judgment of the Settlement Officer mentions clearly that the plaintiff's suit is to be dismissed in accordance with the terms of the *razinama*. It is, therefore, impossible for me to read the judgment passed by the Settlement Officer without referring to the *razinama* filed by Bechu Singh, to which it expressly relates. The judgment and the decree have to be read as a whole and it would not be reasonable to separate the one from the other. On a reference to the *razinama* all doubts are set at rest. That document expressly shows that the rights conferred by the Mahmudabad estate on Bechu Singh were non-transferable. A reference has been made to a decision of their Lordships of the Privy Council in *Lal Sripat Singh* v. *Lal Basant Singh* (1) in which they have confirmed a judgment of the late Court of the Judicial Commissioner, Oudh. I do not think that that case can be considered any authority for the proposition now contended for by the appellant. In that case a decree for under-proprietary rights was passed by the Settlement Court on the basis of a compromise but subsequently on the statement of the decree-holder words were added to the effect that the rights were non-transferable. Their Lordships held that where a decree declared a person entitled to a certain legal status but added words which totally nullified the previous declaration the subsequent words limiting the rights, which under the law attached to such status, should be ignored and that so long as he retained that status he would be entitled to those rights

(1) 47 Ind. Cas. 424; 21 O. C. 180; 5 O. L. J. 497; 8 O. & A. L. R. 218; 22 C. W. N. 985; 8 L. W. 328; (1918) M. W N. 638; 16 A. L. J. 817; 5 P. L. W. 255; 35 M. L. J. 595; 28 C. L. J. 468; 24 M. L. T. 434; 20 Bom. L. R. 1101 (P. C.).

which attached to it. In the present case the Settlement Officer did not choose to confer under-proprietary rights upon Bechu Singh. The only rights for which he passed a decree in his favour were the rights of a holder "rent-free for ever." He nowhere indicated in his decree that the rights to be decreed were the under-proprietary rights and when I turn to the judgment I find it clearly stated that the plaintiff Bechu Singh's suit for the sub-settlement of the village Kanchanpur was to be dismissed in accordance with the terms of the *razinama* filed. Under these circumstances it appears to me that the present case is distinguishable from the one quoted above. In my opinion the meaning of the decree is beyond any doubt, and the rights conferred upon Bechu Singh were those of a rent-free holder (*muafidar*) for ever, generation to generation.

I, therefore, hold that the interpretation placed by the learned Subordinate Judge upon the judgment and the decree of the Settlement Court is quite correct, and that the rights possessed by Bechu Singh and his successors are heritable but non-transferable.

In regard to the entry in the *khewat* it is enough for me to state that the *khewat* filed is of the recent settlement and it cannot be said that the description of the decree entered therein can be considered as any index for holding that the authorities which were responsible for passing the decree in the year 1867 intended that the decree in question was to be a decree for under-proprietary rights. I am of opinion that where the origin of any entry is not known an entry itself might afford an indication of the rights conferred but where the origin itself is not in doubt and where according to the entry itself the fountain-source of the rights can be traced it is not safe to rely upon the entry itself, but recourse must be had to the origin itself to discover what the rights conferred actually are. I am supported in this view by a recent decision of their Lordships of the Privy Council in *Secretary of State for India* v. *Srinivasa Chariar* (2).

It is also contended on behalf of the appellant that the present case should not be treated as a case of a transfer but merely a case of a surrender of his rights by a member of a joint Hindu family in favour of another member, and in support of this contention reliance is placed on a ruling of the late Court of the Judicial Commissioner of Oudh, reported as *Bakhtawar Singh* v. *Ram Singh* (3). This contention of the appellant cannot, however, be accepted. The plaintiff-appellant nowhere took up this plea in the plaint and no issue was framed by the Trial Court embodying the said plea. Zorawar Singh gave his evidence in this case on behalf of the plaintiff and he said that Bechu Singh was his own brother, that when the decree was passed all the brothers of Bechu Singh were joint and that he had 1/6th share in the land decreed by the Settlement Court. He also stated that he was at that time joint with his brothers and that they had separated afterwards but the plaintiff, the son of one of his brothers Jot Singh, used to dine with him always. It, therefore, appears to me that the plaintiff-appellant under those circumstances cannot be allowed to set up a case which he never pleaded in the Trial Court, and which is contradicted by the evidence of Zōrawar Singh, his own witness.

I am, therefore, of opinion that the suit of the plaintiff-appellant was rightly dismissed by the Court below and I dismiss the appeal with costs.

Stuart, C. J.—I concur.

R. L. *Appeal dismissed.*

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(2) 60 Ind. Cas 230; 44 M. 421 at p. 430; 40 M. L. J. 262; (1921) M. W. N. 111; 29 M. L. T. 181; 1 J A. L. J. 201; 33 C. L. J. 280; 13 L. W. 592; 25 C. W. N. 818; 3 U. P. L. R. (P. C.) 43; 48 I. A. 56 (P. C.).

(3) 36 Ind. Cas. 44; 3 O. L. J. 289.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1582 OF 1923.

February 23, 1926.

Present:—Mr. Justice Sulaiman.

RAMDEO—PLAINTIFF—APPELLANT

versus

SHEO NAIK AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Jointness of cultivation, finding as to—Finding of fact—Finding based on misappreciation of expression 'sharing in cultivation'—Sharing in cultivation, meaning of.

Sharing in cultivation is not confined to ploughing, sowing, attending the crops or reaping them but covers any kind of help in agricultural pursuits. [p. 191, col. 2.]

Hari Singh v. *Joti Singh*, 2 Unpub. Dec. 237, followed.

A finding whether a person is sharing in cultivation with another person is one of fact. But where such a finding is based on the misappreciation of the true meaning of the expression "sharing in cultivation" it is liable to be disturbed in second appeal. [p. 191, col. 1.]

Second appeal against a decree of the Judge, Small Cause Court; exercising the powers of a Subordinate Judge, Allahabad, dated the 2nd of May 1923.

Mr. *Shiva Prasad Sinha*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of possession of fractional shares in certain holdings and groves. The plaintiff is the daughter's son of one Bhairo deceased and the defendants are nephews of Bhairo. One of the points in dispute was whether Bhairo was joint with his nephews or separate. Both the Courts below have found the point in favour of the plaintiff and held that Bhairo was separate from his nephews. The holdings, however, remained joint and thus Bhairo and his nephews were co-owners of specific shares in the various holdings. The plaintiff claimed to have acquired interest in the occupancy holdings and groves by virtue of a deed of gift executed by Bhairo in his favour and also because he was the daughter's son and was sharing in cultivation with Bhairo during the latter's lifetime. None of the Courts below have held that the plaintiff is entitled to succeed on the strength of this alleged gift. So far as the tenancies which are the subject-matter of appeal are concerned, a gift would not transfer any title to the plaintiff.

The Court of first instance found that there was abundant evidence that both *Musammat* Dhiraji and her son the present plaintiff lived with Bhairo and were joint in cultivation with him. On the basis of this finding he decreed the claim. On appeal the lower Appellate Court has come to the conclusion that the plaintiff did not share in cultivation with Bhairo. If this finding were binding on me absolutely I would have to dismiss the appeal. The finding ordinarily would be a finding of fact and would be binding upon me. But after some consideration I have come to the conclusion that this finding is vitiated by the circumstance that the learned Judge has not appreciated the true meaning of the expression 'sharing with him in cultivation' and his finding does not mean anything more than that the plaintiff was not actually ploughing the fields when Bhairo was alive. My reasons are as follows:—

(1) The learned Judge thought that the plaintiff must have been twelve years of age when Bhairo died. He then remarked "a boy of this age could hardly share in cultivation". Although it is unlikely that a boy of the age of twelve years would actually plough the fields, yet there is nothing strange in his helping his maternal grandfather in his cultivation. Sharing in cultivation does not necessarily mean actual ploughing. A person who helps another in his agricultural pursuits would be sharing in cultivation although he does not actually plough the fields. It has been held in the case of *Hari Singh* v. *Joti Singh* (1) that sharing is not confined to ploughing sowing, attending the crops or reaping them. In the case of *Ram Kishore* v. *Gauri Shankar* (2) even a boy of ten years who was helping the last tenant was held to be sharing in cultivation.

(2) The learned Judge nowhere says that he disbelieves the plaintiff's evidence. On the other hand he thought that "the statements of plaintiff's own witnesses show that he really did not share in cultivation", but if the statements of plaintiff's witnesses Jasodanand and Mahadeo referred to by the learned Judge are to be accepted, the plaintiff's case is fully established.

(3) The learned Judge says that Jasodanand stated that he saw the plaintiff cultivating from 12 to 15 years, and then because Bhairo died 12 years before the witness's statement, the learned Judge thought that it was clear that the plaintiff could not be joint in cultivation with him. This is hair-splitting. The witness had given a period '12 to 15 years' which was a mere estimate and there was no justification for pinning him down to the lower limit of 12 years. Even if he pinned down to the lower limit, a difference of a few months may yet prove that the plaintiff was joint in cultivation before Bhairo died. The witness, Jasodanand in his examination-in-chief has distinctly stated that the plaintiff was joint in cultivation in the lifetime of Bhairo, (Ramdeo Bhairo *ke sath kheti karta tha*).

(4) The learned Judge thought that the witness Mahadeo was more clear because he stated that the plaintiff began cultiva-

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(1) 2 Unpub. Dec. 237.
(2) 2 Unpub. Dec. 502.

tion after the death of Bhairo. Here the learned Judge has misread the statement of Mahadeo. Mahadeo in his examination-in-chief has stated that Ramdeo used to share in the cultivation with Bhairo: (Bhairo *ke sath kheti bari karta tha*). In cross-examination he stated that he began to *plough* the fields after the death of Bhairo: (*jotne shuru kia*). The learned Judge apparently has thought that sharing in cultivation is the same thing as ploughing.

For the reasons given above I am of opinion that the finding recorded by the lower Appellate Court is unsatisfactory and is vitiated, and that a clear finding on the evidence already on the record is called for. I accordingly send down the following issue to the lower Appellate Court:—

(1) Did the plaintiff Ramdeo share in the cultivation of all or any of the holdings in dispute with Bhairo during the latter's lifetime?

The usual ten days are allowed for filing objections.

R. L.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1942 OF 1925.
March 13, 1926.
Present:—Mr. Justice Addison.
NATHU RAM AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
THE MUNICIPAL COMMITTEE, MUKTSAR, DISTRICT FEROZEPORE, THROUGH ITS PRESIDENT—DEFENDANT—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 131—Reservoir, demolition of—Damages—Municipality preventing re-building of reservoir—Good faith—Perpetual injunction, issue of.

Under s. 131 of the Municipal Act, a Committee cannot order the demolition of a reservoir, it can only have it filled up.

Where, however, a Municipality has acted in good faith in having a reservoir demolished, a plaintiff is not entitled to an injunction to the effect that the Committee should be perpetually restrained from preventing him from re-building his reservoir.

Second appeal from a decree of the Additional District Judge, Ferozepore, dated the 1st June 1925, reversing that of the Subordinate Judge, Third Class, Fazilka, District Ferozepore, dated the 20th May 1924.

Mr. *Shamair Chand*, for the Appellants.

Lala *Madan Gopal*, for the Respondent.

JUDGMENT.—Gokal Chand sued the Municipal Committee of Muktsar for the issue of a perpetual injunction directing it not to prevent the plaintiff from re-building his small reservoir for holding water, and for recovery of Rs. 200 as damages for the loss caused to him by the illegal act of the Committee in demolishing his reservoir. The Court of first instance decreed the claim for the injunction and also awarded damages amounting to Rs. 50. On first appeal the learned District Judge dismissed the suit. He held that the Committee acted *bona fide* and though it committed a technical irregularity in not filling up the reservoir instead of demolishing it this did not matter. This second appeal was admitted on the question as to whether the plaintiff should not be awarded damages.

It was contended before me that once an appeal is admitted, it is admitted as a whole. This is supported by *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunya* (1) and *Janaki Nath Hore* v. *Prabhasini Dasi* (2). The question, however, is not important in this case as it is clear that the plaintiff is not entitled to the injunction claimed to the effect that the Committee should be perpetually restrained from preventing him from re-building his reservoir. The Committee clearly acted in good faith, its only mistake being that it demolised the reservoir instead of filling it up. That, however, is no ground for the issue of a perpetual injunction.

There remains the question of damages. Under s. 131 of the Municipal Act the Committee had only power to require the reservoir to be filled up. It was, therefore, technically wrong in demolishing it. For that act, it seems to me, the plaintiff is entitled to damages. By demolishing the reservoir the Committee must have broken up the bricks with which it was made and it cannot be said that no damage was, therefore, done. The damage, however, must have been slight. It is not clear on the record what the actual damage was, but both Counsel stated that they did not desire a remand to ascertain the damage and that a small sum might be fixed by me as representing the loss to the plaintiff. A fair sum in the circumstances, in my opinion, will be Rs. 15. I accordingly accept the appeal and decree that amount. I leave the parties to bear their own costs throughout.

R. L. *Appeal accepted.*

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(1) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146.

(2) 30 Ind. Cas. 898; 43 C. 178; 22 C. L. J. 99; 19 C. W. N. 1077.

OUDH CHIEF COURT.

Criminal Appeal No. 710 of 1925.
January 12, 1926.
Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Misra.

MUKTA PRASAD and others
—Accused—Appellants
versus
EMPEROR—Complainant—Respondent.

Murder case—Local inspection and preparation of plan by Trying Judge—Police diaries, nature of entries in—Discrepancy between diaries and inquiry—Effect—Trial Judge's opinion about witnesses—Witnesses credibility not shaken—Judge's duty.

It is a commendable procedure on the part of the Trying Judge to visit the spot on the conclusion of a murder case and to prepare a plan of the locality showing as to who are the witnesses who live in close proximity to the house of the deceased. [p. 198, col. 1.]

The entries in the Police diaries are not exhaustive and in a protracted inquiry before the Trial Court little weight attaches to a discrepancy between those entries and the inquiry. [p. 202, col. 2.]

Considerable weight must be attached to the opinion of the Judge who hears the witnesses as to their relative credibility. Where the record does not show that the witnesses on either side have been materially discredited or greatly shaken in cross-examination it is the duty of the Judge to decide which side are telling the truth. Where the Judge has tried the case with marked care and intelligence, his opinion as to credibility of witnesses should ordinarily be accepted. [p. 203, col. 2.]

Appeal against an order of the Second Additional Sessions Judge, Lucknow, at Unao, dated the 22nd December 1925.

Messrs. *John Jackson* and *Ram Krishna Chaudhri*, for the Appellants.

Mr. *G. H. Thomas*, for the Crown.

JUDGMENT.—Mukta Prasad, Madari Lal, Jangi Singh, Lachhman, Bharat Singh, Bahadur Singh and Surjan Singh have been convicted by the Second Additional Sessions Judge of Lucknow of the offence of murder under s. 302, Indian Penal Code. The first-four named have been sentenced to death subject to confirmation by this Court. The last-three-named have been sentenced to transportation for life. All appeal. The reference in confirmation in respect of the first four is also before us.

The village of Kuremau in the Unao District with the conterminous villages is owned and possessed by a large religious endowment, of which the head is known as the Mahant Baba. The present Mahant Baba is Baba Harsaran Das. He does not reside in the Unao District. The management of the villages of the estate is in the hands of agents, under whom are *ziladars*. The responsibility for the collection of rents in the group of villages consisting of Kuremau and the adjoining villages (the Ariars and Mirzapur) is in the charge of a *ziladar* who resides for the purpose in Mirzapur, the village adjoining Kuremau on the south. On the 21st of September 1925 the *ziladar* in question was the appellant Mukta Prasad. The appellants Madari Lal, Jangi Singh, Bharat Singh, Bahadur Singh and Surjan Singh were at that time collecting peons of the estate. Lachhman Pasi was *gorait* of Mirzapur and in the employment of the estate.

Two brothers the elder Jodha Singh a man of 35 and the younger Bharose Singh a man of 25, resided on that date in Kuremau. They were sons of a Thakur called Man Singh. They claimed that their ancestors were the original *zemindars* of Kuremau. There is reason to suppose that their mother was not a Thakurain. The brothers lived in separate houses in the inhabited area of Kuremau, the houses being a short distance apart. Jodha Singh had living with him a Thakur widow of the name of Indrani. Bharose Singh had living with him Indrani's daughter Sheorani who was also a Thakur widow. These women kept house for each brother. Two elderly women called Bhagana and Kailasa who were related to Indrani lived in the houses apparently enjoying the hospitality of the brothers. Jodha Singh and Bharose were men in very humble circumstances. Their whole means of subsistence was a small holding, a portion of which they cultivated as sub-tenants and a portion of which they cultivated as tenants. Bharose Singh was a man of criminal antecedents. He had been sentenced in 1916 when he was a youth to three weeks' imprisonment for theft and was again convicted and sentenced in June 1919 to two years' rigorous imprisonment for burglary with violence. The Police kept up a history-sheet against him. Nothing has been elicited against the character of Jodha Singh.

At 3 a. m. on the 22nd September Mukta Prasad, appellant, accompanied by Bharat Singh appellant, Bahadur Singh appellant and Surjan Singh appellant, collecting peons (the translator of the first report has wrongly translated here the word *'sipahi'* as 'constables'; it clearly means 'collecting peons'), arrived at the Safipur Police Station bringing with them the corpse of Bharose Singh on a bullock-cart together with a bamboo-staff, to the end of which was attached a sort of sickle-shaped axe-head known as a *pharsa*, and a bamboo-*lathi*. Mukta Prasad proceeded to write out a report which is on the record. We note a peculiar error which, although it has no bearing upon the decision of the appeal, has given the Court some trouble in tracing Kuremau on the map. In this report Kuremau is described as 6 miles north of the Police Station. It is actully 6 miles due east of the Police Station. The fact that such a misdescription can arise in a Police report made by a man of some intelligence is sufficient to show with what caution descriptions of position made by witnesses from villages in India should be received.

The report was as follows:—

"I, on the 21st September, 1925, having realized rent from village Bithaur, Ariar Khurd and Kuremau, was going from Kuremau to Mirzapur Kalan at about 7 P.M. with Jangi Singh, Bharat Singh, Madari Lal, Surjan Singh, Bahadur Singh, the *sipahis* of the estate, and Lachhman *gorait*. There was a cotton-field, at a distance of about 6 or 7 fields from village Kuremau; in it about 12 dacoits were sitting, but I had not observed them from before; when we arrived there near the field. one of them dealt a *pharsa* blow to Jangi Singh, *sipahi*, who walked ahead of us. It struck at the back of the said peon. He had a purse containing the income, about four or five hundred rupees. I cannot give the exact figure as I had not totalled the *siaha* by that time. The purse of money fell from the hands of the peon. I followed the poen on horse back. Five other peons and the *gorait* followed me. When they saw the assault they came in front of us and began to exchange blows, and in the meantime I fired 2 rounds one after another out of my gun but I cannot say correctly whether anyone was wounded or not. I fired only to terrify; and in the meanwhile some dacoits took to their heels. Bharose Singh stayed back. After exchanging two or four blows he also fled towards his house. We pursued him and overtook him near his house and he fell down and then three women came out and fell on him and all began to cry. Our peons arrested him. Some time after we brought Bharose Singh to Mirzapur. Subsequently we came to the Police Station on a bullock-*ekka*. I cannot say correctly which of the dacoits took away the purse. When the money-purse had dropped down, one man said 'Pick up the purse.' I surely saw the man picking it up but could not recognise him. Bharose Singh was alive when we started from Mirzapur but he died on the way. Three men of our side, Jangi Singh, Madari Lal and Lachhman *gorait* have been wounded. I failed to recognize anybody except Bharose Singh because the dacoits had wrapped their *safas* (turbans) round their head and face in such a way that I could not recognise any of them."

The following injuries upon the body of Bharose Singh were found at the *post mortem* examination. There was an incised penetrating wound making a hole 2″ × 1″ on the right side of the chest. This went deep into the chest cavity, cut the seventh and eighth ribs through and penetrated the liver. In the body there was a quart of blood from internal hæmorrhage. This wound had clearly been inflicted by a spear or some weapon of that nature. There were 5 incised wounds caused by a cutting weapon on the skull. These were surface-wounds: the longest was $2\frac{1}{2}''$ and the shortest was 1″. There was another long similar wound over the left eye. There was another similar wound on the outside of the left-arm above the elbow. This was not very long. There was a long incised cutting wound on the right wrist and 2 incised wounds on the right leg, a long incised wound 3″ long in front of the right ankle and a cut across a toe of the right foot. The cause of death was clear. It was due in the main to the first spear-thrust which had, in addition to the injury caused to the lungs, penetrated the liver, but even in the absence of that injury the loss of blood from the other wounds and the shock would have been sufficient to cause death. The man had been hacked about cruelly.

Sub-Inspector Ram Sarup, officer-in-charge of the Safipur Police Station, left Safipur for Kuremau at 10 A.M. on the 22nd of September 1925. He arrived at Kuremau at about 2 P.M. He clearly did not hurry as the distance is only 6 miles, but it is to be noted that in so far as he then had the opportunity of determining the nature of the case, there was no necessity for expedition. According to the report made by Mukta Prasad no one was likely to be able to identify any of the alleged dacoits with the exception of the dead man Bharose Singh. He had clearly stated that the dacoits had so concealed their features that no one could identify them. From the point of view of a Police Officer such an investigation was hardly likely to result in much. The property alleged to have been stolen was entirely in cash and difficult to trace. In the face of the first report subsequent identification would not have been favourably viewed in a Court and beyond noting salient features of the case there was very little to do. The Sub-Inspector proceeded to the place where according to Mukta Prasad the dacoity had been committed. He had found there some 20 drops of what looked like human blood. These drops were almost in a straight line, a yard to a yard and a quarter long. They were all about the circumference of the top of a man's index finger, some a little larger and some a little smaller. Outside this line of drops of blood, one yard to one yard and a quarter long, there was no blood discovered on the fields where the dacoity was said to have been committed. An examination of the ground close to the deceased Bharose's house in Kuremau showed eight large patches of blood. The exact dimensions of these patches are not given but the trend of the evidence is that they were large patches. The Sub-Inspector in addition to examining the locality took the statements of witnesses whose names he had obtained from Mukta Prasad as to the commission of the alleged dacoity. It is to be remembered that at that time his attention was fixed upon the dacoity-charge and that he had then no reason to suspect that Bharose Singh had been murdered by Mukta Prasad and his party in circumstances absolutely different from the circumstances set out in the first report. As the first report had referred to the women who had fallen on Bharose Singh's prostrate body, he took on the 22nd of September the statements of the woman Sheorani who lived with Bharose Singh and the woman Indrani who lived with his brother Jodha Singh. Their statements introduced a completely different account of the manner in which Bharose Singh had met his death but in themselves they were hardly sufficient to give the investigating officer more than an indication that the matter might not be as Mukta Prasad had stated it. The Sub-Inspector remained at Kuremau till the evening of the 23rd. He went back to the Police Station that night. On the 23rd in addition to other witnesses he examined Shankar Barhai of Kuremau who has given evidence for the prosecution. His statement went to support the statement of the two women.

On the 24th September the Sub-Inspector returned to the village. At 10 A. M. he came across Jodha Singh, the deceased man's brother. The Sub-Inspector has stated in his evidence that when Jodha Singh appeared before him he bore marks of injury on his body and was perplexed. Jodha Singh made the following statement and gave the names of a large number of witnesses whom he stated would be able to give evidence of the occurrence. This was the statement:—

"I and Bharose Singh were own brothers. We are the old *zemindars* of Kuremau and never used to pay *bhent* to Mukta Prasad, *ziladar*, or do *begar* work for him. Bharose Singh did not mind the authority of the *ziladar*. Land of the village had been leased to Chandi Singh Thakur of Ahmadpur, which was under the cultivation of Bharose Singh as sub-tenant for 3 years. In the month of *Sawan* last, Mukta Prasad *ziladar*, got a deed of relinquishment in respect of that land executed by Chandi Singh but Bharose Singh did not relinquish the land. The *ziladar* let out the land to Seoki Lodh and his son-in-law Hulasi, Mohan and Rajnu Bania. Bharose Singh did not deliver possession to these persons and sowed cotton and *jundhri*. The *ziladar* wanted to have the cotton and *jundhri* sowed by Bharose Singh uprooted and got the field ploughed again but Bharose Singh did not allow him to do so and said, 'First get me ejected through Court then have the land relinquished.' Upon this the *ziladar* became very angry. On Monday, 4 days ago, a *bazar* was held at Khargura and I was ready to go to the *bazar*. A *pahar* or 6 *gharis* of the day was remaining when Mukta Prasad *ziladar* arrived with 10 or 12 men and, having sat at Meharban Mukhia's house, demanded rent from me. I paid Rs. 14 and asked for a receipt. He said that I might take it afterwards. Bharose Singh was at his house. The *ziladar* sent one of his men to Bharose Singh to tell him that he should relinquish the land, otherwise it would not be good for him. He replied: 'I will not leave it at your request: get it relinquished through Court'. Upon this Mukta Prasad *ziladar*, Bharat Singh, Jangi Singh *sipahi* Salik Brahman and Lachhman Pasi *gorait*, went at a secluded place and held some conversation. Lachhman *gorait* sat to make water where my cattle are tied. When I remonstrated with him he showed readiness to fight. Hearing my voice Bharose Singh also came up and told Lachhman not to make water there. From the other side the *ziladar* rose from his seat with his gun, and his *sepahis*, namely, Bharat Singh, Jangi Singh, Madari Lal, Surjan Singh and Lachhman *gorait* as well as Salik Brahman and two or three other persons, whose names I do not know, came with *lathis*, spear and *kanta*.. The *ziladar* said 'Kill this man, I will see the consequences,' and he fired his gun. Mukta Prasad and his men began to beat him with *lathis*, spear and *kanta*. I came in front of Bharose Singh: then they began to strike us both. We too dealt one or two blows with *lathis*. Bharose Singh fell down wounded and I fled, having received injuries. Then all the men began to strike him. At that time several persons of this village as well as of other villages were seeing (the affray). I give their names below. The *ziladar* and his men killed my brother Bharose Singh. I was wandering about for fear, thinking that if they would seize me they would kill me also.

"Names of witnesses:—

Kallu Chamar, Babbu Teli, Dori Dhobi, Ghariba Kori, Thakur Darzi, Raghunath Singh Thakur, residents of Kuremau, Qadir Behna of Mirzapur, Bisram Singh and Gindan Singh Thakurs, residents of Purwa, Nannhu Brahman of Ariar, Gaja Singh Thakur of Salempur, Gauri Shankar Singh, Rampal Singh and Sripal Singh Thakurs of Jodha Khera, hamlet of Kurari"

On inspection the following injuries were found on the person of Jodha Singh:—

"(1) A wound about 1 inch in length on the upper portion of forehead on the left side.

(2) A wound half inch in length above the temple on the head on the left side.

(3) One wound 1/4 inch in length above the forehead, front side of the head.

(4) Swelling on the back side of the head near the left ear.

(5) Scratch on the back and at 3 places marks of *lathi* blows.

(6) Marks of *lathi* blow and scratch on the left shoulder.

(7) Scratches at 3 places on the waist.

(8) Scratch and swelling on the wrist of the right hand.

(9) Scratch and swelling below the calf and knee-joint of the left leg.

(10) Slight scratches at 3 places on the right knee-joint.

On the 24th the Sub-Inspector recorded amongst other statements the statements of the witnesses for the prosecution, Dori Dhobi, Kallu Chamar, Babbu Teli, Ghariba Kori, all of Kuremau, Qadir Bakhsh Darzi of Mirzapur, Sripal Singh a *zemindar* of Jodhakhera, Gindan Lal a *zemindar* of Purwa and Gaja Singh a *zemindar* of Salempur. After completing his investigatian he rejected the story told by Mukta Prasad and arrested him with the remaining appellants and also a man called Sheo Ratan *alias* Salik, the son of Meharban the headman of Kuremau, on the charge of murdering Bharose Singh. The last-named man was committed to sessions, but acquitted. It is necessary to note in the preliminary history of the case that the Police prosecuted before the decision of the sessions case against Mukta Prasad and the rest a *tahsildar* of the estate called Birman Singh, a collecting peon, a gardener of the estate, and three other persons on a charge of criminally intimidating the witnesses in the murder case under the provisions of s. 506 of the Indian Penal Code. These persons were discharged by the Sub-Divisional Magistrate on the 24th November 1925

The foregoing remarks show how the case against the appellants came into being. We shall now proceed to discuss the evidence in that case. We commence our discussion of the evidence with a few preliminary remarks. The case is one of difficulty but our difficulties have been appreciably lessened by the excellent manner in which the case has been tried by the learned Sessions Judge. We cannot speak too highly of the care and intelligence which he has devoted to bringing out the evidence and we are particularly impressed by the judgment which is a model of what a judgment should be in a case of this nature. We have also had the great advantage of having the case of the appellants argued before us by an experienced Counsel, Mr. John Jackson, who appeared also for the appellants in the Sessions Court. Although we do not arrive at the conclusions at which he would have us arrive we are indebted to him for an exceptionally careful, fair and well-reasoned argument. The learned Government Advocate has exhibited great ability in bringing out the case for the Crown. This case has the advantage of presenting a clear-cut issue Is the story told by the prosecution to be accepted or is the story told by the defence to be accepted? On each side there is evidence. That evidence has been weighed and sifted by the learned Sessions Judge but the task has necessarily to be undertaken again in appeal.

The story told for the prosecution is in the main the story told by Jodha Singh to the Police Sub-Inspector on the 24th September 1925. According to this story both brothers were not favourites of the servants of the estate. Of the two Bharose was the most disliked. The evidence for the prosecution shows Bharose Singh as a man who would be considered by the servants of the estate to be a contumacious and turbulent tenant, who boasted that his ancestors had been *zemindars* of the village, refused allegiance to the proprietor and treated both him and his servants with contempt. Great stress has been laid by Jodha Singh upon the fact that he and his brother would not accede to any demands made upon them for forced labour. Their attitude appeared to have been more than independent. It appears to have been truculent. Great stress is laid by Jodha Singh in his evidence upon the alleged incident which is stated to be the last chapter in the history of the ill-feeling between the deceased and the people of the estate. The allegation is that a certain Chandi Singh had a holding of about 9 *bighas*. Chandi Singh, who has been called as a witness upon the point, is a distant relative of Jodha Singh. According to the prosecution story Chandi Singh sub-let this holding to the deceased. Mukta Prasad according to this story had obtained under false pretences the signature of Chandi Singh to a writing on a piece of paper which Chandi Singh supposed was connected with a receipt for rent that he had paid, but which he subsequently discovered was a relinquishment of the holding. The deceased is said to have refused to relinquish the holding, and he sowed crops on it in defiance of Mukta Prasad, who had let it to other tenants to whom the deceased refused possession. The first part of the prosecution story relates to an alleged attempt said to have been made by Mukta Prasad to force the deceased out of his holding. Mukta Prasad is stated by Jodha Singh to have come to the village on the 20th September and ordered the deceased to give up the land. The deceased replied that he would not quit the land except under the orders of the Court. Mukta Prasad is then said to have threatened him. On the day of the occurrence it is stated that Surjan Singh, appellant, was sent by Mukta Prasad to the deceased to force him into a relinquishment. The deceased refused to relinquish the land and repeated that he would not go out until he was put out by a Court's decree. Then the unpleasant incident alleged in connection with Lachhman appellant happened. This man who is a Pasi—a caste so low as to be considered contemptible—is said to have come between 4 P. M and 5 P. M. and passed water deliberately over the cow-dung in the place where Jodha Singh's cattle were tethered. Jodha Singh says that he told him to find some other place for the purpose as the women of his family collected the cow-dung for fuel and that the *gorait* replied that the whole village belonged to his master and he would ease himself where he wished. This brought the deceased from his house. He addressed Lachhman in terms of great contempt and impressed on him the fact that he was a Pasi. It is said that upon this Mukta Prasad and his entourage came to the spot and that Mukta Prasad shouted to the deceased to come on if he was a true Thakur. As on the showing of the defence itself, the deceased's mother was not a Thakurain, the taunt was one that was likely to have enraged the deceased to fury. It is clear from the prosecution evidence that he and Jodha Singh came out with *lathis* and it would look as though the brothers lost all sight of the risk they were incurring. The defence has not challenged the prosecution evidence as to the manner in which Mukta Prasad and his party were armed. It is their own case that the party was so armed. The equipment was remarkable as the equipment of persons whose ostensible object was to collect rent. Mukta Prasad had a single barrel breach-loading gun. His men had spears and axe-heads fixed to the end of the bamboos. The explanation advanced by the defence for this preparation is that dacoity at the time was rife in the Unao District and that it was necessary for those who wished to save themselves from violent attack to go forth well prepared. It is true that dacoities were very rife in the Unao District at the time. Whether it was necessary to take such precautions when Mukta Prasad's party was never more than 2 miles or so from their own village Mirzapur which is one mile from Kuremau is another matter. The fact remains that the party was so armed. According to the prosecution story when the deceased assumed this truculent attitude Mukta Prasad fired two shots at him from his gun at a very short distance. Both shots missed and he is then said to have called on his men to kill the deceased, saying that he would see they did not suffer by so doing. A fight then took place in which Mukta Prasad's men used their spears, axes and *lathis*. Jodha Singh escaped with a few *lathi* blows and losing heart ran away. He wandered from village to village, not returning to his own village till the night of the 23rd September. Mukta Prasad's party continued their attack upon the deceased as he lay helpless on the ground. The women of the house came out and fell upon his body weeping and lamenting. Mukta Prasad's men beat them and dragged them off. They then got a bullock-cart and took away the body of the deceased. Bharose Singh was unconscious and possibly dead. He was at the last gasp if he was not dead. The time of the occurrence was between 4 and 5 P. M. It took place in broad day-light.

This is the prosecution story. The evidence in support of the alleged attempt to deprive the deceased of his holding is contained mainly in the evidence of Jodha Singh but it is also supported by the evidence of Chandi Singh. The evidence as to the actual attack upon the deceased is the evidence of a very large number of alleged eye-witnesses, including Jodha Singh, Sheorani and Indrani. The learned Judge took a course which is greatly to be commended in cases of this nature. When the evidence was practically concluded he visited the spot himself and prepared a sketch-plan of the locality. This is on the record. From his investigation we have been able to ascertain who were the witnesses who live in close proximity to the house of the deceased. Between 4 and 5 P. M. it would not be unusual for persons living in close proximity to the house of the deceased to be in their own house. The first of these witnesses is Shankar carpenter. Taking the *chaupal* of Meharban the headman as a place close to the scene of the occurrence alleged by the prosecution we find that the house of Shankar Barhai is 99 yards from the *chaupal*. Shankar states that his attention was directed by fire of the gun. He ran out to see what was happening and he distinctly saw the appellants' party attacking the deceased and Jodha Singh in broad day-light. The next witness is Dori washerman. His house is only about 40 yards from the *chaupal*. According to him his attention was directed when he was in his house by hearing the abuse and he went out to see what was the matter. He says he saw a gun being fired and the subsequent incidents. The next witness is a Chamar called Kallu. His house is about 66 yards from the *chaupal*. He says that his attention was directed while he was in his house by the fire of the gun and that he saw the remaining incidents. The next witness is Babbu a Teli. His house is about 75 yards from the *chaupal*. He says that when he was in his house he heard a gun-shot and went to the spot and described the affair in the same way. The next witness was Ghariba, a Kori or a Hindu weaver. His house is about 45 yards from the *chaupal*. He says that he came out, being attracted by the verbal altercation, and that he saw the gun-fire and all the subsequent incidents. These five witnesses are residents of the village. The next witness is Qadir Bakhsh. He is a tailor of the adjoining village of Mirzapur. He says that he happened to be in Kuremau at the time and that he was passing the house of Shankar Barhai when he saw Jodha Singh passing him bleeding from the head, that he pushed on and saw the party attacking the prostrate body of the deceased. This man is a fairly well-to-do tailor who states his earnings to be 45 rupees a month. The next witness is a Thakur, Sripal Singh, a substantial *zemindar* of the village of Jodhakhera which is 4 or 5 miles from Kuremau. According to his story he had been that day to the village Ariar to inquire about a pair of bullocks which he wanted to purchase, that he had gone to see a man called Tulshi Lodh of Ariar Khurd who had a pair of bullocks for sale but they could not agree to the price and no bargain was made. He happened to be passing through Kuremau on his way home. His attention was attracted by a gun-shot. He came on the spot and saw the last part of the attack upon the deceased. The next witness was Gindan Singh, a *zemindar* of the village of Purwa, which is about 2 miles from Kuremau. He is a *zemindar* not as well-off as Sripal Singh. According to him he had been to the *bazar* in a village called Khargoura to buy a pair of *dhotis* but could not find any to his liking at a suitable price. He said that he was passing through Kuremau on his way home and hearing a gun-shot came to the spot and witnessed the end of the occurrence. The last witness is Gaja Singh, a *zemindar* of Salempur, a village some 2 miles from Kuremau. This man is a fairly substantial *zemindar* who also sells cloth. He said that he had been to the Khargoura *bazar* to sell cloth that day and on his way back had gone to Ariar to endeavour to get some money which was due to him. He was passing through Kuremau to his home. He was also attracted by the sound of a gun-shot and saw the last part of the attack upon the deceased. There is not one of these witnesses who was shaken or discredited. They were cross-examined by a very competent Counsel. Not only were they not discredited: for the most part they were not shaken in cross-examination. They told straight forward and clear stories. All agreed as to the details of the occurrence, and all agreed to the time of the occurrence as between 4 P. M. and 5 P. M. It is true that they did not agree as to the exact details of the attack or the positions in which the parties were standing but they fixed the place as satisfactorily as witnesses could ordinarily fix the place at the spot where the large patches of the blood were found eventually by the Sub-Inspector. It is true that some of these witnesses gave evidence in the s. 506 case against the estate-servants in which the latter were charged with intimidating witnesses and that that case resulted in a discharge of the accused; but after reading the judgment in that case we are not of opinion that the result in any way discredits the honesty of the witnesses who gave evidence in it. The Magistrate who discharged the accused took the view that the sufficient cause had not been made out to justify the framing of a charge but he did not reflect adversely on the honesty of the witnesses. He was not satisfied that sufficient cause existed for their conviction.

This is the main evidence for the prosecution. We need not discuss the evidence of Sheorani, Indrani and Jodha Singh. They had some interest in the matter. The other witnesses had no such interest.

The main evidence for the defence is contained in the statements of Dibba Bania, Meharban Brahman, Chuni Bania, Nannhe Lodh and Sheo Lal Singh. Dibba Bania admittedly lives close to the scene of the occurrence. Now, it is to be noted that the prosecution and defence agree as to the spot where the deceased's last struggles took place. His story supports absolutely the defence story of the affair. According to him the sun had set and darkness had come on when Mukta Prasad and his party after collecting rents in Kuremau had departed for Mirzapur. Shortly after their departure he heard two gun-shots from outside the inhabited area on the south and saw a man subsequently identified as the deceased running past the deceased's own house towards the dwelling-house and *chaupal* of Meharban with 3 men pursuing him. This man got towards the dwelling-house of Meharban when he turned and faced his pursuers. He had in his hand a bamboo-staff on which was fixed an axe-head, that is a *pharsa*, and with this *pharsa* he turned on his pursuers and attacked them. They struck him once or twice and he fell down. After he fell down the women of Jangi Singh and Ram Bharose's house fell on his body and covered it. According to this witness Mukta Prasad who came up later told the story of the attempted dacoity and Mukta Prasad and his party took away the deceased's body on a bullock-cart. Meharban Brahman, the headman of the village whose son Salik was committed for trial but acquitted, has told much the same story. He, of course, lives on the spot. Chunni Bania of Kuremau says that he was in the headman's house at the time and he gives much the same account. Nannhe Lodh who is a cultivator of Kuremau says that he was on his field and that he saw from the distance an occurrence which was clearly the dacoity, which the defence asserts took place, and that he came up to the spot while the deceased was being placed on the cart. Sheopal Singh *lambardar* and headman of Nurullahnagar which is close to Kuremau stated that he was in the neighbourhood of Kuremau that evening, that he heard two gun-shots after dark and he saw 4 men running towards Kuremau. This is the main evidence for the defence. The witnesses were not discredited or greatly shaken in cross-examination.

We now examine the criticisms directed by Mr. Jackson against the prosecution evidence. The first point which he pressed was that the story that Chandi Singh had been deluded into signing a relinquishment of his holding was absolutely false. He called as a defence witness Rup Chand, the *Patwari* of Kuremau, and he asked us after examining the evidence of Jodha Singh and Chandi Singh in the light of the *Patwari's* evidence to find that Chandi Singh had not relinquished his holding and that no attempt had been made to introduce tenants in the place of the deceased who was admittedly a sub-tenant of that holding. We do not find that the *Patwari's* evidence is of value in this connection. He was not in a position to know whether an attempt had been made to oust Chandi Singh from the holding or what was the intention of Mukta Prasad in respect of replacing Chandi Singh and the deceased (Chandi Singh's sub-tenant) by other persons. The truth of the story as to the holding will have to be decided upon the value that we attach to the evidence of Chandi Singh and Jodha Singh. This we shall indicate later, but we note here that there is nothing substantially improbable in the story told by Jodha Singh upon the point.

The next point which Mr. Jackson urged was that there was no reliable evidence that there was ill-feeling between the deceased and his brother on one hand and the estate-servants on the other. He pointed out that in the previous year Mukta Prasad had clearly let to the deceased a plot of 1 *bigha* 4 *biswa* at a rent of Rs. 6. It is established that Mukta Prasad did let this plot to the deceased. The *Patwari's* evidence is sufficient to prove that point, but the circumstance that a *ziladar* lets one plot to a man is not sufficient to show that he might not be trying to oust him from another holding: Apart from that the question of enmity is fully established by a respectable witness who was called by the defence itself. This witness is Sub-Inspector Raghunandan Prasad who had formerly been in charge of the Safipur Police Station. He was called by the defence to prove the bad character of the deceased, the object of proving this bad character being to show that the deceased was a man who would be very likely to commit dacoity. He stated in cross-examination: "I know this that there was a long-standing enmity between Bharose Singh aforesaid and the men of the *Mahant*. He was reputed to be a bad character and the men of the *Mahant* were also my informants that he was a bad character. Mukta Prasad accused was *ziladar* of the *Mahant* in that circle of his estate when I was Sub Inspector of Safipur and he is still there He too used to complain to me about the conduct of Bharose Singh." In face of this evidence we state our conclusion at once upon this point. Mukta Prasad and his party were on very bad terms with the deceased.

Mr. Jackson sought to explain away the evidence of the eye-witnesses Dori, Shankar, Kallu, Babbu and Ghariba upon the suggestion that these men must also be bad characters who were in the gang of the deceased and that as such they would be under the influence of the deceased's brother Jodha Singh who would have no difficulty in inducing them to give false evidence against the man who admittedly caused his brother's death. All these men are in humble circumstances, but it is impossible to discredit them in the manner in which Mr. Jackson would have us do so. The deceased was a bad character. How bad character he was we cannot say. There is nothing to justify us in forming a conclusion that he was a professional dacoit. But even if we did form that conclusion we should have no justification in finding that Bharose Singh was the leader of a gang of dacoits. and even if he were the leader of a gang of dacoits there is nothing to show that the 5 witnesses were members of such a gang or even associated with Bharose Singh in it. They are all close neighbours. They were likely to have been in their houses at the time. Nothing was brought out against the character of any one of them.

In dealing with the evidence of Qadir Bakhsh, Sripal Singh and Gindan Singh and Gaja Singh, Mr. Jackson was unable to do more than suggest that, if the deceased was a leader of a gang of dacoits it was possible that these apparently perfectly respectable persons protected him and shared the proceeds of the dacoities. There is nothing to justify such an assumption. He was unable to criticise the evidence of Shankar, Dori, Kallu, Babbu and Ghariba in great detail. He elicited that a witness who was recorded in the diary as having done nothing more than corroborate Qadir Bakhsh had gone very much further in Court and stated many facts to which Qadir Bakhsh had not deposed. But the entries in the Police diary are not exhaustive and in a lengthy inquiry little turns upon such an alleged discrepancy. Against Sripal Singh, he produced Tulshi Lodh of Ariar Khurd who declared that Sripal's story was completely untrue inasmuch as he (Tulshi) had only had one pair of bullocks which were worth 30 to 40 rupees and that Sripal Singh had never approached him as to their purchase. It is to be noted that Tulshi must be very badly served in respect of plough-bullocks if he has only the services of a pair worth Rs. 20 each, when the price of plough-bullocks at present ranges about Rs. 100.

In order to explain the main difficulty against his clients created by the fact that such a large number of seemingly respectable witnesses have deposed against Mukta Prasad, who is a man of influence in the employment of a wealthy endowment, to support the story of the murder of a poverty-striken ex convict, Mr. Jackson has in addition to the criticisms already mentioned extracted from the statement of Mukta Prasad before the Committing Magistrate a reason for efforts being made to fabricate a strong case against the appellants. This is an allegation that during the course of the investigation, Sub-Inspector Ram Sarup demanded a large sum of money from Mukta Prasad as consideration for investigating the case honestly and putting up the true facts, and that as he refused to pay this sum the Sub-Inspector has deliberately fabricated false evidence to implicate him, an innocent man, and to implicate other innocent men on a charge of murder. There is no evidence to support this allegation. Mr. Jackson was acting within his duty in putting forward this allegation, for the allegation was made by his client himself. But there is absolutely nothing to show that there is any truth in it Not only in view of that allegation but in view of the importance of the issues involved we have examined very carefully the deposition of the Sub Inspector Ram Sarup and have been much impressed by the clear and straightforward way in which he gave his evidence. We consider that the inquiry made by the Sub-Inspector Ram Sarup was an admirably fair inquiry and that he has conducted it without the slightest attempt to favour anyone. He was placed in a position of great difficulty in endeavouring to substantiate a charge against estate-officials of having murdered a man who was an ex-convict and a bad character and we appreciate very greatly the manner in which he has performed his duties.

We now turn to the points of criticism directed against the prosecution which are entered in detail in the judgment of the learned Sessions Judge. The first point was as to the character of Bharose Singh, the suggestion being that he was a man who would be likely to organise and commit such a dacoity as alleged by the defence. We consider that Bharose Singh was rather a worse character than the Sessions Judge considers him, but, as we have already noted on the main point, the criticism has no value. No implication can be drawn against the prosecution from Bharose Singh's bad character. In fact, Bharose Singh's bad character is a fact in favour of the prosecution for it is intensely unlikely that a mass of witnesses would perjure themselves to oblige the relatives of Bharose Singh. His brother Jodha Singh is a poverty-striken tenant who would ordinarily have no influence in securing, as false witnesses, men of the class of Qadir Bakhsh, Sripal Singh, Gindan Singh and Gaja Singh.

The next point against the prosecution story is based on the procrastination of Jodha Singh in bringing his version of the matter to the knowledge of the Police authority. Mr. Jackson has argued, and argued with force, that Jodha Singh's account of his procrastination as the result of physical injuries and mental distress seems exaggerated. He undoubtedly had been beaten and beaten badly. That is clear from his condition when he appeared before the Sub-Inspector but it appears to us that he was in a position, had he wished, to make a complaint at Safipur Police Station, if not on the night of the 21st September, at any rate on the following day; and he has not been straightforward in explaining his omission to do so at even a later period. The absence of the Sub-Inspector was not a sufficient reason for not making a report. We do not, however, consider that this procrastination affects in any case the truth of the story for the prosecution. It must be remembered that Jodha Singh (if his story be true) was in a state of terror when he left the village.

He had not actually seen his brother die at the hands of Mukta Prasad's party but he could surmise very accurately that his brother was not likely to live long after he left. He might well think that he had incurred the unrelenting resentment of powerful men who had no scruples and were in a position not only to take his life but to put a complexion upon what had happened, which would go not only against his brother but against himself. We are of opinion that he was quite capable of making the report at Safipur if he had wished to, but that he wanted before he made a report to find out what attitude the Police were going to take in the matter and that after remaining in hiding for some time he got back to his house after nightfall and sounded the women as to the position which the Sub-Inspector was taking. When he found that the Sub-Inspector was taking a fair and reasonable view of the matter he then approached the Sub-Inspector and told his story. There is no reason to attach any value to the hypothesis put forward by the defence that he was lurking in the village in concealment from the 21st to the 24th September, fabricating false evidence.

We leave the story for the prosecution for the present and examine the criticisms of the defence. The learned Government Advocate has supplemented the intelligent criticisms of the learned Sessions Judge upon the defence story. We agree with the learned Sessions Judge that even in the unfortunate circumstances of the Unao District in September 1925 it would have been an extremely audacious act to have attacked Mukta Prasad and his party at a spot some 150 yards from the deceased's own house and just outside the inhabited area. The place is so near that one of the defence witnesses stated that if two persons talk loudly at the spot indicated their voices will be heard in the village. Further, the story told by Mukta Prasad in the written report which he handed in at 3 A. M. on the 22nd September is not a convincing story. According to this story Jangi Singh appellant was walking in front of the party with the amount collected as rent stated to be four or five hundred rupees (that is to say, he was carrying coin weighing some 10 to 12 pounds) when a dacoit sprang out of a cotton-crop which was proved to be only two to three feet high and struck Jangi Singh a blow with a *pharsa* on the back of the neck which knocked him down. The medical examination of Jangi Singh shows no injuries from a cutting weapon but only bruises which might have been caused by the bamboo-shaft of a *pharsa* or by an ordinary *lathi.* The *pharsa* which was produced at the Police Station, which was said to have been the property of the deceased and which might equally well have been the *pharsa* belonging to one of Mukta Prasad's party, is an ordinary *lathi* with a sickle-head attached to it. It would, of course, be perfectly possible to knock down a man who was not expecting the blow with a *lathi* from behind and a heavy bag carried by him would naturally fall to the ground when he fell. We have it from this first report that as soon as the bag fell down another dacoit seized it, made off with it and effectively evaded pursuit. To cover him, it is said that the dacoits who had apparently nothing but *lathis* or *pharsas* put up a fight with the well-armed party of Mukta Prasad and held them back successfully for a time. It is said that Madari Lal and Lachhman received injuries. They showed injuries to the Doctor. Madari Lal's main injury was an incised wound, an inch and-a-half long, skin-deep, in the web between the left thumb and index-finger. This was apparently caused by a sharp weapon. He had also a very small bruise on the middle of his left arm. The small bruise on the middle of the left arm was a bruise, such as had been inflicted on Jodha Singh, and looked as though it had been caused by a blunt weapon. Such injuries could have been caused in the fight as detailed by the prosecution. A very strong point against the defence story is the nature of the incised wound on Madari. It was skin-deep, and just a sort of wound that could be easily self-inflicted by the point of a sharp pen-knife or a razor. It is almost incredible that such a wound could have been inflicted if the cutting-edge of the *pharsa* had been applied by a man striking with force. A wound so inflicted would not have been skin-deep. Lachhman's injury was a slight superficial abrasion on the left side of the forehead which had apparently been inflicted by a sharp-pointed weapon. Here again a point of a pen-knife or a razor could have been sufficient. It is incredible that if he had been struck on the forehead with a cutting edge of a *pharsa* or even a *lathi* he would not have had more severe injuries. We thus have it that although the dacoits were supposed to have put up a fight Mukta Prasad's party received practically no injuries and yet they were unable to get through the men who were screening the retreat of the dacoit who was running away carrying a bag weighing ten or twelve pounds. This does not sound well. Next we have the account given in the first report as to the injuries inflicted upon the deceased and his pursuit. We note, as the learned Sessions Judge has noted, that the story told in the first report differs in material particulars from the story stated by the defence witnesses. According to the first report, the injuries upon Bharose Singh were inflicted upon the scene of the dacoity and there was no fight inside the village of Kuremau. The evidence of the Civil Surgeon of Unao was to the effect that a man who had received the thrust through the chest which the deceased received could hardly conceivably have run 150 yards. The defence called to rebut this opinion a senior medical man from Lucknow who deposed that in his opinion it was possible for a man to run such a distance after receiving such a wound, but that it was not likely that he could have done so. The circumstances apart from the condition of the deceased's body go all to show that he received this thrust inside the inhabited area of Kuremau. If he had received the injury 150 yards away and then run into Kuremau (presuming that he could have done so) he would be running with a gaping wound in his chest with his lungs and liver penetrated. He must have bled profusely from a wound which was 2 inches long and 1 inch broad. If a diagram be made of 2″ × 1″ it will be seen what a very large cavity this will be in a man's chest. The investigation found a line of what appeared to be blood-drops, some 20 in all, all small. There were no more marks till 150 yards: further on there are 8 large patches of blood. If the deceased had performed the feat of running 150 yards after receiving such a spear-thrust it would be reasonable to expect a track of blood the whole way, and no such track was found. The learned Sessions Judge was under the impression that the drops of blood found in the fields had been left there by Mukta Prasad's party on their way back when they were bringing the dead body of the deceased in the bullock-cart after they had killed him in the village. It is true that the blood-drops in question were some 50 yards from the cart-track, but it would not have been difficult to have sent out a man with some of the blood (which must have been flowing very freely from the deceased) while the party were on their way back and sprinkled it near the field which had been selected as the scene of the alleged dacoity. As we have shown there are indications that injuries were inflicted on Madari Lal and Lachhman between the time that the party left the village and the time when they reached the Safipur Police Station. Many hours had then elapsed and the distance covered was 6 miles. There was ample time to think out a story, inflict injuries, and arrange blood-drops on the ground. The learned Sessions Judge has discussed the story in further detail. We need not follow his criticisms further. It is sufficient to note that we consider them very valuable criticisms.

We are thus left in the end with the evidence for the prosecution that the deceased was wantonly killed between 4 and 5 in the afternoon in the village and the evidence for the defence that he was killed in the dark in exercise of the right of private defence. At all times we attach considerable weight to the opinion of the Judge who heard the witnesses as to their relative credibility. When, as here, the record does not show that the witnesses on either side have been materially discredited or greatly shaken in cross-examination, it is the duty of the Judge to decide which side are telling the truth. When, as here, the Judge has tried the case with marked care and intelligence, his opinion as to credibility of the witnesses should ordinarily be accepted. His conclusions are that the prosecution witnesses have told the truth and that the defence witnesses who have deposed to the incidents of the alleged dacoity have not told the truth. We accept his conclusion and accept it with confidence. We find no reasons to distrust the story as to the intent to dispossess the deceased from his sub-tenancy. We see no reason to disbelieve the evidence that Lachhman was set to insult the two brothers by passing water upon the place where their cattle were kept and that the two brothers were taunted and goaded into a quarrel. We have given full weight to the representations of the learned Counsel for the appellants to the effect that the circumstances of the murder are unusual to a degree. Fortunately they are unusual to a degree. But none-the-less we find the prosecution story to be true. The attitude taken by Mukta Prasad and his party appears to have been this:—They came to the village fully armed not, we believe, with any preconceived intention of killing the deceased or anybody else, and not under any real impression that dacoits were likely to attack him. We believe that they came to the village fully armed because they were deliberately endeavouring to impress the country-side with their power and importance. The matter of the ejectment of the deceased came up once more. The deceased was truculent. An attempt was made to lure him into a quarrel. It succeeded. He became more truculent. Mukta Prasad probably lost his temper and fired his gun in a fit of unreasoning rage Having done so he became even more unreasonable. The feelings of his men were running high. They were being defied by a poverty striken ex-convict who was taking an attitude as though he were the owner of the village. When feelings are as high as this, desperate deeds are occasionally done. This was one.

The evidence for the prosecution is, in our opinion, convincing. One point we have left to the end. It is an important one. The woman, Sheorani, was examined by the Doctor. She had bruises on the back of her right fore-arm and a bruise on the back of her right wrist clearly caused by a blunt weapon. They were just the sort of bruises that would be caused to a woman who was trying to defend herself from blows from *lathis* while she was protecting a prostrate body. It is difficult to see how such injuries would have been caused if she was merely being pulled off the body of a man whom it was sought to take to the Police Station.

After a careful consideration we have arrived at the conclusion that all the appellants have been rightly convicted. The learned Sessions Judge, who has been scrupulously fair in deciding in the case of each individual prisoner, gave the benefit of the doubt to Salik, the headman's son. We do not see that he was wrong to give him the benefit of the doubt but the circumstance that he acquitted Salik in no way assists any one of the appellants. We find that complicity in this offence has been brought home absolutely to every one of them.

On the question of sentence we are unable to find a cause for reduction in the case of the four men who have been sentenced to death. The remaining 3 men have been sentenced to the minimum sentence allowed by the law against persons convicted of murder. While we are not of opinion that the murder was pre meditated and have already indicated that it was the result of a blaze of anger on the part of Mukta Prasad and his subordinates against a man who was defying their authority, we are unable to reduce the sentences on those men. The murder was wanton, cowardly and horrible. It is painful to think that such a murder, which carries the mind back to the most lawless periods of the history of Oudh, could have been perpetrated at the present time.

We accordingly dismiss all the appeals and in the case of Mukta Prasad, Madari Lal, Jangi Singh and Lachhman direct that the sentences of death passed upon them be confirmed and that they be carried into effect according to law.

R. L. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1016 OF 1925.
January 7, 1926.
Present:—Justice Sir C. C. Ghose, KT., and Mr. Justice Duval.

RAM CHANDRA DE AND ANOTHER—PETITIONERS
versus
GAJENDRA NATH DAS—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 420—Sale of property—Consideration money, balance of, not paid—Offence.

Where the complainant's case is that it was agreed between him and the accused that the consideration money for the sale of property was to be paid by the accused after execution of sale-deed and that the complainant had executed the sale-deed and had got it registered but that the accused refused to pay the money, the dispute is purely of a civil nature and no offence under s. 420, Penal Code is made out [p. 205, col. 1.]

Criminal revision against an order of the Sessions Judge, 24-Pergannas, dated the 12th November 1925, affirming that of the Honorary Magistrate, Alipore, dated the 31st August 1925.

Babus *Suresh Chandra Taluqdar* and *Kiran Mohan Sirkar*, for the Petitioners.

Babus *Bir Bhusan Dutt* and *SikharKumar Bose*, for the Opposite Party.

JUDGMENT.—The facts giving rise to the prosecution out of which this Rule has arisen, shortly stated, are as follows:—The complainant sold two thatched huts to the accused No 1 for a sum of Rs. 150. The complainant's case is that the said consideration was to be paid in the following manner, *i. e.*, a sum of Rs. 47 was to be set off on account of a debt which the complainant owed to the accused No. 1 and the balance, namely, a sum of Rs. 103 was to be paid to the complainant by the accused No. 1 on the execution of the document. It is said that the complainant was in a hurry to leave Calcutta and that it was arranged between the parties that the *kobala* in respect of the huts should be executed and registered forthwith by the complainant and that the said sum of Rs. 103 being the balance of the consideration should be paid by the accused No. 1 afterwards. The complainant complains that although the *kobala* was executed and registered in accordance with the said arrangement, the accused No. 1 failed and neglected to pay to him the said sum of Rs. 103 and that when demands were made on the accused No. 1 for payment of the said sum, the accused No. 1 at first put off payment from time to time on various pretexts and ultimately denied that he had to pay any sum whatsoever to the complainant. The case against the accused No. 2 is that he abetted accused No. 1 in denying his liability.

Now the two accused before us have been convicted under ss. 420/34, Indian Penal Code. We have examined the record for ourselves and are of opinion that the dispute, such as it was, was of a civil nature, and that it is impossible to say from the evidence on record and having regard to the recitals in the *kobala* that the ingredients required in s. 420, Indian Penal Code, have been satisfied in this case. In this view of the matter we set aside the conviction and sentence and direct that the petitioners be discharged from their bail bonds. The complainant, if so advised, may seek his remedy in a Civil Court.

R. L. *Rule made absolute.*

OUDH CHIEF COURT.

CRIMINAL APPEAL NO. 9 OF 1926.
February 5, 1926.
Present:—Mr. Justice Ashworth and
Mr. Justice Misra.
EMPEROR—COMPLAINANT—APPELLANT
versus
DAYA SHANKAR—ACCUSED—
RESPONDENT.

Penal Code (Act XLV of 1860), s. 409—Public servant, retention of Government money by—Money not included in balance—Misappropriation—Failure to give excess money to successor-in-office—Money, retention of, pending scrutiny of accounts.

The fact that the accused a public servant, does not include the money received by him in his capacity as a public servant in the cash balance is a very strong *prima facie* evidence of misappropriation on his part. Failure to hand over the money due in his hand to his successor-in-office is a further proof of his guilt. [p. 207, col 2.]

A public servant is not entitled to retain, pending the scrutiny of accounts, any money due to the Government in his hand in excess of what the registers show to be due. If he removes the balance he is guilty of misappropriation even if he removes it to godown belonging to the Government. [p. 208, col. 1.]

Appeal under s. 417, Cr. P. C., on behalf of Local Government, against an order, dated the 28th October 1925, of the Second Additional Sessions Judge, Lucknow, at Unao.

Mr. *G. H. Thomas*, Government Advocate, for the Crown.

Mr. *Hyder Husein*, for the Accused.

JUDGMENT.—This is a Government appeal from an acquittal on appeal by the Second Additional Sessions Judge of Lucknow at Unao. The accused, Daya Shankar, was a *naib nazir* officiating at the Safipur Tahsil in the Unao District. He was charged under s. 409, Indian Penal Code, with having committed in his capacity of *naib nazir* criminal breach of trust in respect of a sum of Rs. 50-4-0 between the 16th April and 15th June 1925.

The facts proved against the accused and either admitted or not denied by him are as follows:—On the 16th April, while acting as *naib nazir*, he received by money order a sum of Rs. 50-4-0 in connection with a certain revenue case. On receipt of the money he was bound to enter it under its proper date, and under its proper serial number of receipts in register No. 4, "Account of miscellaneous receipts and payments." For the headings of this register see page 9 of the printed book. He did not so enter it until long afterwards (the precise date will remain unproved). He also did not, in his register No. 7, "Daily abstract of *nazir's* account," include this money in the total balance of money in his hands at the end of the day. One column of this register No. 7 shows the balance that ought to be in his hands according to the several registers. In the remark column is entered the actual amount of cash and value of postage stamps in the *nazir's* possession. This column showed a total on the evening of the 16th April 1925 of Rs.183-13-9 in cash as actually in the *nazir's* hands. It is admitted by the accused that it should have been Rs. 50-4-0 more than this sum. The entry has been marked by this Court, as Ex. P, and, though overlooked by the lower Courts, it is perhaps the most important Exhibit in this case. The sum of Rs. 50-4-0 thus received was paid out on the 7th May 1925 by the accused, and this disbursement was duly entered in the said register under date 7th May, and under serial No. 38 of payments. The entry is Ex. F on the record. In this Ex. F, the accused entered the disbursement as corresponding with receipt Item No. 26, dated 16th April 1925, the date he could get from the record of the revenue case in connection with which the money had been received and was disbursed. The serial No. 26 he could only obtain if he had already made an entry of the receipt of this money. He himself has not stated when he made the entry of the receipt which he ought to have made of course when the money was received. Against every entry, however, of receipt there are some columns in the middle of the page of the register No. 4 separating the items received from items paid out and in these columns are entered in the same lines as the receipt, the serial number of any payment out and the amount. Under the date of the 18th March, we find in these middle columns reference to the amount of Rs. 50-4-0 and to the serial number of the payment, No. 58, *i. e*, Ex. F. The accused states that he made this entry when some time in June he got notice that he was to be transferred. This entry is Ex. E. In a line with this Ex. E, there is under the same date of the 18th March 1925 a receipt serial No. 26 and the amount of Rs. 50-4 is entered against this number. If, therefore, the accused is speaking the truth as to the time of entering the mid-column entry, Ex. E, we may presume that he made the entry of the payment No. 26, which is marked Ex. D, on the same date. It comes to this then, that although the accused received the money on the 16th April, and paid out an equivalent sum on the 7th May, he did not enter the receipt of the money until some time in June when he had notice of transfer. But two days after paying out this money, namely, on the 9th May 1925, the accused has made a payment under serial No. 29 of payments, of Rs. 50. This is Ex. H. It will be seen that in this Ex. H the serial number of receipt referred to is 20 in black ink, but a tail has been faintly added to the "2" so as to make it "3". Thus at the first sight it would read as 20, but would read 30, if the tail in red ink were drawn attention to. This disbursement was shown to be a disbursement of a portion of a receipt No. 30 of Rs. 95 received on the previous date, namely 8th May, and in the mid-column against this receipt is an entry that Rs. 50 of the Rs. 95 were paid out under serial No. 38 of payments. These entries as to the receipt and payment out are Ex. G. This disbursement No. 39 has, however, also been entered in the register against a receipt No. 20 of the 12th February 1925 of Rs. 87-1-0. Reference is made to payment No. 39 in the mid-column as against this receipt but the sum entered is Rs. 50-4-0 and not Rs. 50. This receipt and payment reference is marked Ex. M. It would, therefore, *prima facie* appear that about the 9th May the accused diminished the balance appearing as due to Government according to his registers by a wrong entry that a sum of Rs. 50-4 0 had been paid out of a receipt of Rs. 87-1-0, whereas he had already entered the payment out as against another receipt number, namely, No. 26 for Rs. 95. Of course this last entry would obviously invite criticism when reference was made to the serial number of payment, No. 39, because that serial number showed payment of Rs. 50, whereas this mid-column reference to payment showed Rs. 50-4-0, and, if we believe the evidence, it was this discrepancy which first led to suspicion being entertained against the accused. We now come to the date when Kali Charan, the successor of the accused, arrived to take over charge, namely, the 15th of June. On that date the accused handed over to Kali Charan a balance of Rs. 335-9-9 in cash, which he admits was Rs. 50-4-0 short of what was due according to the registers, if they had been kept properly, but he did not hand over the registers. On the 7th July 1925, the accused paid to the Treasury the deficiency. Where I use the words "if they had been kept properly" I mean this. The receipt No. 26 under date 18th March 1925 of Rs. 50-4-0 was never shown in the total of the balance due on that date or anywhere else in the registers, and the accused admits that this was a mistake. Now on the 7th of July the accused deposited Rs. 50 in the Treasury, and gave Kali Charan four annas. This he did to make up the deficiency. The Tahsildar has stated that he did this under an order of the Collector, but the accused states that he did it of his own accord. The Tahsildar did not produce the writing or the order of the Collector, and so the lower Appellate Court has disbelieved him, though we see no reason to do so.

Such were the facts proved against the accused. The defence of the accused was briefly this. He was too busy to keep his accounts properly, and up to date. On the evening of the 16th April, the date of the receipt of this item of Rs. 50-4-0, he entered in registar No. 7 as the money that he had in cash, not the actual sum which he had in cash, but the sum which the registers showed (incorrectly as he admits) should have been the amount that he should have had. As to the entry of the receipt of Rs. 50-4-0, under the wrong date of the 18th March, instead of the right date of 16th April, he explains that it was a mere mistake, there being no other receipt between the 18th of March and the 17th April. As to his failure to total this receipt, he inferentially ascribes it to the fact that he made the entry of the receipt long after the money was actually received. He does not explain at all how he came to refer the payment out of the Rs. 50 under the 9th May to two receipts, namely, one of Rs. 95 received on the 8th May and another of Rs. 87-1-0 received on the 12th February. As to his failure to hand over this sum when he paid up the balance according to his registers to Kali Charan, he states that he withheld it because he only thought it his duty to hand over the sum due to Government according to the registers. His story is that he took this money and put it in the *mal godown* where miscellaneous property is kept, intending to go through the registers, and see what sum was due to Government in excess of that handed over.

The Assistant Magistrate who tried the case found the accused guilty of having withheld the payment of this Rs. 50-4-0 over to his successor on the 15th of June He held that the accused could not be deemed guilty of misappropriating the sum on the day that he received it, that is on the 16th April, inasmuch as he paid over an equivalent sum on the 7th May 1925 to the person entitled to it. " Hence it cannot be said that the accused misappropriated this particular item." The Second Additional Sessions Judge on appeal concurred in this last view. He, however, acquitted the accused on the ground that the determining factor in the case was, whether or not the accused was short of the amount on the day when he made over charge to Kali Charan, and that, so far as the evidence went the accused may have paid over the deficiency into the Treasury before he received, if he did receive, an order to do so from the Deputy Commissioner. The Sessions Judge, therefore, considered the accused might be speaking the truth when he stated that he kept this amount in cash ready to pay over if it should be found due. As to the manipulation of the registers, whereby the balance due to Government was reduced on paper by Rs. 50 4-0, he held that this only showed at the worst a preparation to defraud Government, and that there was no evidence to show that he actually did defraud Government. He accepted the statement of the accused to explain why the receipt was entered under the date 18th March 1925 instead of under its proper date of 16th April, because he said that, although the date was wrong, the place in the register was correct " there being no transaction between the 18th of March and the 17th of April."

We consider that both the Courts were wrong in holding that the subsequent disbursement of Rs. 50-4-0, on the 7th May, as a disbursement of a similar sum received on the 16th April, is any answer to a charge of embezzlement of the Rs. 50-4-0 as soon as it was received on the 16th April. The money must have been somewhere, and the fact that the accused did not include it in his cash balance entered in the remark column of register No. 7 on the day that it was received, is very strong *prima facie* evidence of its having been misappropriated on that date. We cannot accept the statement of the accused that his entry in the remark column was only meant to represent the cash due to Government according to the registers. It was clearly a representation of the actual cash in hand ascertained by actual accounting. The Sessions Judge is quite wrong in accepting the explanation of the accused as to the entry of the receipt of the money under date 18th March. He says "As a matter of fact there is no entry for any date between the 18th March and the 17th April either of income or of re-payment." It is correct that there is no entry between these dates of income, but there are two entries of re-payment. These entries made it impossible for the entry of the receipt of Rs. 50-4-0 under the 18th March to have been a mistake. We think that the prosecution were correct in suggesting that it was made on this date because there was room here. The Sessions Judge is again wrong in suggesting that the prosecution "had to shift the ground from this item entered as No. 26 of the 18th March of Rs 50-4-0 to two other entries in the register No. 4". This was not what the prosecution did. The prosecution always maintained that this Rs. 50-4-0 was misappropriated, but they cited the manipulation whereby the balance shown as due to Government was reduced in the registers by the exact amount of Rs. 50 4-0, as proof that this sum had been embezzled on the day that it was paid in. We accordingly are of the opinion that the proof was adequate to convict the accused of the embezzlement of the fifty rupees four annas on the 16th April.

Even if this were not the case, according to the evidence it must be held that the accused embezzled this sum on the 15th June when he ought to have handed over to his successor the money in his hands due to Government. He cannot have really believed that, if he had money due to Government in his hands in excess of what the registers showed to be due, he was entitled to retain it pending scrutiny of the accounts. He has nowhere suggested that he kept his private money in the cash box in his office. He must, therefore, have known that all the money in that box was the property of Government. By removing the balance, if there was any balance, which we do not believe, he would have been guilty of misappropriation. It makes no difference that he removed it to a godown belonging to Government. He failed to deal with this excess as he was bound to according to his trust. It is to be noticed that there is a rule of Government, para. 1429 of Volume II, Manual of the Revenue Department, that required the accused every night to deposit in the Treasury any sum in excess of the hundred rupees for which he had given security. We are not concerned with judging the accused on the score of his failure to do this, but what is clear is this. This rule must have been known to the accused, and must have clearly indicated to him that it was, *a fortiori*, necessary to lodge in the Treasury any Government money in excess of that shown due to Government by the registers which he might have in his hands. He himself admits that he kept the accounts very remissly. When he found that he had excess sum, he was bound, therefore, to suspect that the registers were wrong, but it passes our imagination how he could think that he was entitled to retain the money for one moment.

The accused produced the evidence of two *chaprasis* to show respectively that when he handed over to his successor on the 15th June the sum of Rs. 335 9-9 in cash, he also removed from the box another Rs. 200 and that this sum was removed again from the *malkhana* and taken to the Treasury. The evidence of these *chaprasis* is open to doubt as they were not likely to have seen this, and moreover in his statement under examination the accused never specified this amount as being Rs. 200. It may be remarked, however, that the Trial Court should have enquired of the accused what the excess amount in his office cash box was, and should also have asked the witness Kali Charan what was the other money besides the Rs 50-4-0 which was handed over by the accused to him as "deficiency" on the 7th July. If these questions had been asked the defence of the accused would have been rendered more definite. At the same time we hold that the accused has entirely failed to explain his failure to credit Government with this sum either on the date of its receipt or when he gave over his balance. It is possible that the accused borrowed this money on the 16th April intending to re-place it, but that he was not in a position to do so until after the 15th June, with the consequence that the embezzlement was discovered. It does not appear that he embezzled any other amount.

For the above reasons, we allow this appeal and restore the judgment of the first Court. We find the accused guilty of an offence under s. 409, Indian Penal Code, and sentence him to six months' rigorous imprisonment. The accused will surrender himself to the District Magistrate, Unao, for serving this sentence.

R. L. *Appeal allowed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 84 OF 1923.
November 4, 1925.
Present:—Justice Sir Jwala Prasad, KT., and Justice Sir John Bucknill, KT.
SADHU SARAN PANDEY—APPELLANT
versus
NAND KUMAR SINGH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Only one legal representative brought on record—Abatement—Knowledge of death—Diligence required.

Even if one of the legal representatives of a deceased party is brought on the record in time there is no abatement of the suit or appeal as the case may be. [p. 209, col. 1.]

Lilo Sonar v. *Jhagru Sahu*, 85 Ind. Cas. 25; 6 P. L. T. 313; 3 Pat. 853; A. I. R. 1925 Pat. 123; 3 Pat. L. R. 97, followed.

No doubt an appellant is required to be diligent in prosecuting his appeal, but after he gets the notice served on the respondent he is not required to watch the movements of the respondent and as to whether he is dead or alive. The law, therefore, is that he must make the application for substitution within 90 days of his knowledge of the death. [p. 209, col. 2.]

Application for setting aside the abatement in the above appeal.

Messrs. *A. K. Roy* and *Ambicapada Upadhya*, for the Appellant.

Mr. *Sambhu Saran*, for the Respondents.

JUDGMENT.—This is an application to set aside abatement and substitution of the persons named in the petition as heirs of the deceased respondent. Notices of the appeal were served upon respondents Nand Kumar Singh, Ramsingar Singh and Mathura Prasad Singh. Thereafter Nand Kumar Singh died, in whose place the appellant substituted the name of his widow *Musammat* Ramkali Koer. At a subsequent stage it turned out that Nand Kumar had another widow named Sheoratan Koer and that Mathura Prasad Singh was also dead leaving his widow Sri Krishna Koer. The appellant, therefore, applied for setting aside the abatement and for substitution of the co-widow Sheoratan Koer as an heir of Nand Kumar Singh in addition to the first widow already brought on the record. They also applied for substituting Sri Kishna Koer in place of Mathura Prasad Singh

As far as Nand Kumar Singh is concerned there is no difficulty, for Ramkali. one of his widows, was brought on the record within time and the appeal did not, therefore, abate so far as he was concerned. In accordance with the authority of this Court in the case of *Lilo Sonar* v. *Jhagru Sahu* (1) and in consonance with r. 4 of O. XXII, the appeal against Nand Kumar Singh could not abate, as one of his heirs was already on the record. The bringing in of Sheoratan Koer on the record is only for the purpose of the final disposal of the appeal.

As regards Mathura Prasad Singh the contention has been that the application for substitution of his widow in his place was not made in time, nor was the application for setting aside abatement. There has been, no doubt, a great delay in making the application in this behalf; but the circumstances of the case show that the appellant came to know of the death as alleged by them at a time which is well within the time they are entitled to make an application for setting aside the abatement. The notice upon Mathura Prasad was duly served and the appeal has far advanced. No doubt the appellant is required to be diligent in prosecuting his appeal; but after he gets the notice served upon the respondent he is not required to watch the movements of the respondent and as to whether he is dead or alive. The law, therefore, is that he must make an application within ninety days of his knowledge of the death; but it has to be seen whether the date of knowledge has been falsely alleged. There is no reason why the appellant who has been prosecuting this appeal so diligently would allow the appeal to abate if he had known of the death of Mathura Prasad Singh earlier than what is stated in his application. Mr. Sambhu Saran says that the appellant must have known of the death of Mathura Prasad at least on the 20th of September 1924 when notice of a rent suit brought by the widow of Mathura Prasad against one of the appellants was served upon him. In support of this contention he has filed a certified copy of a notice of the aforesaid suit. The service return shows that the appellant refused to give the receipt. This in itself does not show that the summons or notice was actually served upon the appellant. Moreover, the notice to one of the appellants is not notice to all, and there is nothing to indicate that the appellant apprised the death of Mathura Prasad to the rest of the appellants. Each one of the appellants is entitled to prosecute the appeal and to apply for setting aside abatement and for substitution. Therefore the certified copy of the notice filed by Mr. Sambhu Saran is not conclusive upon the point.

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(1) 85 Ind. Cas. 25; 6 P. L. T. 313; 3 Pat. 853; A. I. R. 1925 Pat. 123; 3 Pat. L. R. 97.

In the circumstances of the case I would set aside the abatement and allow substitution as prayed for. The name of Sri Krishna Koer be substituted in the place of Mathura Prasad Singh, deceased. The name of Sheoratan Koer, co-widow of Ramkali Koer, be included as a respondent and a legal representative in place of Nand Kumar Singh.

R. L. *Abatement set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1482 OF 1923.
February 23, 1926.
Present:—Mr. Justice Dalal.
SITAL PRASAD SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
JANKI AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Compromise petition presented to Executing Court—Compromise dealing with matters outside decree—Registration—Claim under compromise, how to be enforced.

A compromise petition presented to the Executing Court dealing with matters under the decree as well as extraneous to the decree does not require compulsory registration even so far as it relates to the latter.

Thazhathitathil Poovvanayi Ayissa v. *Puthan Purayil Kundron Chokru*, 58 Ind. Cas. 554; 43 M. 688; (1920) M. W. N. 431; 12 L. W. 35; 39 M. L. J. 77; 28 M. L. T. 90, *Raghubans Mani Singh* v. *Mahabir Singh*, 28 A. 78; A. W. N. (1905) 195; 2 A. L. J. 564, *Hemanta Kumari Debi* v. *Midnapore Zemindari Company*, 53 Ind. Cas. 534; 46 I. A. 240; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 47 C. 485; 22 Bom. L. R. 488 (P. C.), referred to.

Where a compromise presented to a Court deals with a liability under a decree as well as a liability independent of it, the former can be enforced by a proceeding in execution and the latter by means of a separate suit.

Second appeal from a decree of the Subordinate Judge, Allahabad, dated the 6th of August 1923.

FACTS appear from the following judgment of Pandit Kanhaiya Lal, J. dated 22nd May 1923:

"The plaintiffs sued for the recovery of money due on an unregistered mortgage-bond executed by Janki in favour of Har Sahai the ancestor of the plaintiffs on the 4th of January 1901. By virtue of that bond Janki had agreed to supply 99 maunds of grain by certain instalments and hypothecated certain property as security for the fulfilment of that engagement. The allegation of the plaintiffs was that Janki had failed to pay certain instalments, that a suit was filed by Har Sahai for the recovery of the instalments for 1960 to 1963 *Sambat* and a decree obtained, therefor, to be enforced by the sale of the mortgaged property and that in the course of the execution of that decree a compromise was arrived at on the 24th of August 1912 between Janki and his son Ram Ratan on the one side and the present plaintiffs who were the legal representatives of Har Sahai on the other, whereby the former agreed to pay Rs. 141 in satisfaction of the decree by certain instalments and 48 maunds of grain in satisfaction of the remaining instalments, not covered by that decree by certain instalments payable half yearly during a period of eight years.

The plaintiffs seek in the present suit to enforce the latter portion of the compromise. The Court of first instance decreed the claim in part. The lower Appellate Court dismissed it on the ground that the original mortgage merged in the compromise and that the compromise could not be enforced by a suit.

A perusal of the compromise, however, shows that by virtue of the compromise the quantity of grain payable was merely adjusted and the manner in which it was to be paid was settled but no other alteration was made in the terms of the original bond. In fact the mortgage of the property made by the original bond was maintained. In other words the compromise merely operated as an adjustment of the account of the instalments, not covered by the previous suit and as such it had merely the effect of determining the extent of the liability of the defendants without disturbing the terms of the original mortgage except in so far as it provided for the payment of the amount of that liability in a particular manner. The compromise dealt with the liability of the defendants under the decree and also with their liability independently of the decree. So far as the former was concerned the plaintiffs could only enforce it by a proceeding in execution. So far as the latter was concerned the matter covered by the compromise was entirely extraneous to the decree and could be enforced by a separate suit. The entire bond, so far as it was outside the scope of the previous suit, was merged either in the decree or the compromise and the plaintiffs are entitled to enforce it subject to such objections as may be otherwise entertainable or may be deserving of consideration. The appeal is, therefore, allowed and the case remanded to the lower Appellate Court with a direction to re-instate it to its original number and dispose of it after determining the other points involved therein in the manner provided by the law. The costs here and hitherto will abide the result."

Mr. *Haribans Sahai*, for the Appellants.

Messrs. *Shiva Prasad Sinha* and *Beni Bhadur*, for the Respondents.

JUDGMENT.—The facts of the case are given in the judgment of my learned brother Pandit Kanhaiya Lal delivered on 22nd May 1923. Under that order the appeal was remanded to the lower Appellate Court under O. XLI, r. 23 with a direction to re-hear it. The learned Judge held that the compromise of 24th August 1912 could be enforced by the plaintiff so far as it was extraneous to the decree for sale, No. 114 of 1907. The learned Judge thus upheld the finding of the Munsif and set aside the finding of the lower Appellate Court. On remand another flaw was discovered by the lower Appellate Court in the claim of the plaintiff. It held that the *sulahnama* not being registered did not create a charge on property of the value of over Rs. 100. This finding of the lower Appellate Court also is incorrect. This point has been discussed in a Full Bench ruling of the Madras High Court reported as *Thazhathitathil Poovvanayi Ayissa* v. *Puthan Purayil Kundron Chokru* (1). There also after a decree a petition was presented under O. XXI, r. 2, to the Court whose duty it was to execute the decree certifying as required by the rule that the decree had been adjusted and praying that the petition setting out the terms that the decree had been adjusted should be recorded. In the Madras case the order passed was "recorded." In the present case also a similar phrase was used.

"*Hasb sulahnama mutalba* decree-*dar qaim ho*" (In accordance with the compromise the claim of the decree-holder be recorded.) In the Madras case also the compromise went beyond the decree and the decree-holder brought a suit for the recovery of the claim which was in excess of the decree. The Full Bench held that such a compromise was exempted from registration under the provisions of s. 17 of the Registration Act which laid down that any decree or order of Court need not be registered. Long prior to the Madras ruling of 1920 a Bench of this Court had held in 1905 that such a compromise, even though it was in excess of the decree, did not require registration [*Raghubans Mani Singh* v. *Mahabir Singh* (2).] In that case the compromise was made in a suit and went beyond the relief covered by the suit and related to land which was not covered by that suit. The Madras High Court pointed out that the decision of the Privy Council in *Hemanta Kumari Debi* v. *Midnapore Zemindary Company* (3) had settled the differences of opinion which had been referred to in the order of reference.

This appeal succeeds. I refuse to send it back to the lower Appellate Court. The litigation has been going on for years and almost continuously since 1907. The plaint in the suit to which this appeal refers was filed as far back as 3rd January 1921. It would be an abuse of the process of law not to put a stop finally to the litigation. I have read the grounds of appeal to the lower Appellate Court so far as they are not covered by the judgment of my learned brother. There is no force in them. The learned Munsif has given very satisfactory reasons for his finding that the bond sued upon had been fully paid off. I have also read the objections by way of appeal and hold that there is no substance in them.

In the result I set aside the decree of the lower Appellate Court, restore the decree of the Munsif dated the 29th April 1921 and direct that the parties shall bear their own intervening costs.

R. L. *Decree set aside.*

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(1) 58 Ind. Cas. 554; 43 M. 688; (1920) M. W. N. 431; 12 L. W. 35; 39 M. L. J. 77; 28 M. L. T. 90.

(2) 28 A. 78; A. W. N. (1905) 195; 2 A. L. J. 564.

(3) 53 Ind. Cas. 534; 46 I. A. 240; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 47 C. 485; 22 Bom. L. R 488 (P. C.).

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1576 OF 1925.

January 19, 1926.

Present:—Mr. Justice Martineau.

Musammat HUSSAIN BIBI—JUDGMENT-DEBTOR—APPELLANT

versus

NUR HUSSAIN SHAH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Muhammadan Law—Wakf—Wakf *institution and property—Removal from office — Effect — Decree — Execution, relief in.*

A *wakf* institution is something distinct from the *wakf* property attached to the institution. Therefore, the mere removal of a *gaddi nashin* from the office does not imply his physical dispossession from the property of the institution.

Bawa Mangal Das v. *Mahant Narayan Das*, 56 P. R. 1895 and *Tilok Chand* v. *Ram Chand*, 37 Ind. Cas. 105; 95 P. R. 1916, followed.

An Executing Court cannot grant a relief which is not given by the decree itself.

Miscellaneous first appeal from an order of the District Judge, Lahore, dated the 1st May 1925.

Mr. *Aziz Ahmad*, for the Appellant.

Bakhshi *Tek Chand*, Mr. *N. C. Mehra* and Lala *Mehar Chand Mahajan*, for the Respondents.

JUDGMENT.—The respondents obtained a decree for the removal of the appellant from the *wakf* institution of *takya Rasul Shahian*, and for a declaration that the various *gaddi nashins* of the *Rasul Shahi* sect and *Rasul Shahi Fakirs* were entitled with the approval of the head *gaddi nashin* at Alwar, to appoint a new *gaddi nashin* instead of the appellant. In the execution of the decree, the learned District Judge has ordered the removal of the appellant from the *wakf* property attached to the *takya*, and the question in appeal is whether he was competent to pass such an order.

Mr. Tek Chand for the respondents has referred to a passage of the learned District Judge's order of the 1st May last in which it is stated that Counsel for the judgment-debtor said he had no objection to an order being passed for his client's removal from the *wakf* property attached to the *takya*, but objected only to an order that the decree-holders should be put in possession. With regard to this Mr. Aziz Ahmad for the appellant urges that the learned Judge was confusing the institution with the property attached to it, and that Counsel who appeared before him on behalf of the judgment-debtor meant only that there was no objection to the latter's removal from the institution. Possibly this is the case, as I notice that the learned Judge at the beginning of the order in question wrongly described the suit in which the decree had been passed as one for the defendant's removal from the *wakf* property. At any rate whatever her Counsel may have stated, the Court was not competent to order her removal from the property unless the decree justified it.

Now the decree ordered the appellant's removal only from the *wakf* institution, which is something distinct from the *wakf* property attached to the institution. It is argued for the respondents that the removal from her office as trustee or from the institution involves her removal from the *wakf* property which she held by virtue of being the trustee. It was, however, held in *Bawa Mangal Das* v. *Mahant Narayan Das* (1) which was followed in *Tilok Chand* v. *Ram Chand* (2) that the prayer for the removal of a *Mahant* from his office did not imply his physical dispossession from the property of the institution, and in any case the respondents cannot be given by the Executing Court a relief which is not given by the decree itself.

I hold, therefore, that the lower Court was not competent to order the appellant's removal from the *wakf* property attached to *takya*, and I accept the appeal and set aside the order. The respondents will pay the appellant's costs in this Court.

R. L. *Appeal accepted.*

(1) 56 P. R. 1895.

(2) 37 Ind. Cas. 105; 95 P. R. 1916.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 1926 OF 1921.

August 5, 1925.

Present:—Mr. Justice Page.

NAGENDRA NATH PALIT—PLAINTIFF

versus

ROBINDRA NARAIN DEB—DEFENDANT.

Hindu Law—Shebaitship, *alienation of—Distinction between spiritual obligations and temporalities—Doctrine of benefit or necessity.*

The office of a *shebait*, *i. e.*, the spiritual rights and duties the fulfilment of which is the primary function of a *shebait*, is not alienable. The doctrine of benefit or necessity is confined in its application to an alienation of the temporalities of the idol. [p. 224, col. 1.]

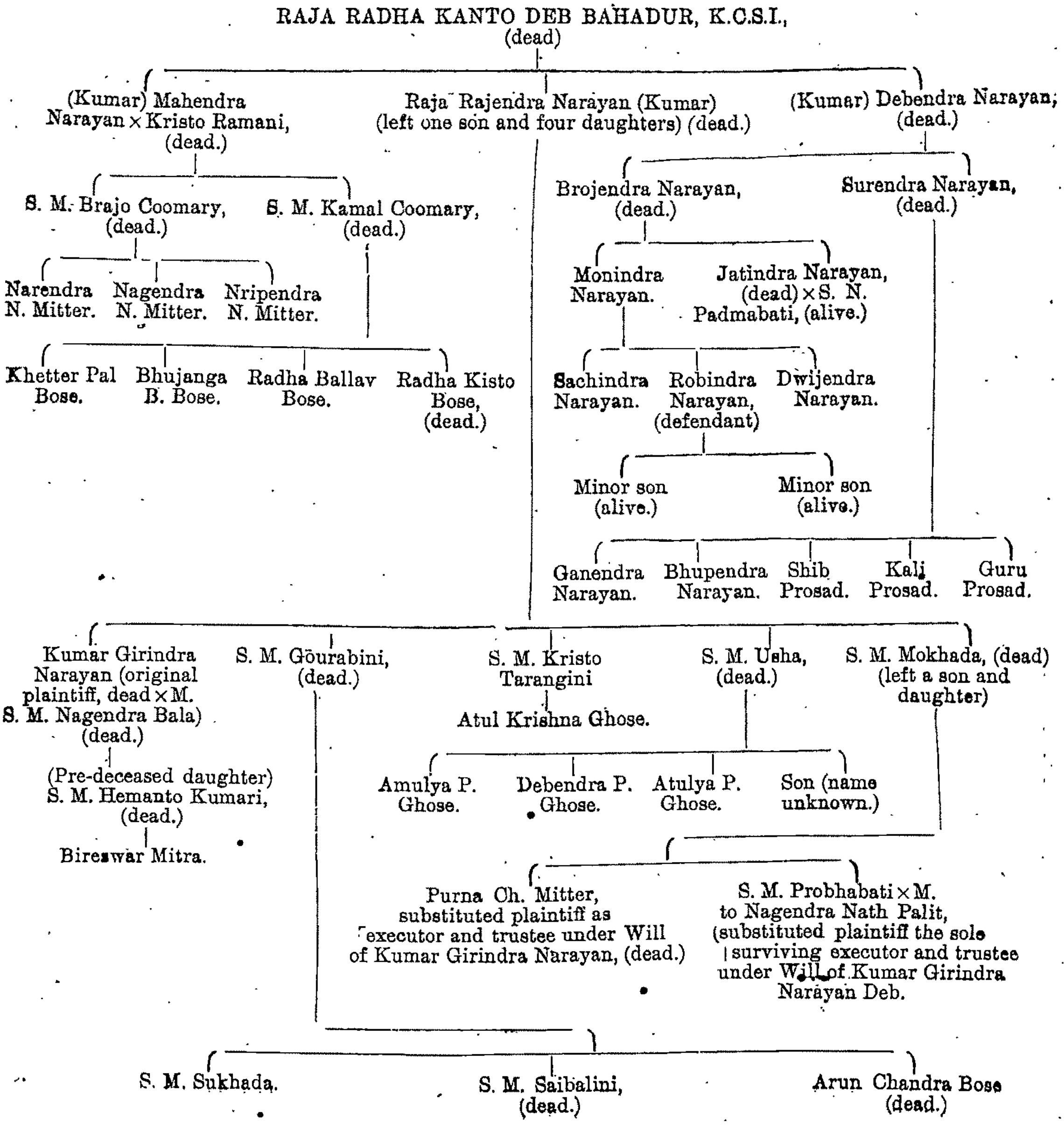
There is a distinction between the *shebait's* obligation to perform the spiritual obligations of his office and his obligation to manage the temporalities of the idol. A *shebaitship* is primarily and mainly a sacred office and it does not follow that because in certain circumstances a *shebait* may be entitled to alienate the temporalities of the deity, in similar or certain circumstances he is entitled to transfer the spiritual duties and privileges which appertain to the office. [p. 218, col. 2.]

Messrs. *N. N. Sircar*, *B. K. Ghose* and *B. C. Kar*, for the Plaintiff.

Messrs. *H. D. Bose* and *A. K. Deb*, for the Defendant.

JUDGMENT.—This case raises an issue of deep and general interest to the Hindu community, *viz.*, whether a *shebait* is entitled to transfer the rights and duties which appertain to his office.

On the 19th April 1867 Raja Sir Radha Kanto Deb died. He was an erudite Sanskrit scholar, and a personage of culture and distinction. He left surviving him three sons and numerous other relations of whom the following is a pedigree:—


RAJA RADHA KANTO DEB BAHADUR, K.C.S.I., (dead)
(Kumar) Mahendra Narayan × Kristo Ramani, (dead.)
Raja Rajendra Narayan (Kumar) (left one son and four daughters) (dead.)
(Kumar) Debendra Narayan, (dead.)
S. M. Brajo Coomary, (dead.)
S. M. Kamal Coomary, (dead.)
Brojendra Narayan, (dead.)
Surendra Narayan, (dead.)
Narendra N. Mitter.
Nagendra N. Mitter.
Nripendra N. Mitter.
Monindra Narayan.
Jatindra Narayan, (dead) × S. N. Padmabati, (alive.)
Khetter Pal Bose.
Bhujanga B. Bose.
Radha Ballav Bose.
Radha Kisto Bose, (dead.)
Sachindra Narayan.
Robindra Narayan, (defendant)
Dwijendra Narayan.
Minor son (alive.)
Minor son (alive.)
Ganendra Narayan.
Bhupendra Narayan.
Shib Prosad.
Kali Prosad.
Guru Prosad.
Kumar Girindra Narayan (original plaintiff, dead × M. S. M. Nagendra Bala) (dead.)
S. M. Gourabini, (dead.)
S. M. Kristo Tarangini
S. M. Usha, (dead.)
S. M. Mokhada, (dead) (left a son and daughter)
Atul Krishna Ghose.
(Pre-deceased daughter) S. M. Hemanto Kumari, (dead.)
Bireswar Mitra.
Amulya P. Ghose.
Debendra P. Ghose.
Atulya P. Ghose.
Son (name unknown.)
Purna Ch. Mitter, substituted plaintiff as executor and trustee under Will of Kumar Girindra Narayan, (dead.)
S. M. Probhabati × M. to Nagendra Nath Palit, (substituted plaintiff the sole surviving executor and trustee under Will of Kumar Girindra Narayan Deb.
S. M. Sukhada.
S. M. Saibalini, (dead.)
Arun Chandra Bose (dead.)

On the 3rd August 1863 the Raja made his last Will which has been admitted to Probate, although the terms thereof have formed the subject of much litigation. Under this Will a large estate passed to the executors and trustees subject to certain trusts, but for the purpose of my judgment in this suit, I need refer only to those set out in the 12th, 15th, 16th clauses of the Will. Under the 12th clause it is provided:—

The executors and trustees shall pay to my sons or their heirs and representatives such sums for the *sheba* or service of my family idols and the usual *pujas* that are celebrated in my house and the periodical *sradhas* of my ancestors, of my late wife and of myself when dead as to the executors and trustees may seem fit and proper, but the executor, and trustees are not to be personally responsible for the proper performance of this trust, which is to devolve and be a burden and duty upon the recipient and recipients of the said sums.

Under the 15th clause provision was made for the mode in which the family dwelling-houses, including a certain garden-house at Sukchar, should be used. Under the 16th clause it is provided that—

the clothes, ornaments, jewels and other articles for the use of the family idol, daily or on festive occasions and relating to the *pujas* and ceremonies are to remain in the common custody of my sons and heirs, provided nevertheless that the articles above mentioned shall not be appropriated to any private use of my sons or their heirs.

By a decree of the High Court (Peacock, C. J., and Macpherson, J.), dated 20th September 1869, it was declared that the bequests contained in the 12th and 16th clauses were valid, and as regards the 15th clause it was declared that in so far as the terms thereof related to the dedication of property to the family idol, Gobinjee, the same were valid, but in so far as the said clause related to the use of the family dwelling-houses and garden, the directions of the testator must be limited to the members of the family who were living at the time of his death. By a decree of the High Court (Macpherson, J,), dated 6th October 1871, it was *inter alia* ordered that the worship of the idols was to be performed by the three branches of the family in *palas* of one year in succession and that the "garden with *baitakkhana* at Sukchar be enjoyed by the person or persons entitled to perform the *deb sheba* while performing the same during his or her turn of worship." Since that date further litigation in connection with the terms of the Will has taken place, but it is unnecessary I think, that I should refer to these later proceedings except to mention that by a decree of the High Court (Sale, J.), dated 7th September 1899, the garden and house at Sukchar were included in the trusts under the Will of 3rd August 1863, provided that the same should be used in the manner prescribed under the decree of the 6th October 1871.

On the 13th September 1918 Girindra Narayan, the only son and heir of Raja Rajendra Deb, being entitled to a *pala* of the worship of the deities, referred to in the Will, executed in favour of the defendant an indenture of *arpannama* in the following form:—

This indenture of *arpannama patra* made this thirteenth day of September in the Christian Year one thousand nine hundred and eighteen, between Kumar Girindra Narain Deb, son of the late Raja Rajendra Narain Deb Bahadur of the Sovabazar Rajbati in Raja Nabo Kissen Street in the town of Calcutta hereinafter called the grantor of the one part and Robindra Narain Deb, son of Monindra Narain Deb of the same place of the other part hereinafter called the grantee (in which term is included his lineal male heirs and representatives unless the context is repugnant thereto) whereas Raja Sir Radha Kanto Deb Bahadur, K. C. S. I. of Sovabazar in the town of Calcutta died on the nineteenth day of April one thousand eight hundred and sixty-seven leaving behind him three sons, *viz.*, Kumar Mahendra Narain Deb, Kumar (subsequently Raja) Rajendra Narain Deb and Kumar Debendra Narain Deb and a Will bearing date the third day of August in the year of Christ one thousand eight hundred and sixty-three. And whereas a Probate was obtained by the executor therein named of the Will from the Testamentary and Intestate Jurisdiction of the Hon'ble High Court of Judicature at Fort William in Bengal on first day of May, one thousand eight hundred and sixty seven, and whereas the grantor herein Kumar Girindra Narain Deb the only son and heir of Raja Rajendra Narain Deb, deceased, was born during the lifetime of the said testator Raja Radha Kanto Deb Bahadur and whereas under the terms and provisions of the said Will the grantor is sufficiently possessed of the right of worship of the family deity Sree Sree Iswar Radha Gobinda Jew and other deities in the manner indicated in cl. 12 of the said Will and as such sufficiently entitled to and possessed of the right of enjoyment of certain properties, privileges, rights and liberties particularly set forth in the said Will by cl. 12 and also by terms and provisions of the consent decree, dated 6th of October one thousand eight hundred and seventy-one, in Suits Nos. 155 and 220 of 1868 and also under the decree in Suit No. 699 of 1899 in the High Court of Judicature at Fort William in Bengal in its Ordinary Original Civil Jurisdiction to any other rights, privileges in or any other deeds and documents and whereas the grantor herein is performing the daily worship of the said family deity Sree Sree Iswar Radha Gobinda Jew and other *pujas* according to his turn of worship and the annual *sradh* in compliance with the terms and provisions of the said cl. 12 of the said Will and in the manner indicated therein and the decrees and orders set forth above and is in full possession, enjoyment of the rights, privileges, etc., as set forth in the said Will of Raja Sir Radha Kanto Deb Bahadur and the consent decree dated sixth day of October one thousand nine hundred and seventy-one made in Suits Nos. 155 and 220 of 1868 and also of the decree of seventh day of September one thousand eight hundred and ninety-nine in Suit No. 699 of 1899 in the Original Side of the High Court and whereas the grantor has no male lineal descendant and has only a grandson Bireswar Mitra son of his deceased daughter Sreemuty Hemanta Kumari Dasi who the grantor holds and considers is unfit to perform the various orders and duties imposed upon him and enjoy the privileges by the terms and provisions of the Will of the late Raja Radha Kanto Deb Bahadur and the decree set forth above by reason of his want of training and defective moral character and whereas the grantor hath given the grantee sound and regular training as to the way in which the said worship of the family deities Sree Sree Laksmi Narain Jew Salagram established and consecrated by his late father and also of the periodical *sradh* from his infancy and believes and considers the said grantee the best person to perform truly and faithfully the worship of the said deities and is best able to manage the properties and control the affairs in connection with the worship of the said family deities other *pujas* and *sradhs* of the late Raja Sir Radha Kanto Deb Bahadur instead of the grantor and whereas the said grantee Robindra Narain Deb is great great grandson of the said testator Raja Sir Radha Kanto Deb Behadur, K. C. S. I., in the male line of succession and best able to perform the worship of the said deities. Now this indenture witnesseth that in consideration of the said grantee being a great great grand son of the said testator Raja Sir Radha Kanto Deb Bahadur in the male line of succession and by his character, education and training is best able to perform the worship of the said family deity Sree Sree Radha Gobinda Jew and other deities of late Sir Radha Kanto Deb Bahadur and of Sree Sree Laksmi Narain Jew Salagram as above stated and in consideration of the fact that the arrangement will be beneficial for the said deities as it will be conducive to the proper conduct of the worship the grantor Kumar Girindra Narain Deb doth hereby convey, confer, alienate and transfer his right, title and interest to and in the worship of the said family deity Sree Sree Radha Gobinda Jew and other deities with all rights and privileges that he is entitled to under the Will of the said Raja Sir Radha Kanto Deb Bahadur, K. C. S. I. and the consent decree dated the 6th day of October one thousand eight hundred and seventy-one in Suits Nos. 155 and 220 of 1868 on the Original Side of the High Court and by any other document for the performance of the said *seva* and *puja* to be held and enjoyed by him so long as he shall be alive and capable of performing the *seva* or service of the family deity, etc., and the usual *pujas* that are celebrated in the house of Raja Sir Radha Kanto Deb Bahadur, K. C. S. I. to be continued to be so held and enjoyed by his heirs in the male line of succession only on condition of their duly performing the *seva* and service of the said family deities, etc., with other usual *pujas* that are held and celebrated in the family Rajbati and not for any personal gain and that in the event of failure in the male line of succession of the same grantee the grantor doth hereby confer or convey and alienate his right of worship of the said family deities, etc., and privileges attached thereto under the Will of the late Raja Sir Radha Kanto Deb Bahadur, K. C. S. I., and the consent decree of the sixth day of October one thousand eight hundred and seventy-one in Suits Nos. 155 and 220 of 1868 in the High Court of Judicature at Fort William in Bengal or by any other deed or deeds in favour of Dwijendra Narain Deb the third son of Monindra Narain Deb and in his absence his heir or heirs in the male line of succession who may be living at the time to be held and enjoyed by him or them only on condition of his or their performing the *seva* or service of the said deities, etc., and in his or their absence the grantor doth hereby confer, convey, transfer and alienate his right of worship of the said family deities and the several *pujahs* and all rights and privileges attached to the same under the terms and provisions of the Will of late Raja Sir Radha Kanto Deb Bahadur and those of the consent decrees of sixth day of October one thousand eight hundred and seventy-one in Suits Nos. 155 and 220 of 1868 and the decree dated seventh day of September one thousand eight hundred and ninety-nine in Suit No. 699 of 1899 in the Original Side of the High Court of Judicature at Fort William in Bengal to the nearest male agnate that may be alive at the time to the exclusion of Sachindra Narayan Deb eldest son of Monindra Narain Deb and his representatives.

In witness whereof I do hereunto affix my signature.

(Sd.) GIRINDRA NARAYAN DEB.

Witnesses:
Romesh Chandra Bose,
Solicitor, Calcutta.
Anil Chandra Sircar,
Clerk to Babu Romesh Chandra Bose.
Solicitor.

On the 14th September 1918 Girindra executed a general power-of-attorney in favour of the defendant empowering him *inter alia* to represent Girindra in all matters connected with the trust estate, and to receive monies for the purpose of the *deb sheba* expenses. After executing the said documents Girindra went to Benares, and in his absence the defendant performed the *Durga Puja* of 1918. In December 1918 Girindra returned to Calcutta, and becoming suspicious of the manner in which the defendant was managing his affairs cancelled the said power-of-attorney, and on the 23rd June 1921 filed the present suit, praying *inter alia* that the said indenture of *arpannama* be declared invalid and void, and that the said indenture be cancelled, and for incidental relief. On the 20th April 1923 Girindra died, and on 3rd July 1923 an order was made substituting his two executors as plaintiffs in his stead. On the 7th March 1924 one of the executors died, and on the 14th April 1924 an order was made directing the present plaintiff, as the sole surviving executor to prosecute the suit.

The defendant has based his defence upon three grounds: (1) that the present plaintiff is not entitled to maintain the suit; (2) that Girindra did not execute the said indenture of *arpannama* with the intention thereby of defeating or delaying his creditors, as the plaintiff alleged, or in the alternative, if such was his intention, that the said creditors were thereby defeated and/or delayed; (3) that the transfer of Girindra's rights and interests in the turn of worship of the said deities was for the benefit of the deities, and that Girindra executed the said indenture *bona fide* in the interest of the dieties in order that the worship should be more fittingly celebrated and the endowment more effectively managed.

As regards the first ground of defence, the defendant urged that as the subject-matter of the suit related to a personal right of worship vested in Girindra as the heir of Rajendra, the cause of action, if any, which Girindra possessed did not pass to his executors, for *actio personalis moritur cum persona.* In my opinion, there is no substance in this contention. Apart from the question as to whether, having regard to the interlocutory proceedings in this suit, it is open to the defendant to raise this contention, by para. 27 of the plaint the plaintiff alleged that his "turn of worship commenced from the 1st *Bysack* 1328 (14th April 1921), and he had begun to perform the worship of the deities in accordance with the testator's Will at his own expense. The plaintiff has been put to great hardship in consequence of the withdrawal of the funds by the said trustee at the instance of the defendant." This allegation is not denied in the written statement, and the executors clearly are entitled to recover from the trust estate the reasonable expenses of the *palas* which Girindra incurred, and this relief they cannot obtain unless and until the indenture is cancelled, or declared to be void. In my opinion, the cause of action is not merely of a personal nature, and the plaintiff is entitled to maintain the suit [*Peary Mohan Mukerji* v. *Norendra Nath Mukerji* (1).]

In support of the second ground of defence, evidence was led, and arguments were addressed to me for the purpose of casting aspersion upon the moral conduct; and impugning the financial dealings of the parties in connection with this *debutter* estate. Now, this is a dispute between relatives, and the parties are members of a well-known and distinguished family. It is very desirable, I think, that I should not embark upon a discussion of the matters raised in this ground of defence, for the result inevitably would be to embitter, and not to heal, the dissensions which have arisen among the members of this family; unless, indeed, I am compelled to do so in order to determine the issues raised between the parties.

It is a source of satisfaction to me that I am not called upon to express any opinion upon the second ground of defence, for, in my opinion, the terms of the indenture of *arpannama* are such that I must hold the indenture to be in law void and inoperative. It is to be observed that by the operative words in the indenture the grantor "doth hereby convey, confer, alienate and transfer his right, title and interest to, and in the worship of, the said family deity Sree Sree Radha Gobinda Jew and other deities with all rights and privileges that he is entitled to under the Will of the Raja Sir Radha Kanto Deb and the consent decree, dated the 6th October 1871, in Suits Nos. 155 and 220 of 1868 on the Original Side of the High Court, and by any other document for the performance of the said *sheba* and *puja* to Robindra, to be held and enjoyed by him so long as he shall be alive and capable of performing the *sheba* or service of the family deities." And later "doth hereby confer, convey, transfer and alienate his right of worship of the said family deities, and of the several *pujas* and all rights and privileges attached to the same to the nearest male agnate that may be alive at the time to the exclusion of Sityendra Narain Deb, eldest son of Monindra Narain Deb, and his representatives."

It is conceded that the rights and privileges conveyed by the indenture are solely those relating and attached to the worship of the deities, and that the line of succession to the *shebaiti* set out in the indenture is neither that laid down by the founder, nor that prescribed by the principles of the Hindu Law. It is contended, however, that inasmuch as the provisions of the indenture were "for the benefit of the deities," and the grantee was a member of the founder's family, the indenture was one that Girindra as *shebait* was competent to execute, and that the transaction should receive the sanction of the Court. I have to determine whether this contention is sound or not.

A Judge who is not a Hindu must needs approach the consideration of such a question with diffidence, but I have had the advantage of hearing the matter exhaustively argued by distinguished Hindu Counsel, and I have myself explored the case-law and such Hindu texts as bear upon the subject. The ancient sages for the most part are silent on the subject of *shebaiti* rights and duties, [*per* Seshagiri Aiyar, J., *Annaya Tantri* v. *Ammakka Hengsu* (2)], but the decisions are numerous, and conflicting and I find myself, therefore, at liberty—indeed I am constrained to express my own opinion on the matter.

Now, "*sheba*" means "service," and whenever an image or idol is set up and consecrated, there must needs be a *shebait* to serve and sustain the deity whose tabernacle the image is. The duties and the privileges of a *shebait* primarily are those of one who fills a sacred office. He must take the image into his charge and custody; he must see that it is washed and fed and clothed and tended, and that due provision for its worship is made: "We need not describe here in detail the normal type of continued worship of a consecrated image,—the sweeping of the temple, the process of smearing, the removel of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessaries and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest." [*Per* Mookerjee, J., in *Rambrama Chatterjee v. Kedar Nath Banerjee* (3).] The main concern of a *shebait*, therefore, is duly to carry out the sacred duties of his office. He may perform his spiritual functions personally or he may—indeed, if he does not possess the necessary qualifications to enable him to celebrate the worship of the deity he must,—appoint a qualified deputy to officiate in his stead. [*Annaya Tantri* v. *Ammaka Hengsu* (2).]

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(1) 5 Ind. Cas. 404; 37 C. 229; 14 C. W. N. 261; 7 A. L. J. 125; 7 M. L. T. 63; 11 C. L. J. 220; 12 Bom. L. R. 257; 20 M. L. J. 171; 37 I. A. 27 (P. C.).

(2) 47 Ind. Cas. 341; 41 M. 886; 35 M. L. J. 196; 8 L. W. 301; 24 M. L. T. 163; (1918) M. W. N. 569.

Now, it usually happens when an image is consecrated that property, moveable or immoveable, is dedicated to its use. This is the common, indeed, almost the invariable, practice. After dedication the proprietary title to the property is vested in the idol, the right to possess and the duty to manage the property in the *shebait*. *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (4).] "As regards the property the manager is in a position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity" [*Per* Lord Macnaughten: *Ramanathan Chetti* v. *Murugappa Chetti* (5).] There is "no distinction between the office and the property of the endowment; the one is attached to the other" [*Per* Sir Richard Couch in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (6)] but, in truth, it is the endowment which is attached to the office, not the office to the endowment, for while there may be a *shebait* without endowed property, there cannot be property dedicated to an idol without a *shebait* to manage it. "I might at once say that in respect of such a religious office, it is not the right of the office-holder to receive emoluments which is the important or principal right, but, in my opinion it is the right of the deity to have certain services performed to it which is a primary right. I also think that as regards the religious office itself, the duties of the office should be considered as the substance of the office, the right to receive the emoluments being only an appurtenance of the said duties......I am inclined to hold that it is the rights that are subordinate and appurtenant to the duties, and it is not the duties that are subordinate and appurtenant to the rights" [*per* Sadasiva Aiyar, J., in *Sundarambal Ammal* v. *Gogavanagurukkal* (7).]

I have emphasised the distinction between the *shebait's* obligation to perform the spiritual duties of his office, and his obligation to manage the temporalities of the idol, because it is important to bear in mind that a *shebaiti* primarily and mainly is a sacred office, and that it does not follow, because in certain circumstances a *shebait* may be entitled to alienate the temporalities of the deity, that in similar or any circumstances he is entitled to transfer the spiritual duties and privileges which appertain to his office.

Now, on the question which falls for determination the authorities in India are numerous, but, as I apprehend them, the decisions sometimes are inconsistent, sometimes inconclusive, and if I refrain from examining them in detail, I do so, not out of want of respect for the learned Judges who were parties to the decisions, but because I am content to found my judgment upon the Common Law of India and the decisions of the Judicial Committee of the Privy Council which, to my mind, put the matter beyond controversy. In 1869 an appeal was heard by the Judicial Committee in which the issue was whether a *shebait* was entitled to sell certain *jammas* connected with a *taluk* which had been dedicated to an idol. The Judicial Committee held that "The *taluk* itself, with which these *jammas* were connected by tenure, was dedicated to the religious services of the idol. The rents constituted, therefore, in legal contemplation, its property. The *shebait* had not the legal property, but only the title of manager of a religious endowment. In the exercise of that office, she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage." [*Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (8).]

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(3) 72 Ind. Cas. 1026; 36 C. L. J. 478 at p. 483; A. I. R. 1923 Cal. 60.

(4) 31 I. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).

(5) 29 M. 283 at p. 289; 10 C. W. N. 825; 8 Bom. L. R. 498; 16 M. L. J. 265; 4 C. L. J. 189; 3 A. L. J. 707; 1 M. L. T. 327; 33 I. A. 139 (P. C.).

(6) 27 I. A. 69 at p. 77; 4 C. W. N. 329; 23 M. 271; 2 Bom. L. R. 597; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

(7) 23 Ind. Cas. 72; 38 M. 850; 26 M. L. J. 315; (1914) M. W. N. 286; 1 L. W. 276.

(8) 13 M. I. A. 270; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

In 1875 in *Prosunno Kumari Debya* v. *Golab Chand* (9) Sir Montague Smith, in the course of the judgment, observed that "there is no doubt that, as a general rule of Hindu Law, property given for the maintenance of religious worship and of charities connected with it is inalienable......... But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the *shebait* of property dedicated to the worship of the idol, in his capacity as *shebait* and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them......It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as *shebait*, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them."

In 1876 in *Raja Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (10) the issue was whether the *urallers* or managers of a *pagoda* were entitled to assign the conduct of the worship and the right to manage the property of the endowment to the Raja of Cherakel. The deed of assignment recited that "the *pagoda* and its dependent institutions belong exclusively to the four *tarwads* of the *urallers*; that they are in debt to the amount of Rs. 46,000; that as the property was insufficient to conduct the affairs of the *pagoda*, this debt was likely to increase, that the Cherakel was willing to pay off the debts and take over the *pagoda* and its property and conduct all the ceremonies, and that the *urallers* had received in cash Rs. 46,000 to pay off debts and Rs 10,000 for their own use. In consideration of the above the deed assigned over to the Raja all the property, moveable and immoveable, of the *pagoda*, and the *uraima* right of the four families, with the reservation of the right to join in the assembly for conducting the ceremonies and to receive the privileges attached thereto."

Sir James Colville who in this appeal delivered the opinion of the Board, observed: "The first question is, whether, independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship, and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district, open to the public opinion of that district and having that sort of family interest in the maintenance of this religious worship which would insure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken. Such a transferee might be a powerful man, as probably this Cherakel Rajah is, and, therefore, the less amenable to public opinion, the less capable of being reached by the Courts, and the more likely to deal with the institution with a high hand. Mr. Mayne almost admitted that the broad principle *delegatus non potest delegare* would *prima facie* apply to such a case." After discussing the authorities, his Lordship added: "This being the state of the authorities, their Lordships are of opinion that there is no authority binding even on the Court of Madras which is inconsistent with the judgments under appeal; that the general principle affirmed by those judgments is correct; and consequently that the *urallers* had no power under what may be termed the Common Law of India to transfer their *uraima* right to the plaintiff, the Cherakel Rajah. But it is said that in India, and particularly in that part of India in which this *pagoda* is situated, custom must prevail against the general law. That such would be the consequence of a well proved and established custom their Lordships do not deny............... But their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case; and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law."

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(9) 2 I. A. 145 at p. 150; 14 B. L. R. 450.

(10) 4 I. A. 76; 1 M. 235; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156 (P. C.).

In 1899 in *Gnanasambanda Pandara Sannadhi* v. *Velupandaram* (6) a later Board of the Judicial Committee re-stated the same rule: "In *Rjaa Vurmah Valia* v. *Ravi Vurmah Kunhi Kully* (10) this Committee held that an assignment by the *urallers* of a *pagoda* of the right of management thereof was beyond their competence under the Common Law of India, and that no custom to do so had been established. There is no proof of any custom in this case, and consequently these deeds of sale are void and do not give any title to the purchaser." Alienations by a *shebait* in contravention of the law as laid down in these decisions are void and need not be set aside: *Raja Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (10), *Narayana Chettiar* v. *Lakshmanan Chettiar* (11) and such an alienation may be declared void even at the instance of the alienor [*Juggut Mohini Dossee* v. *Sokheemoney Dossee* (12), *Srimati Mallika Dasi* v. *Ratammani Chakervarti* (13). The Judicial Committee have never deviated from the principles laid down in the above cases, and it is settled law that "in the absence of any custom or usage to the contrary or any term to that effect in the deed of endowment a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder [*per* Mookerjee, J., in *Mahamaya Debi* v. *Haridas Haldar* (14).]

In the present case it is conceded that no usage obtains in the family which would render valid the indenture of *arpannama*, if otherwise it is void under the Common Law of India. I need not, therefore, embark upon the still unsettled question as to whether, and if so, in what circumstances, the Courts would sanction an usage under which rights of worship have been alienated by a *shebait*. Again, there is authority for the proposition that the consensus of all the persons interested in the worship may "give the estate another direction," [*Raja Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (10), *Khetter Chunder Ghose* v. *Hari Das Bundopadbya* (15) and *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (16)]: but so far as I know the Judicial Committee in no case have determined that such a consensus of opinion would justify a transfer of the spiritual rights and duties of the office of a *shebait*: *Sethuramaswamiar* v. *Meruswamiar* (17). In this case, however, it is admitted that Girindra executed the *arpannama* entirely at his own will, and upon his own initiative, and that he neither invited nor obtained a consensus of opinion among those interested in the worship of the deities in favour of the course which he pursued. It is further urged that Girindra as *shebait* was competent and entitled to execute the indenture of *arpannama* provided that either of the following conditions was fulfilled: (1) that the assignment of the *pala* was to a member of the founder's family qualified to perform the duties of *shebait*, or (2) that the assignment was "for the benefit of the deities." As regards (1) it is well-settled that "according to Hindu Law, when the worship of a *thakur* has been founded, the *shebaitship* is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution" [*Gossamee Sri Gridhariji* v. *Ramanlalji Gossami* (18).]

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(11) 29 Ind. Cas. 1; 39; M. 456; 28 M. L. J. 571.

(12) 17 W. R. 41; 14 M. I. A. 289; 10 B. L. R. 19; 2 Suth. P. C. J. 512; 3 Sar. P. C. J. 23; 20 E. R. 795.

(13) 1 C. W. N. 493 at p. 496.

(14) 27 Ind. Cas. 400; 42 C. 455 at p. 470; 19 C. W. N. 208; 20 C. L. J. 183.

(15) 17 C. 557; 8 Ind. Dec. (N. S.) 911.

(16) 87 Ind. Cas. 305; 52 C. 809; 30 C. W. N. 25; 23 A. L. J. 537; A. I. R. 1925 P. C. 139; 49 M. L. J. 30; (1925) M. W. N. 431; 41 C. L. J. 551; 2 O. W. N. 557; 27 Bom. L. R. 1064; 22 L. W. 492; 3 Pat. L. R. 315 (P. C.).

(17) 43 Ind. Cas. 806; 41 M. 296; 7 L. W. 22; 4 P. L. W. 91; 34 M. L. J. 130; 16 A. L. J. 113; 27 C. L. J. 231; 22 C. W. N. 457; 20 Bom. L. R. 514; 45 I. A. 1. (P. C.).

The High Court at Madras consistently has held that an alienation by a *shebait* of the corpus of the dedicated property, either to a member of the founder's family or to a stranger, is utterly void. *Kuppa Gurukal* v. *Dorasami Gurukal* (19), *Narayana* v. *Ranga* (20) and *Sundarambal Ammal's case* (7); see also *Juggurnath Roy Chowdhry* v. *Kishen Pershad Surmah* (21), *Narayan* v. *Chintaman* (22), *Shri Ganesh Dharnidhar Maharajdev* v. *Keshaorav Govind Kulgavkar* (23), *Mallika's case* (13) and *Gobinda Kumar Roy Chowdhry* v. *Debendra Kumar Roy* (24). In *Mallika's case* (13) Banerji, J., observed that "It has been held in a uniform current of decisions, both in this and in the High Courts of Bombay and Madras, that a priestly office with emoluments attached to it is inalienable.................If it were necessary to give reasons for such a proposition so amply supported by authority, as the proposition contended for on behalf of the respondent is, I may say that it would be contrary to public policy to allow an office like this to be transferred either by private sale or by sale in execution of a decree. The defendant in this case is one of several *shebaits* to the idol, his turn of office extending for eleven days in a month. The emoluments of the office consist of votive offerings. And if a person professing a religion differing from Hinduism were to become the execution purchaser, it would lead to no end of complications and disturbances, which would be detrimental in the highest degree to the interests of other *shebaits* and of votaries generally."

It is not settled whether the renunciation of a *shebaiti* by the office-holder in favour of a sole immediate heir would be void: [*Narayana* v. *Ranga* (20).] It may be—though I do not decide—that such an alienation would contravene the doctrine of *delegatus non-potest delegare*: [*Raja Vurma Valia* v. *Ravi Vurmah Kunhi Kutty* (10)], but if it be assumed that a *shebait* is competent to abdicate from his office, in my opinion, such an act would operate to transfer the office to the persons entitled thereto as reversioners under the foundation, or in default of any directions by the founder or of custom according to the principles of the Common Law of India. The office would not pass under or by virtue of any assignment of his office by the abdicating *shebait* whether it purported to be in favour of the sole immediate heir or of any other person, for every such assignment, in my opinion, is wholly void and inoperative. If the view of the position and status of a *shebait* which I have expressed is correct, it follows that the case of *Moncharam* v. *Pranshankar* (25) was wrongly decided and ought not to be followed. *Rajeswar Mullick* v. *Gopeswar Mullick* (26) and *Gobinda Kumar Roy's case* (24). As regards (2) it is urged that the assignment in suit is valid and should receive the *imprimatur* of the Court because the transfer of the *pala* was "for the benefit of the deities." In support of this contention the learned Counsel for the defendant referred to the decision of this Court in *Nirodbarani Dassi* v. *Shiba Das Pal Dewasin* (27) and the *dictum* of Mitra, J., in *Rajeswar Mullick's case* (26). With all respect to the learned Judges who decided these cases, for the reasons which I am about to state, I am of opinion that the decisions in *Nirodbarani Dassi's case* (27) and in *Rajeswar Mullick's case* (26) so far as it is founded upon the same reasoning, are not in accordance with the Law of India as enunciated by the Judicial Committee of the Privy Council, and I cannot acquiesce in them.

The contention which learned Counsel has urged upon the Court, in my opinion, is founded upon a heresy which has crept into the Hindu Law, and ought to be exposed and eradicated. This is not the only branch of law in which the words "for the benefit" have caused error and confusion [see *Barwick* v. *English Joint Stock Bank* (28), *Lloyd* v. *Grace, Smith & Co.* (29).] Who is to determine whether any particular alienation is "for the benefit of the deity?" Is it the founder? Is it the persons interested in the worship? Is it the *shebaits*, or one or more of them? Is it the Court? I do not pause to hazard a conjecture, for, in my opinion, the doctrine contravenes the Hindu Law, and in any event cannot be extended to an alienation of the spiritual rights and duties of a *shebait*. The genesis of the heresy may be found, I think, in a misapprehension of certain observations of Sir Montague Smith in *Prosunno Kumar's case* (9): "The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir which was thus defined in a judgment of this Committee delivered by Lord Justice Knight Bruce: The power of the manager for an infant heir to charge an estate not his own is under the Hindu Law a limited and qualified power; it can only be exercised rightly in a case of need or for the benefit of the estate, but where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance is the thing to be regarded." *Hunoomanpersaud Pandey* v. *Babooee Munraj Koonweree* (30). From the above passage the doctrine has been evolved that although there might be no necessity for any particular alienation of *debutter* property, yet, if the transfer was "for the benefit" or "for the clear benefit" of the endowment, it could be upheld according to the Hindu Law. It is incumbent upon me, therefore, to examine more closely the rule propounded in *Prosunno Kumari's case* (9). It is to be observed that while Sir Montague Smith laid down that a *shebait* "may incur debts or borrow money for necessary purposes," his Lordship added: "The power, however, to incur such debts must be measured by the *existing necessity* for incurring them." Since 1875, the Judicial Committee have more fully defined the circumstances in which a *shebait* is empowered to alienate *debutter* property. In 1876 Sir Montague Smith, delivering the opinion of the Board in *Konwar Doorganath Roy* v. *Ram Chunder Sen* (31) stated that the Rani Rashmoni, who had effected the alienation of the property then in suit "had, as the manager of the estate, power, if it were *debutter* dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol; and if it were secular to alienate it if it became necessary to do so to preserve the rest of the family estate." And later in his judgment his Lordship, referring to *Prosunno Kumari's case* (9) observed that "in that case a *shebait* had incurred debts, and mortgaged the property of the idol for the purpose of the necessary sustentation of the worship of the idol; and this tribunal held that the position of the *shebait* was analogous to that of a manager of an infant, and that he had the same authority, *which in both cases arises from the necessity of the case*, to raise money for the benefit of the estate." In that case their Lordships held that the "sale of part of the land was justified by the *imperious necessity* of finishing the temple which had been commenced." In *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (32), Sir Andrew Scoble, delivering the judgment of the Board, observed that "it is well-settled law that the power of the *mohunt* to alienate *debutter* property is, like the power of the manager for an infant heir, limited to cases of *unavoidable necessity*." Again, in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (33), Lord Atkinson laid down that "if for the reasons above mentioned the grant of a lease in perpetuity of *debutter* lands at a fixed rent requires to be justified by *unavoidable necessity*, it is difficult to see why an absolute alienation in perpetuity of the same kind of land in consideration of a premium, should not equally require to be justified by the same kind of necessity, since it brings about quite as completely the same prejudicial results." His Lordship also observed that "the only specific point touching the present case actually decided in these three authorities was this: that a *debutter* estate may be mortgaged to secure the re-payment of money borrowed and applied to prevent its own extinction by sequestration. No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit of the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it from injury or deterioration by inundation, this and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits, and what not." An examination of these authorities leads to the conclusion that the power of a *shebait* to alienate the corpus of *debutter* property is to be measured by the exigencies of the occasion. An alienation of such property, in my opinion, cannot, be justified unless it is impracticable duly to carry out the service and worship of the deity, and matters incidental thereto, or to preserve the dedicated property without incurring the expenditure, to defray which it is proposed to effect the alienation; and further, unless the required expenditure cannot be met out of the income of the endowment, and without alienating the corpus of the estate. In short, the *shebait's* power of alienation must be exercised for purposes of defence and not of aggrandisement, as a shield and not as a sword. Occasions which would justify the alienation of the corpus will not frequently arise, for "even in cases where, owing to causes beyond the control of the managers, such as famine, etc., the income falls off, the uniform and approved practice of the country has been to regulate the scale of the services with reference to the diminished income until the income returns to its normal condition, and not to keep up the services on a scale rendering the incurring of debts necessary. Nor is money ever borrowed, even for the purpose of repairs. One reason why a manager never thinks of mortgaging or setting the corpus for such a purpose is that he will ordinarily not be able to find a mortgagee or purchaser among the members of the community since the principle that property dedicated to God ought never to be diverted for other purposes, operates so strongly on the mind of the community that even innocent participation in such diversion is understood to be sinful, and to forbode evil to the participator......Nor should it be forgotten that, as shown by the *formula* with which grants and donations to charities usually conclude, the people take that to renovate is even more meritorious than to found. In such circumstances it is obvious that the manager's powers are quite limited. He can only do what is necessary for the services of the idol...and he need only preserve and duly manage what property may belong thereto. It is no part of his duty to effect improvements with reference to existing endowments when the funds in his hands do not admit of it; nor is he called upon to enter into transactions for the purpose of augmenting the funds of the institution. He cannot in any manner subject the institution in his charge to duties, obligations and burdens to which, with reference to the nature of the foundation or otherwise, the institution is not inherently or necessarily subject" [per Subramania Iyer, A. C. J.) in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi* (34).]

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(18) 16 I. A. 137 at p. 144; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N. S.) 541 (P. C.).

(19) 6 M. 76; 7 Ind. Jur. 75; 2 Ind. Dec. (N. S.) 331.

(20) 15 M. 183; 2 M. L. J. 19; 5 Ind. Dec. (N. S.) 477.

(21) 7 W. R. 266.

(22) 5 B. 393; 3 Ind. Dec. (N. S.) 259.

(23) 15 B. 625; ; 8 Ind. Dec. (N. S.) 421.

(24) 12 C. W. N. 98.

(25) 6 B. 298; 6 Ind. Dec. 426; 3 Ind. Dec. (N. S.) 655.

(26) 35 C. 226; 12 C. W. N. 323; 7 C. L. J. 315.

(27) 3 Ind. Cas. 76; 36 C. 975; 13 C. W. N. 1084.

(28) (1867) 2 Ex. 259; 36 L. J. Ex. 147; 16 L. T. 461; 14 W. R. 877.

(29) (1912) A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 723; 28 T. L. R. 547.

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(30) 6 M. I. A. 393 at p. 423; 18 W. R. 81n; Sevestre 53n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(31) 4 I. A. 52; 2 C. 341; 3 Sar. P. C. J. 681; 1 Ind. Dec. (N. S.) 508 (P. C.).

(32) 4 Ind. Cas. 449; 36 C. 1003; 14 C. W. N. 1; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 36 I. A. 148 (P. C.).

(33) 39 Ind. Cas. 722; 44 I. A. 147; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222 (P. C.).

Where there is an "*imperious necessity*" or an "*unavoidable necessity*" in the above sense compelling the *shebait* to alienate the property, such an alienation clearly is "for the benefit of the deity," but if there is no such necessity, the fact that the value of the estate will be increased if an alienation by sale, mortgage, exchange or otherwise is effected, will not justify such a transaction, although thereby it may be that the endowment can be benefited [*per* Subramania Aiyar, (A. C. J. in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi* (34); *per* Lord Atkinson in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (33), *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (35) and *Shankar Sahi* v. *Baichu Ram* (36). As it is admitted that there was no necessity in the sense I have indicated which would justify the execution of the *arpannama* in suit, in my opinion, the contention that the Court ought to uphold the *arpannama* on the ground that it was or might be "for the benefit of the deities" is misconceived, and irrelevant, and I reject it.

(34) 27 M. 465 at p. 473; 14 M. L. J. 81.

(35) 71 Ind. Cas. 959; 45 A. 390 at p. 394; 21 A. L. J. 271; A. I. R. 1923 All. 298.

(36) 86 Ind. Cas. 769; 47 A. 381; 23 A. L. J. 204; L. R. 6 A. 214 Civ.; A. I. R. 1925 All. 383.

I desire to add that, in my opinion, the rule of necessity extends only to an alienation of the temporalities of the idol. It does not, and, in my opinion, it cannot be made to apply to an alienation of the spiritual rights and duties, the fulfilment of which is the primary function of a *shebait*. To apply such a rule to the spiritual duties of a *shebait* would be to contravene the fundamental principle of the Hindu Law, and to violate the religious instincts of all orthodox Hindus. Indeed, in the nature of things there can be no necessity for a voluntary transfer of the spiritual duties of a *shebait* [*Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (37)] and the doctrine that a *shebait* at his own will and pleasure is at liberty to alter the line of *shebaits* on the ground that to do so will be "for the benefit of the deity" offends against the Common Law of India and is in conflict with the uniform rulings of the Judicial Committee of the Privy Council. For these reasons, in my opinion, the indenture of *arpannama* of the 13th September 1918 must be declared void and inoperative and there will be a decree in favour of the plaintiff.

The Receiver will be discharged. Each party will bear his own cost.

R. L. *Decree modified.*

(37) 27 M. 435; 14 M. L. J. 105.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1400 OF 1923.

February 24, 1926.

Present:—Mr. Justice Walsh.

Musammat KHATUN BIBI—DEFENDANT—APPELLANT

versus

RAJJAB—PLAINTIFF—RESPONDENT.

*Muhammadan Law—Marriage—*Pre-nuptial *agreement to live with wife's parents—Legality.*

An agreement by which a Muhammadan husband binds himself to live presumably for all time, so long as the marital relationship continues, in his wife's house is invalid.

[Case-law reviewed.]

Second appeal against a decree of the Subordinate Judge, Allahabad, dated the 30th of July 1923.

Mr. *Mukhtar Ahmad*, (with him Mr. *Iqbal Ahmad*), for the Appellant.

Messrs. *U. S. Bajpai* and *N. C. Bose*, for the Respondent.

JUDGMENT.—This appeal raises a question of the validity of an agreement in relation to a Muhammadan marriage, which seems to me to be concluded by authorities which I feel compelled to follow, even if I did not agree with them.

A Muhammadan husband sues his wife for restitution of conjugal rights. The wife alleges that in breach of an agreement, made on the 1st of March 1921, (*an ante nuptial* agreement, she is entitled to, and has, in fact, divorced her husband. The lower Appellate Court held that there is no proof that the defendant exercised the option of divorce and it also rightly held that the agreement gave no power to the wife to divorce. In my opinion, the question of divorce is a side issue, which really does not arise. The real question is whether the agreement is binding upon the husband so as to disentitle him to bring a suit for restitution of conjugal rights. The agreement is not correctly set out in the written statement. In fact, it appears to me to have been deliberately mis-stated in the written statement. The material portion of the agreement made by the husband before the date of marriage, as translated into English, runs as follows:—

"I shall live at the house of wife's mother and shall always live with my wife. If I do not live at her house or live at any other place, I shall have no concern with *Musammat* Khatun Bibi (the wife), daughter of *Musammat* Maiki (mother-in-law), and she will have a right to marry *Musammat* Khatun Bibi to whomsoever she likes. I shall have no concern with *Musammat* Khatun Bibi again. I shall not live at any other place without the permission of *Musammat* Maiki or Khatun Bibi."

Two things are clear from this agreement. The word "she" refers to the mother. There is no provision giving the wife power to divorce, or an option to exercise that power. The appellant contends that the power given to the mother to re-marry her daughter. is useless without a previous divorce, and that the right to divorce must be implied. That is in a sense true, but it is equally true that interpreting the agreement as it is, the power given to the mother is ineffectual, in fact, without a prior right of divorce residing in the wife. I do not think that it is legitimate to infer, or rather to insert into an agreement, a provision which is not there, in order to decide whether the agreement itself is valid or not, or whether it is against public policy. The appellant relies upon a passage in the 1894 Edition of Ameer Ali's book on Muhammadan Law, which, while recognising the obvious fundamental right of the Muhammadan husband to compel his wife to live with him, states that the law recognises express stipulation entered into at the time of marriage respecting conjugal domicile, and that, if a husband has agreed to let his wife live at her father's house, he cannot afterwards force her to leave it, which, of course, in this case he is trying to do by a suit for restitution of conjugal rights. No authority is quoted for that proposition, which probably is only true within limits, which the author has not fully explained. Further reliance is placed upon *Hamidoolah* v. *Feizunnissa* (1), where it is held that the Muhammadan Law permits the delegation by the husband to the wife of the power of divorce on certain occasions. That does not arise in this case, because the agreement contains no such delegation. The case also holds that an *ante nuptial* agreement with reference to the residence of the wife may be valid, if of a reasonable nature. The provision in that case was not that the husband should live at the wife's father's house, but that the wife should be taken to her father's house four times a year. Clearly that case has no bearing upon the present question.

On the other hand, there seems to be a fairly clearly current of authorities that an agreement by which the husband binds himself to live presumably for all time so long as the marital relationship continues, in his wife's house, is invalid, *prima facie* it would clearly be so, because it is inconsistent with the fundamental rule of Muhammadan Law, and it is an attempt to bind the liberty of the subject which, as a general, is against public policy. The question first arose in *Hamid-un-Nissa Bibi* v. *Zohir ud-Din Sheik* (2), where, without deciding the question because it was unnecessary to do so, the Court, which included the Chief Justice of Bengal, expressed great doubt whether such a stipulation could be valid in any case. That was in 1890. In 1904, in *Abdul Piroj Khan* v. *Hussenbi* (3), a Bench, including the Chief Justice, held that it was not competent for the husband and wife to enter into an agreement, by which the husband consented that his wife might live with her parents. That is different from this case. The permission there was not so strong: but, of course, it was a surrender of the husband's ordinary right to decide the residence for himself and his wife. In 1910, in *Imam Ali Patwari* v. *Arfat-un-Nisa* (4), it was held positively by Mr. Justice Stephen and Mr Justice Mullick, that a condition in *kabinnamah*, that the husband should live with a wife in her father's house and that she would be entitled to divorce him if he did not, was invalid in Muhammadan Law. That case is really applicable here. In 1916 another Court in Calcutta, neither of the members of which was a Muhammadan, took the same view after going into the law and considering the previous decision reported as *Imam Ali Patwari* v. *Arfat-un-Nissa* (4) to which I have already referred. That case is reported as *Imam Ali Patwari* v. *Arfatunnessa* (5). There is finally the authority of the Punjab High Court in 1920 *Fatima Bibi* v. *Nur Muhammad* (6), in which the matter was gone into very thoroughly and the judgment was delivered by a well-known Muhammdan Lawyer, Mr. Justice Abdul Raoof.

In the face of all these authorities, I hold that this agreement, to the extent to which it bound the husband to live with his wife at her father's house, was invalid and could not constitute a defence which was the real defence set up at the trial, to a suit for restitution of conjugal rights. I am deciding the point somewhat differently to the way in which it was dealt with in the Court below, although in substance the decision is the same. No question, in my opinion, of a divorce arises in this case at all and, if it did, the finding of the lower Court that the so-called option in favour of the wife had never been exercised would be fatal to it in any event. The appeal must be dismissed with costs, in this Court on the higher scale.

R. L. *Appeal dismissed.*

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(1) 8 C. 327; 10 C. L. R. 291; 6 Ind. Jur. 414; 4 Ind. Dec. (N. S.) 209.

(2) 17 C. 670; 8 Ind. Dec. (N. S.) 986.

(3) 6 Bom. L. R. 728.

(4) 21 Ind. Cas. 87; 18 C. W. N. 693.

(5) 32 Ind. Cas. 707.

(6) 60 Ind. Cas. 88; 1 L. 597.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 8 OF 1923.
March 26, 1925.
Present:—Mr. Justice Krishnan and
Mr. Justice Odgers.

MUCHUMARRI MALLIAH AND OTHERS
—DEFENDANTS NOS. 1 AND 2, 4 TO 12 AND 15
—APPELLANTS
versus
YERRAVULU GANGANNA AND OTHERS
—PLAINTIFFS NOS. 1 TO 10 AND DEFENDANTS
NOS. 3, 13 AND 14—RESPONDENTS.

Pleadings and proof—Suit for declaration of customary right—Custom found against—Common Law right as citizen, whether can be set up.

Where the plaintiffs who are shepherds in a village sue the defendants, the members of another community, for a declaration that they, the plaintiffs, are entitled by custom to take their procession on marriage and other festive occasions through the public streets of the village with music, dancing and torches by daylight, which they claim to be component parts of the procession itself, from time immemorial and the alleged customary right is not proved, the plaintiffs' suit must fail. Any right which the plaintiffs may have, based upon their Common Law right as citizens, must be vindicated in a separate suit. [p. 228, col. 1.]

Obiter.—Any member of the public has got the right to use a public street in any lawful manner and a declaration can be granted if he is prevented from so doing without proof of any special damage. [*ibid.*]

Appeal against an order of the District Court, Cuddapah, in Appeal Suit No. 35 of 1921, preferred against a decree of the Court of the Temporary Subordinate Judge, Cuddapah, in Original Suit No. 5 of 1920.

This appeal coming on for hearing on the 10th October 1923, the Court delivered the following

JUDGMENT.—This is an appeal against an order of remand by the District Judge of Cuddapah in a suit brought by the plaintiffs, the shepherds of a village called Thathireddipalli, for a declaration that they are entitled to take their processions on marriage and after festive occasions through the public streets of the village with certain ceremonials attached to it, which they claim to be component parts of the procession itself from time immemorial. They say that they are entitled to carry on their processions with music, dancing, torches by daylight and with vahanams. They allege in the plaint that the defendants, who are the Kapus of their place, threatend to obstruct them in exercisg this right of theirs.

The suit was first before the Subordinate Judge of Cuddappah and he held that the dispute between the parties was confined to the claim by the shepherds to carry torches during daylight, that that was a mere dignity or honour and that no declaration could be given as to that right it not being a civil right at all; and he, therefore, dismissed the suit. It was against that that an appeal was filed by the shepherds before the District Judge. The District Judge has come to the conclusion that it is not a question of a mere declation of a dignity or honour that is involved in this case but a right of procession along the public road in a certain manner accompanied by music, etc., which was obstructed and that therefore, this is a suit of a civil nature, the obstruction being really to the procession itself. The plaintiffs explain before us that they claim the right to take their processions with those accompaniments only as a matter of customary right, and they admit that unless they are able to establish that they have a customary right of carrying on their processions with daylight torches which is the main point in dispute between the parties, they are not entitled to a declaration but, if they do prove that, they would be entitled to the declaration claimed as without these customary component parts of the procession, the procession itself will be of no value, and the stoppage of the accompaniments will be tatamount, as the District Judge has held in the lower Court, to stoppage of the procession altogether.

Before disposing of this case, we think it would lead to quickness of despatch and convenience of parties if we call for a finding on the following issue:—

Whether the plaintiffs have a right by custom to carry on their procession along the public streets on the occasions mentioned in the plaint with daylight torches as claimed by them?

The Subordinate Judge will try this issue after taking evidence from both sides and submit his finding in three months. Ten days for objections.

In compliance with the order contained in the above judgment the District Judge of Cuddapah submitted the following

FINDING.—In this case the High Court has called for a finding on the following issues:—

Whether the plaintiffs have a right, by custom, to carry on their procession along the public streets on the occasions mentioned in the plaint with daylight torches as claimed by them?

* * * * * * *

The weight of evidence and probabilities are against the plaintiffs and I find that the custom is not proved.

JUDGMENT.—In this case we called for a finding on the issue "Whether the plaintiffs have a right by custom to carry on their procession along the public streets on the occasions mentioned in the plaint with daylight torches as claimed by them?" A finding has been returned by the District Judge against the plaintiffs; he has held that it is not proved that the plaintiffs have made out such a custom as alleged by them. Ordinarily on this finding the appeal would have been allowed and the suit directed to be dismissed, but it is argued by Mr. Ramachandra Ayyar for the plaintiffs who now appears for the first time in the case that we should go back upon what we held on the last occasion and hold that the plaintiffs have a right as members of the public to use public roads in any manner that they can lawfully use them and that it is not open to any other member of the public to prevent them from so doing unless they infringe some particular right of the other or they infringe any Magisterial orders or Police regulations or cause injury to any member of the public by so using. This argument was not urged before us at the time when the case was heard by us and we called for findings. In fact as stated in our judgment it was expressly admitted by the learned Vakil who then appeared for the plaintiffs that the plaintiffs based their right to take processions with the accompaniments named only as a matter of customary right and if they were not able to establish such a customary right they would not be entitled to a declaration.

It is contended on behalf of the plaintiffs that the learned Vakil who appeared then was acting beyond his authority and the admission being on a question of law is not binding on the clients; but the argument overlooks the nature of the suit. The plaint says that by immemorial custom the plaintiffs in this suit and their castemen have the right from time immemorial to conduct processions in these streets with music and daylight torches. The Kapus the defendants denied this customary right and they stated that it was merely an attempt made by the plaintiffs to make themselves equal to the Kapus in caste status by carrying daylight torches and that the Kapus alone were entitled to this privilege and on that ground they objected to the declaration being granted. The issue was worded like this:—"Whether the plaintiffs have not the right to carry daylight torches in procession as claimed by them?" It was admitted before the Subordinate Judge as noted by him in para. 7 that the suit was for the vindication of a dignity, *i. e.*, for a declaration that the plaintiffs were entitled to carry torches during daytime on ceremonial occasions. He declined to give the plaintiffs a declaratory decree as prayed for holding that the case was one for a declaration of a mere dignity or honour unconnected with any office or temple and he was of opinion that the right was not one which Civil Courts ought to recognize. Before the appellate Court the District Judge starts his judgment by saying that the suit was for a declaration of the customary right of the Gollas of Thathireddipalli to go to their temple in procession through certain public streets with music and torches during daytime on marriage and other ceremonial occasions and for an injunction. In the course of his judgment no doubt he treated the right claimed as not different from the inherent right of every citizen to use the public streets in a lawful manner and said, "Admittedly the streets in question are public streets. All members of the public have, therefore, equal rights in them. Apart from any custom every citizen has an inherent right to conduct processions, civil or religious, through a public street, so as not to obstruct the use of it by other and subject to any directions a Magistrate may lawfully give to prevent obstructions of thoroughfare or breaches of public peace."

It was objected before us on the former occasion that this view of the case was not permissible considering the way in which the suit was framed, the suit being to vindicate a customary right. It is not without due care and deliberation that the plaintiffs confined their case to a vindication of what they call a customary right for the plaintiffs Gollas would have no doubt objected to the Malas and Madigas and other low castes exercising a right such as the one in question now. If the right is to be claimed as a right inherent in every citizen the Malas and Madigas would be equally entitled to the right of carrying daylight torches in their processions but the Gollas in their evidence carefully deny that any but the Kapus and themselves have got that right; so that it is clear that here we have not got to deal with the general question as to what the right of a member of the public is on the public road. It is in view of this contention that the learned Vakil for the plaintiffs who appeared on the last occasion admitted that unless he was able to establish his customary right his case must fail. We do not think, therefore, that it is open now to the plaintiffs or to the learned Vakil who appears for them to put his case upon a general inherent right of the public on public roads. The recent decision of the Privy Council reported as *Manzur Hassan* v. *Muhammad Zamman* (1) has put the matter beyond controversy that any member of the public has got the right to use a public street in any lawful manner and a declaration can be granted if he is prevented from so doing without proof of any special damage. This was the view taken by the Madras High Court and the Privy Council has accepted the Madras view as correct. But that case has no bearing on the present case, because such a case as this must necessarily fail when the custom is not proved. Any right that the plaintiffs may conceive themselves to have, based upon their position as citizens, they will have to vindicate by another suit, if they are so advised and if they find it necessary to do so. Mr. Ramachandra Ayyar, has quoted some cases to show that so long as this case is pending before us it is open to us to re-consider the decision already taken if we find that that decision is not correct to put matters right. It may be that the parties have not right to insist upon re-opening questions that had been decided before calling for a finding but I am clearly of opinion that it is open to the Court to do so if it thinks fit and it cannot be said to act without jurisdiction if it goes back upon the position taken by it previously so long as the case is not out of its hands. It is not necessary however to decide this point, for the point that has now been taken by Mr. Ramachandra Ayyer we have held is not open to him on the frame of the suit. We must, therefore, accept the finding of the District Judge, as against his finding nothing has been urged, and we hold that the customary right is not proved. In this view the appeal must be allowed and the suit dismissed with costs.

V. N. V. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 63 AND 64 OF 1924.
August 19, 1925.
Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Duval.
IN APPEAL NO. 63 OF 1924.
KHORSHEDENNESSA KHATOON—DEFENDANT NO. 3—APPELLANT
IN APPEAL NO. 64 OF 1924.
MAHAMMAD BAZLAR RAHAMAN CHOWDHURY—DEFENDANT NO. 1—APPELLANT
versus
HAKIKANNESSA BANOO—PLAINTIFF—RESPONDENT IN BOTH.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Notice, service of— Pardanashin *lady—Service on son, validity of.*

Service of notice on the son of a *pardanashin* lady living in the same house with her is valid and proper service. [p. 229, col. 1.]

Appeals against the orders of the Subordinate Judge, Fourth Court, Mymensingh, dated the 30th of June 1923.

Mr. *Sasankajiban Roy* and Babu *Bhupendra Chandra Guho*, for the Appellant.

Babu *Birendra Kumar De*, for the Respondent.

JUDGMENT.

Greaves, J.—These two appeals are by defendants Nos. 3 and 1 respectively in a partition suit for setting aside an *ex parte* decree that had been passed for partition of certain properties. Defendant No. 3 is a *pardanashin* lady and her case is that she was never served. Defendant No. 1 who is appellant in Appeal No. 64 of 1924 says that he was unable to present his case to the Court owing to the negligence or collusion of one Bhola Nath an employer of his who had been entrusted by him with the conduct of the case. So far as the lady is concerned, defendant No. 1, the appellant in Appeal No. 63, it appears that the service was effected by serving summons on her third son who lives in the same house as the lady. Under the circumstances it seems to me that it must be taken to be a proper service on this lady and we have not the slightest doubt that she knew all about the suit and that she had ample opportunity of giving due and proper instructions with regard to the conduct of the case.

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(1) 86 Ind. Cas 236; 48 M. L. J. 23; A I. R. 1925 P. C. 36; 21 L. W. 239; 6 P. L. T. 115; 23 A. L. J. 179; 27 Bom. L. R. 170; 2 O. W. N. 53; L. R. 6. A. P. O.) 34; 29 C. W. N. 486; 47 A. 151; 3 Pat. L. R. 300 (P. C.).

The result is that Appeal No. 63 of 1924 is dismissed with costs—hearing-fee, one gold *mohur*.

Defendant No. 1 filed a written statement in the suit but he was not present when the *ex parte* decree was passed on the 13th December 1923. So far as I can make out from the evidence which is very incomplete Bhola Nath on or about the 28th November when the suit was adjourned until the 13th December was present at the place of hearing and according to his story he left a rupee with some person to be handed over to the Pleader Girindra Mohan Datta in order that he might apply on the 13th December for further adjournment of the suit. Apparently, the fee never reached the Pleader Girindra and no application for adjournment was made and the suit was decreed *ex parte*. Now, no doubt, if there had been no negligence on the part of defendant No. 1 he should be allowed, under the circumstances, an opportunity of having the case re-heard. But I am not at all satisfied that he can be acquitted of negligence in the matter. Bhola Nath returned from Mymensingh some time after the 28th November and surely, it was the duty of defendant No. 1 to enquire in a suit of this nature as to what had happened at Mymensingh on the 28th November. If he failed to enquire he was, in my opinion, guilty of negligence and the Court should not assist him and if he did enquire then he knew that the suit had been adjourned until the 13th December and yet in spite of this Bhola Nath and he were both content to rely the fact that he had left the fee behind with instruction that the Pleader was to apply for adjournment on the 13th December. We think that they had no right to assume that the Court would grant an adjournment on the 13th December and that it was their duty to have made proper and adequate provision for the carrying on of the case if, as turned out, the adjournment was refused on the 13th December.

In the circumstances, holding as we do that the appellant was negligent in the case we do not think that we should be justified in setting aside the *ex parte* decree which has been passed. Parties should learn that they cannot have as of right an adjournment or if an adjournment is refused and the case proceeds that they cannot have the case restored as of right and it will be better for the conduct of litigation as well as for the community as a whole when this is realized.

The result is that this appeal is also dismissed with costs—hearing-fee, one gold *mohur*.

Duval, J.—I agree.

R. L. *Appeal dismissed.*

PATNA HIGH COURT.

CIVIL REVISION NO. 477 OF 1925.

February 18, 1926.

Present :—Mr. Justice Adami.

Syed FARIDUDDIN AHMED—PETITIONER

versus

Syed ABDUL WAHAB—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 4 (1) (a)—Examination of plaintiff on commission—Applicant for removal of guardianship, examination on commission of.

Ordinarily a plaintiff, having had a choice of *forum*, is not entitled to claim to be examined on commission outside the jurisdiction of the Court in which the suit is pending. But where the plaintiff has had in effect no choice of *forum*, he can, in a fit case, be permitted to examine himself on commission. [p. 230, col. 1.]

Muhammad Akbar Ali Khan v. *Herbert Francis*, 84 Ind. Cas. 993; 3 Pat. 863; (1925) Pat. 326; A. I. R. 1925 Pat. 125; 6 P. L. T. 520, *Sarat Kumar Ray* v. *Ram Chandra Chatterjee*, 68 Ind. Cas. 9; 35 C. L. J. 78; A. I. R. 1922 Cal. 42, *Nadin* v. *Bassett*, (1884) 25 Ch. D. 21; 53 L. J. Ch. 253; 49 L. T. 454; 32 W. R. 70 and *Ross* v. *Woodford*, (1894) 1 Ch. 38; 63 L. J. Ch. 191; 8 R. 20; 70 L. T. 22; 42 W. R. 188, referred to.

Application for revision of an order of the District Judge, Patna, dated the 30th November 1925.

Messrs. *K. Hussain*, *Syed Ali Khan* and *S. M. Wasi*, for the Petitioner.

Messrs. *W. H. Akbari* and *Ghulam Mohammad*, for the Opposite Party.

JUDGMENT.—This application is directed against an order of the District Judge of Patna, directing a commission to issue for the examination of the opposite party and his wife at Dacca. The opposite party is a Reader in Arabic at the Dacca University; his wife is a girl aged about 19 who is the daughter of the petitioner. The petitioner had been appointed the certificated guardian of the girl and her property before her marriage to the opposite party. Last June when the opposite party was living in Patna, where his wife's property is situated, he made an application for the removal of the petitioner from the guardianship and for the appointment of himself in his place. The girl was then residing with her father. The wife was enceinte, and the opposite party, who had got the appointment of Reader in the Dacca University, took away his wife from her father's care to Dacca, and since then the opposite party and his wife have been residing in Dacca. In October or November last, when the case came on before the District Judge, the opposite party applied to be allowed to be examined on commission in Dacca, and, after hearing the objection of the petitioner, the District Judge ordered the commission to issue for the examination both of the opposite party and of his wife. The ground given by the opposite party for the issue of such commission was that his wife was likely to be giving birth to a child in the near future and that she would not be able to leave Dacca, nor would he himself be able to leave her in that condition; also as Reader in Arabic at the University, it would be difficult, if not impossible, for him to leave his duty.

The grounds taken before this Court are that, though a commission may be issued for the examination of a defendant or witnesses, it is irregular to grant such a commission in the case of the plaintiff who has had the choice of *forum* and must abide by his choice. It is also urged that it will cause great harassment to the petitioner if he has to go to Dacca, and also, if the girl is under the charge of her husband at the time the examination is conducted on commission, it is likely that the opposite party will be able to have influence with her.

With regard to the argument that in the case of a plaintiff, a commission should not issue outside the jurisdiction, the learned Advocate has relied on the case of *Muhammad Akbar Ali Khan* v. *Herbert Francis* (1). There the plaintiff, residing in London, had instituted a suit against the defendant, residing in Patna, in the Patna Court, and applied for his examination on commission in London. Das, J., after reference to the several cases, held that the plaintiff, having had the choice of *forum* was not entitled to claim to be examined on commission outside the jurisdiction. The cases of *Sarat Kumar Ray* v. *Ram Chandra Chatterjee* (2), *Nadin* v. *Bassett* (3) and *Ross* v. *Woodford* (4) were relied on. The general ground on which an application to examine a plaintiff on commission is refused is that the plaintiff had had his choice of *forum* and, therefore, should not be allowed to ask for his examination elsewhere than in the Court in which he has instituted his suit.

In the present case the opposite party had no choice of *forum*; he himself was residing in Patna and so were his wife and the petitioner and his wife's property was situate also in Patna. It was only because he received the appointment of Reader in Arabic at the Dacca University that he had to go to Dacca.

Under the circumstances of this case, I think that the order of the District Judge should be upheld. However, the issue of a commission to Dacca will cause the petitioner expense and trouble and I think it should be directed that the costs of the commission to the petitioner should be deposited by the opposite party before the commission issues, and I would direct accordingly. Also if it can be managed, the learned District Judge should direct that the examination of the wife of the opposite party should be conducted in the presence of an officer of the Court at Dacca elsewhere than in the opposite party's house.

Subject to these modifications, the application is rejected. Hearing fee two gold *mohurs*.

N. H. *Application rejected.*

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(1) 84 Ind. Cas. 993; 3 Pat. 863; (1925) Pat. 26; A. I. R. 1925 Pat. 125; 6 P. L. T. 520.

(2) 68 Ind. Cas. 9; 35 C. L. J. 78; A. I. R. 1922 Cal 42.

(3) (1884) 25 Ch. D. 21; 53 L. J. Ch. 253; 49 L. T. 454; 32 W. R. 70.

(4) (1894) 1 Ch. 38; 63 L. J. Ch. 191; 8 R. 20; 70 L. T. 22; 42 W. R. 188.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 274 OF 1925.

December 14, 1925.

Present:—Mr. Justice Cuming and
Mr. Justice B. B. Ghose.

BHUBAN MOHAN BASAK AND OTHERS
—PLAINTIFFS—APPELLANTS
versus
THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE DACCA MUNICIPALITY—DEFENDANT—RESPONDENT.

Bengal Municipal Act (III B. C. of 1884), ss. 102, 103, 113—Re-valuation of holdings without fresh determination of percentage rate—Legality—Privy and water taxes—Liability—Remedy of person aggrieved—Civil Procedure Code (Act V of 1908), s. 96—Second appeal—Meaning of word—Finding of fact.

Section 102 of the Bengal Municipal Act provides that once a percentage has been fixed it shall remain in force until rescinded or until the Commissioners at a meeting determine some other percentage at which the rate will be levied from the next year. There is no provision in the Act which provides that every time there is a fresh valuation there must be a formal meeting to fix the percentage even though the Commissioners intend the same percentage to continue. [p. 232, col. 2.[

In some cases it is the owners and in others it is the occupier that is liable for privy and water taxes. A person who disputes his liability to be assessed has his remedy by way of an application to the Commissioners under s. 113 of the Act and until he has exhausted the remedies provided by the Act he cannot invoke the assistance of the Civil Courts. [p 233, col. 1.]

The finding as to the meaning of a word is a finding of fact and cannot be disturbed in second appeal. [*ibid.*]

Appeal against a decree of the District Judge, Dacca, dated the 24th of November 1924, confirming that of the Additional Munsif of that place, dated the 26th of May 1924.

Sir *Benode Chandra Mitter* and Babu *Bhupendra Chandra Guha*, for the Appellants.

Mr. *B. L. Mitter* (Advocate General) and Babu *Prokas Chandra Pakrasi*, for the Respondent.

JUDGMENT.

Cuming, J.—This appeal arises out of a suit brought by one Bhuban Mohan Basak on his own behalf and on behalf of the rate-payers of Dacca against the Chairman of the Municipal Commissioners of Dacca for a declaration that the last assessment made by the Dacca Municipality is null and void, illegal and *ultra vires* and that there is no Municipal tax payable for the years 1923-24. He also prayed for a permanent injunction to restrain the Municipality from realising the taxes. His case was briefly as follows:—

On the 28th June 1922 the Commissioners passed a resolution that the general revision of the assessment of holdings be undertaken without delay as it was overdue. In pursuance of this resolution an Assessor was appointed to value the holdings and also an Assistant Assessor. Valuation was duly made and accepted and the new assessment was made. There was no change in the percentage charged on the valuation, which remained as it was before. This assessment was brought into force for the years 1923-24. The plaintiff complained that the assessment was illegal for the following reasons:—

(1) That the resolution of 28th June was illegally passed, the objection, if I understand it rightly, being that an amendment and substantive motion were put at the same time.

(2) That no percentage was fixed before the assessment and that under the resolution the Commissioners cannot assess any tax without first fixing the percentage.

(3) That Government and Railway buildings have not been properly assessed and many holdings have not been assessed at all.

(4) The Assistant Assessor had not power to assess any buildings.

(5) The privy and water tax being payable by the occupiers, assessment of the owners to pay it is illegal.

(6) That assessment of privy and water tax of houses let when the occupier was living elsewhere was illegal.

(7) That the assessment made being on a different basis is illegal.

(8) That as the money realised by the assessment exceeded the expenditure by Rs. 1,04,000, it was illegal.

A number of issues were framed.

The Trial Court for reasons which it is unnecessary to specify found against the plaintiff and dismissed his suit.

The plaintiff appealed to the District Court where he was equally unsuccessful. He now appeals to this Court.

His grounds of appeal number some 20 but the following points only have been urged:—

(1) The meeting of the 22nd June 1922 resolved that there should be a new assessment and this means that there should be both valuation and fixing of the actual percentage.

(2) The percentage at which taxes are to be levied must be fixed before the valuation or rating list is prepared and that

whenever there is a fresh valuation there must be a fresh fixing of percentage.

(3) That it is illegal to assess the water and privy tax on owners.

(1) The whole of the argument here centered round what did the Commissioners mean when in their resolution they resolved that there should be a fresh assessment. Did they mean both valuation and fixing of the percentage or did they mean only a valuation of holdings?

Sir Benode Mitter for the appellants contends they meant both valuation and percentage and that as they have not fixed the percentage the assessment is illegal. The learned Advocate-General contends that "assessment" was used loosely by the Commissioners to mean "valuation." It seems quite clear to me that what the Commissioners resolved to do at their meeting and what they meant in their resolution by the expression "assessment" is a question of fact. The lower Court of Appeal has found that by the expression "assessment" they meant a valuation of the holdings. In second appeal we cannot go behind this finding of fact unless it can be argued that it is based on no evidence. There is, however, no suggestion in any of the 20 grounds of appeal that this finding of fact was come to without any evidence and in these circumstances the appellant cannot be allowed to argue that it was not. It cannot be said that the determination of the point depends on the construction of any document. The document on the construction of which it is contended that the point depends is merely the record of the proceedings of the Commissioners and what we are concerned with is what the Commissioners mean by their resolution. It is not suggested that the record of the proceedings is inaccurate or that it does not represent what the Commissioners resolved. This disposes of the appellant's first contention.

(2) The decision on the second point requires the consideration of certain sections of the Municipal Act, *viz.*, s. 96, s. 97, 97-A, s. 102 and s. 103. Sir Benode Mitter contends that the Commissioners have not complied with s. 103 of the Act and hence their action is illegal.

Section 103 runs as follows:—

"As soon as possible after the percentage at which the rate is to be levied for the next year shall have been determined under the last preceding section, the Commissioners shall cause to be prepared a valuation and rating list, which shall contain the following particulars—

(*f*) amount of rate payable for the year;

(*g*) amount of quarterly instalment."

Section 102 which is referred to in this section provides that at a meeting to be held before the close of the year next preceding the year to which the rate will apply the Commissioners shall determine the percentage on the valuation of holdings at which the rate shall be levied and the percentage so fixed shall remain in force until the order of the Commissioners determining such percentage shall be rescinded and until the Commissioners at a meeting shall determine some other percentage. Sir Benode Mitter argues that if s. 102 and s. 103 are read together it is clear that the valuation and rating list can only be prepared shortly after a meeting has been held to fix the percentage and that as no such meeting was held after the valuation was made the assessment was illegal. I do not think that this is necessarily the interpretation to be placed on these sections. Section 102 provides that once a percentage has been fixed it shall ramain in force until rescinded or until the Commissioners at a meeting determine some other percenrage at which the rate will be levied from the next year. The reasonable interpretation to be put on this section then is that the rate fixed continues unchanged and is to be considered as the rate for the year until altered. It might be said that by implication the rate is to be considered as fixed each year at the same rate until changed and is although there is no formal meeting to do so. The Commissioners by holding no meeting to change it by implication fixed the rate at the old rate. There is no provision in the Act which provides that every time there is a fresh valuation there must be a formal meeting to fix the percentage even though the Commissioners intend the same percentage to continue.

It no doubt might be argued that the Commissioners should after they have made a valuation take into consideration the percentage rate and consider how much money they require and, therefore, what the rate should be No doubt if the Municipality was properly managed, as a business concern should be, this would be done, but the fact that it has not been done does not, I think, render the assessment invalid.

I do not think reading the Act as a whole that it is required that whenever a fresh valuation is made the Commissioners must hold a meeting to fix the percentage. I think it is open to them by not holding any meeting to levey the rate at the old rate of percentage on the new valuation.

(3) The last point to be dealt with is the privy and water tax.

It seems to be the case of the appellant that the privy and water tax is payable by the occupier and it is illegal to assess owners to privy and water tax. Section 279 (3) provides that the water rate shall be paid by the occupier and s. 281 provides that such occupier may recover ¼ share from the owner.

Section 282 provides that when the house is unoccupied the owner will pay ¼ rate. Section 312 provides that if the house is occupied by more than one tenant severally it shall be lawful for the Commissioners to recover the rate from the owner. With regard to privy tax the provisions are more or less similar. It is thus clear that in some circumstances the owner and in other circumstances the occupier is liable. There is, therefore, nothing illegal in assessing an owner to pay privy and water tax. It may be, however, that the owner is wrongly assessed in some cases while in other circumstances the assessment is legal, for it cannot be said that in no circumstances is the owner liable. The Municipality may owing to ignorance of the facts assess the owner where they ought to assess the occupier and *vice versa.* The aggrieved person has his remedy under s. 113 which provides that a person who disputes his liability to be assessed may apply to the Commissioners under s. 113. Clearly this was the remedy open to the plaintiff of which he did not avail himself.

Until the aggrieved person has exhausted the remedies which the Act provides he cannot invoke the assistance of the Civil Courts. This point is also decided against the appellants.

The result is that the appeal fails and is dismissed with costs.

B. B. Ghose, J.—I agree. The first point argued in the appeal that the resolution of 28th June 1922 of the Commissioners was not given effect to is based on the ground that there has not been revision of "assessment" of holdings but only a valuation. This depends upon the meaning of the word "assessment" as used in the resolution. The Court of Appeal below has held that the word is not necessarily of wider import than the word "valuation." It is argued that this is a question of construction and may be raised in second appeal. The expression "construction" as applied to a document includes two things: first, the meaning of the words; and secondly, the effect which is to be given to them. It is well-settled that the meaning of words is a question of fact in all cases. The effect of the words is a question of law. This distinction between the meaning and the legal effect of expressions used must be always borne in mind. This question cannot, therefore, be raised in second appeal. Moreover as the learned District Judge points out the word "assessor" and "assessment" have been rather loosely used in the Municipal Act itself.

The second and most important question is whether the valuation and rating list prepared under s. 103 is null and void, as the procedure prescribed in s. 102 of the Bengal Municipal Act has not been followed. Section 102 provides that the Commissioners at a meeting, before the close of the next preceding year to which the rate will apply, shall determine the percentage on the valuation of the holdings at which the rate shall be levied, and the percentage so fixed shall remain in force until that order is rescinded or some other percentage is determined. This seems to imply that when once the percentage is determined that will continue in force for each succeeding year so long as it is not altered in the manner provided in the section. It follows that if there is no intention to rescind or alter the percentage which has been once fixed it is not necessary that the Commissioners should at a meeting determine that the same percentage on the valuation should remain in force. Stress, however, is laid upon the opening words of s. 103 by Sir Benode which runs as follows:—"As soon as possible after the percentage at which the rate is to be levied for the next year shall have been determined under the last preceding section............" and it is contended that this provision shows that a valuation and rating list cannot be prepared unless the percentage is determined under s. 102 after a new valuation and Sir Benode further argues that it is necessary that this should be done in order to ascertain the gross amount of taxes to be levied after a re-valuation. It appears to be quite reasonable and proper that the percentage should be determined after a new valuation. But the question is whether the omission to do so renders the preparation of the valuation and rating list null and void. It seems to me upon a consideration of the relevant sections in the Act that the passage relied on is only for the purpose of instruction and guidance of the Commissioners in order to enable them to give notice in due time of the rates to be levied for the next year, or in other words, as directory only. No time is fixed for doing the act, and no imperative language is used that there should be a fresh determination of the percentage on a re-valuation, and there is the provision that if there is no fresh determination the percentage previously fixed shall remain in force. The omission to fix a percentage after the re-valuation did not operate to the prejudice of any person, as the old rate continues. Under these circumstances, in my opinion, the omission to hold a meeting does not carry with it the consequence of nullification of the preparation of the list under s. 103.

With regard to the third point relating to the water and latrine tax, the plaintiffs are not, in my opinion, entitled to maintain the suit. It has been found that these plaintiffs are liable to pay the rates. They are not persons in the same interest, as provided in O. I, r. 8 of the C. P. C., with persons who might have been illegally rated, if there are any such. If the rating on the plaintiffs is excessive that is not a matter for the Civil Court to revise. The appeal should, therefore, be dismissed with costs.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 174 OF 1925.
February 2, 1926.
Present:—Mr. Justice Jai Lal.
Rai Sahib ROOP NARAIN AND ANOTHER —CREDITORS—PETITIONERS
versus
MESSRS. KING KING & Co.—
DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 37, 43—Insolvent's failure to apply for discharge—Annulment of adjudication—Protection of creditors, provision as to.

A Court has no option but to annul adjudication where an insolvent fails to apply for an order of discharge within the time specified by the Court. But with a view to protect the creditors the Court should pass an order under s. 37 of the Provincial Insolvency Act vesting property of the debtor in a person appointed by it.

Civil revision against an order of the District Judge, Delhi, dated the 12th November 1924, reversing that of the Judge, Insolvency Court, Delhi, dated the 19th June 1924.

Lala *Sardha Ram,* R. S., for the Petitioners.

Lala *Moti Sagar*, R. B., for the Respondents.

JUDGMENT.—One Din Dial was adjudicated an insolvent and a date was fixed for him to apply for his discharge. He failed to present an application for his discharge on the date fixed. The view of the Courts below appears to be that this was due to the fact that the insolvent had been held to be guilty of fraudulent preference in respect of some creditors. Such transactions were cancelled and the amounts paid to the creditors were refunded to the Official Receiver. The insolvent, therefore, took advantage of s. 43 which makes it incumbent on the Insolvency Court to annul his adjudication. The insolvent thought that this would enable him to receive the assets in the hands of the Official Receiver and to hand them over to those creditors to whom he had given fraudulent preference before. On an application made by some of the creditors the adjudication order was annulled on the 12th June 1924. This order was cancelled by the District Judge on appeal by other creditors who represented that the annulment of the adjudication would cause them serious loss in the manner already mentioned.

This is a petition by some of the creditors who claim that the order of annulment should be restored as the provisions of s. 43 are mandatory and the Insolvency Court had no alternative but to annul the adjudication on the insolvent's failure to apply for an order of discharge within the period specified by the Court. Messrs. King King & Co., who are represented by Mr. Moti Sagar before me claim to be the biggest creditors and they oppose this petition. Both parties are agreed that their object is to prevent the insolvent from getting possession of the assets which were originally in the hands of the Official Receiver. It appears to me that the order of the learned

District Judge cannot be sustained. The insolvent having failed to apply for an order of discharge the Insolvency Court had no option but to annul his adjudication. But in order to protect the creditors under s. 37 of the Provincial Insolvency Act the proper order of the Court in this case should have been that the property of the debtor shall vest in a person appointed by the Court. This would have obviated the necessity of any further proceedings before the District Judge. I accept this revision, set aside the order of the District Judge and restore that of the Insolvency Court annulling the adjudication of the insolvent Din Dial, and add a further direction that the property of the insolvent shall vest in Lala Basheshar Nath Goela under the provisions of s. 37 of the Provincial Insolvency Act. The parties will bear their own costs.

R. L. *Revision accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1271 OF 1923.

December 17, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerjee.

GANGA PROSAD CHOWDHURY—
DEFENDANT—APPELLANT
versus
KULADANANDA ROY AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata *between co-defendants—Necessary conditions*—Res judicata, *constructive—Limitation Act (IX of 1908), s. 10—Endowment in favour of deity—Adverse possession, how established.*

In order to constitute a decision *res judicata* between co-defendants three essential conditions must be fulfilled: (1) that there should be a conflict of interests between co-defendants, (2) that it should be necessary to decide on that conflict in order to give the plaintiff the relief appropriate to his suit, and (3) that the judgment should contain a decision on the question as between co-defendants. [p. 237, col. 2.]

[Case-law discussed.]

The tendency of Courts is to apply the doctrine of constructive *res judicata* as founded on *Explanation IV* to s. 11, C. P. C., within very narrow limits as between plaintiffs and defendants and there is scarcely any room for its application as between co-defendants. [p. 238, col. 1.]

For application of s. 10, Limitation Act, two conditions must combine, there must be a trustee with an express trust and an estate or interest vested in the trustee. Therefore, the section is inapplicable to the case of an endowment in favour of a deity. [p. 240, col. 2.]

No particular form of an expression is necessary to constitute adverse possession; it is always a question of *animus* which has to be gathered from all the circumstances. [p. 242, col. 2.]

Appeal against a decree of the District Judge, Burdwan, dated the 27th March 1923, reversing that of the Additional Subordinate Judge of that District, dated the 13th December 1920.

Mr. *Sarat Chandra Bose* (with him Babu *Rupendra Kumar Mitter*), for the Appellant.

Babu *Nagendra Nath Ghose* (with him Mr. *Jyotish Chandra Pal*), for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit in which the plaintiff asked for a declaration that a certain house situated in the town of Burdwan is a part of an estate of which he alleges he is now one of the trustees, and also for recovery of possession thereof.

The trust was created by one Annada Prosad Ghose by a deed which was called a Niyam-Nirbandhapatra in 1305. He died in the year 1308. Shortly after his death his daughter Katyani instituted a suit being No. 438 of 1901 wherein she prayed for a declaration that the deed executed by her father was void and inoperative and in the alternative she prayed for construction of the deed. In this suit she impleaded as defendant her step-mother Haribhabini, and the trustees named in the deed and also other persons in whose favour certain bequests had been made by the deed. The deed, it may be observed here, purported to dedicate certain properties to the family deity Sri Sri Iswar Sridhar Jieu and creates an endowment for the *sheba* of the said deity and for meeting the expenses for certain religious observances and the feeding of the guests connected with the worship of the said deity. Certain bequests were also made in favour of others. He appointed himself as trustee to act during his life; and, to act after his death as trustees, nine other persons were named. No provision was made in the deed as regards Haribhabini and she took no active part in the suit. Three of the trustees named in the deed, namely, Sarada Prosad Choudhury, Makhan Lal Choudhury and Kuladananda Roy as well as others with whom we are not concerned at this stage contested the suit. During the trial of the suit Katyani, the plaintiff, withdrew her case as to the validity of the deed. She pressed her case so far as the construction of the deed was concerned and the deed was construed. One of the clauses of the deed which dealt with the house which forms the subject-matter of the present suit was construed and it was held that Annada Prasad Ghose had made an absolute gift of it with the exception of its western room to Makhan Lal Chowdhury one of the trustees named in the deed. Similarly, all the other clauses of the deed were also construed. Subsequently Kulada Prasad and Sarada Prasad Choudhury, two of the aforesaid trustees, took out Letters of Administration in respect of the properties covered by the deed and administered the properties. The present suit has been instituted by Kulada Prasad Roy as *shebait* of Sri Sri Sridhar Jieu and as a trustee in respect of the trust properties left as aforesaid by Annada Prasad Ghose for ejecting the defendant-appellant, who is the son of Makhan Lal Choudhury, on a declaration that the house in question is the *debutter* property of the said deity. The suit has had a long and chequered career. The decision, which is now under appeal, has been in plaintiff's favour.

The questions which arise for our consideration, upon the arguments addressed to us, are four in number: 1st, whether the decision in Suit No. 438 of 1901 operates as *res judicata*; 2nd, what is the true construction of para. 21 of the deed; 3rd, whether the suit is barred by limitation; 4th, whether the defendant has acquired a title by adverse possession.

The contention of the appellant on the question of *res judicata* is two-fold: It is urged in the first place that the previous decision operates as *res judicata* as all the requirements for the application of that doctrine as between co-defendants are present in the case, and nextly, it is said that even if strictly speaking that doctrine cannot be applied, then the Court having construed the deed in the presence of all the parties interested, its conclusions are binding on them all on general principles. To this contention a preliminary objection is put forward on behalf of the plaintiff-respondent. The objection is to the effect that this contention is not entertainable at this stage.

It would be convenient, first of all, to dispose of the preliminary objection The suit was dismissed in the first instance by the Trial Court on the ground of *res judicata*. On appeal the District Judge reversed the decision and remanded the suit for determination of the other issues involved. Those issues were then decided by the Trial Court and the records together with the decision on those issues were sent back to the District Judge and then the appeal was finally decided by him. It is said that the appellant should have appealed against the order of remand which was founded upon a decision adverse to him on the question of *res judicata*, and that, not having done so, he is now precluded from challenging that decision in this appeal by reason of the provisions of s. 105, sub-s. (1) of the C. P. C. This preliminary objection must, however, be overruled as the order of remand on the face of it purports to have been one under O. XLI, r. 25 and it was expressly declared by the learned Judge to have been made by him under that rule upon a petition filed by the appellant with the object of finding out its true nature and effect.

In order to deal with the contention of *res judicata* upon the principle as embodied in s. 11 of the C. P. C., and when it is to be applied to parties who were in the position of defendants in the earlier suit, tests have from time to time been laid down by learned Judges, but these tests own their origin to a well-known rule which was expressed by Wigram, V. C., in *Cottingham* v. *Shrewsbury (Earl)* (1) in these words: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." The same rule was suggested by Jessel, M. R. in *Kevan* v. *Crawford* (2) when he said: "What right has a Court of Justice to investigate a claim by title paramount by one co-defendant against another? I am not aware of any. The answer is, if you wish to assert these claims you must assert them in a proper action..............Where a plaintiff obtains relief against one or more defendants, and there are subordinate questions either necessary to be gone into to work out that relief completely for the benefit of the plaintiff or necessary to adjust the rights of the defendants consequent on the relief so obtained by the plaintiff, the Court may, by enquiries in Chambers, work out the equities between the co-defendants. But there is no case produced in which any such enquiries were directed where the plaintiff's case wholly failed." It is contended on behalf of the respondents that the observations, which I have quoted above, go to indicate that it is only when some relief is granted to the plaintiff that the adjudication of a conflict as between co-defendants will operate as *res judicata* in a subsequent suit as between them. It will be seen, however, that the cases of *Cottingham* v. *Shrewsbury (Earl)* (1) and *Kevan* v. *Crawford* (2) were both instances where, when after the determination of questions which were necessary to be determined in order to give relief to the plaintiff and when the plaintiff was out of the way, as it were, it was sought to have certain matters gone into and adjudicated upon as between the defendants, it being alleged that the adjudication might be binding between the latter for the future as having finally adjusted their rights. This peculiar feature of the cases, therefore, necessitated those observations. They were not cases in which any question arose as to whether any previous decision operated as *res judicata* in respect to the cases themselves. To accept the respondent's contention in this respect would be to hold that a decision will be *res judicata* only if the suit ends in a particular way. Such a position is hardly tenable. On the other hand there are many reported decisions in which notwithstanding the dismissal of the plaintiff's suit, the decision has been held to operate as *res judicata* as between co-defendants: *e. g.*, *Venkayya* v. *Narasamma* (3), *Kandiyil Cheriya Chandu* v. *Zamorin of Calicut* (4) and *Yusuf Sahib* v. *Durgi* (5). The true rule was enunciated by West, J., in his judgment in the case of *Ramchandra Narayan* v. *Narayan Mahadev* (6) in these words : "There must be a conflict of interest amongst the defendants, and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group." This statement of the rule has been accepted as settled law in the generality of cases. *Madhavi* v. *Kelu* (7), *Ahmad Ali* v. *Najabat Khan* (8), *Chajju* v. *Umrao Singh* (9), *Balambhat* v. *Narayanbhat* (10), *Muhammad Kuni Rowthan* v. *Visvanathaiyar* (11) and *Magni Ram* v. *Mehdi Husain Khan* (12). The rule has been stated in some other decisions as requiring the fulfilment of three essential conditions : (1) that there should be a conflict of interest between co-defendants, (2) that it should be necessary to decide on that conflict in order to give to the plaintiff the relief appropriate to his suit, and (3) that the judgment should contain a decision on the question as between co-defendants. *Gurdeo Singh* v. *Chandrika Singh* (13) and *Jadav Chandra Sarkar* v. *Kailash Chandra Singh* (14). Courts are reluctant to apply the doctrine as between co-defendants unless clear indications appear of the presence of all the requisite conditions, and in the generality of cases where it has been applied, it has been applied with great caution [observations of the learned Judges in the case of *Jadav Chandra Sarkar* v. *Kailash Chandra Singh* (14)]. So chary are the Courts of applying this doctrine in the case of co-defendants that in some cases the Courts have enunciated the rule as limited to cases of active contest, *e. g.*, *Ramanuja Ayyangar* v. *Narayana Ayyangar* (15), *Kandiyil Cheriya Chandu* v. *Zamorin of Calicut* (4), *Ramaswamy Reddi* v. *Abhoy Chetty* (16), *Yusuf Sahib* v. *Durgi* (5), *Muhayadeen Alli Sahib* v. *Bacha Sahib* (17), *Nand Lal Pal* v. *Naresh Chandra Deb* (18), and *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (19).

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(1) (1843) 3 Hare. 627; 15 L. J. Ch. 441; 67 E. R. 530.

(2) (1877) 6 Ch. D. 29; 46 L. J. Ch. 729; 37 L. T. 322; 26 W. R. 49.

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(3) 11 M. 204; 4 Ind. Dec. (N. S.) 142.

(4) 29 M. 515.

(5) 30 M. 447; 17 M. L. J. 260; 2 M. L. T. 368.

(6) 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 142.

(7) 15 M. 264; 5 Ind. Dec. (N. S.) 535.

(8) 18 A. 65; A. W. N. (1895) 156; 8 Ind. Dec. (N. S.) 749.

(9) 22 A. 386; A. W. N. (1900) 120; 9 Ind. Dec. (N. S.) 1293.

(10) 25 B. 74; 2 Bom. L. R. 511.

(11) 26 M. 337; 12 M. L. J. 471.

(12) 31 C. 95; 8 C. W. N. 30.

(13) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.

(14) 34 Ind. Cas. 929; 21 C. W. N. 693 at p. 694; 25 C. L. J. 322.

(15) 18 M. 374; 6 Ind. Dec. (N. S.) 609.

(16) 11 Ind. Cas. 17; (1911) 2 M. W. N. 306; 11 M. L. T. 71.

(17) 49 Ind. Cas. 369; (1918) M. W. N. 580; 8 L. W. 473.

(18) 41 Ind. Cas. 468; 2 P. L. W. 108.

(19) 27 Ind. Cas. 954; 19 C. W. N. 1280; 21 C. L. J. 157.

Bearing these principles in mind, when we come to examine the facts of the present case we find that Makhan and Kuloda were arrayed as defendants in the suit of 1901. The validity of the deed was challenged by Katyani, and she also prayed for a construction of the deed on the ground that "if the deed was held to be operative there was a chance of her rights being injured and, therefore, it was necessary to determine what rights she has in her father's estate under the deed, and if the said deed be not construed, her rights and that of her heirs will not be settled." Makhan, Kulada and Sarada jointly filed a written statement in that suit presumably for the purpose of defeating the plaintiff's claim. The whole of the written statement deals with the validity of the deed and challenges Katyani's right to have it construed. It does not appear that they set up any claim, far less any conflicting claims, to the house which is now in suit. The deed was construed as it had to be for the purpose of finding out what the rights of Katyani and her heirs were. Under cl. 21, she was found to have no rights and it was held on a construction of the said clause that the house had been made an absolute gift of to Makhan and his heirs. In the decree that was drawn up it was only declared that the deed was construed. To apply the doctrine of *res judicata* to the case a contest will have to be presumed from the mere fact that Kulada might and ought to have contested the title of Makhan, that is to say, the doctrine of constructive *res judicata* founded upon *Explanation IV* to s. 11 of the Code will have to be invoked. The tendency of Courts is to apply this doctrine within very narrow limits even as between plaintiffs and defendants; and there is scarcely any room for its application as between co-defendants. At any rate, there is no authority that this doctrine may be applied as between them in a case where they made a joint defence to the plaintiff's suit. The plaintiff got some relief, which was said to be a "nominal" one in the judgment, but none under cl. 21 of the deed. The view of the Court as to the meaning of the clause was embodied in the judgment—but the course of the proceedings do not suggest that any conflict *inter se* as between Kulada and Makhan was decided, such as might give Kulada a right of appeal. One defendant may under certain circumstances prefer an appeal against another, although the plaintiff's suit has been wholly dismissed in respect of adverse findings in the judgment; but such an appeal is maintainable only when the adjudication has been upon a real conflict as between the co-defendants. In the present case no such conflict is discernible. There was a joint defence and the construction of the deed seems to have been made in order to find out the rights of the plaintiff and her heirs. It is difficult to see how Kulada could have appealed against the decree as against Makhan; and, if he could not then on the principle laid down in the Full Bench decision of this Court in the case of *Brojo Behari Mitter* v. *Kedar Nath Majumdar* (20), the previous decision cannot be held to operate as *res judicata.* This principle has been followed in a recent decision of this Court in the case of *Gopal Jew Thakur* v. *Radha Binode Mondal* (21).

It is also contended that on the principles which are applicable to suits for partition or for construction of a Will, the decision must be held to be binding as against all the parties to the suit. Suits for partition have always been regarded as standing on a different footing. A decree for partition made in a suit instituted by a member of a joint Hindu family is *res judicata* as between all co-sharers who are parties to the suit. *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (22). A decree for partition is a joint declaration of the rights of persons interested in the property of which partition is sought, and when properly drawn up, it is in favour of each share-holder or set of share-holders having a distinct share; *Pursotam Rao Tantia* v. *Radha Bai* (23), *Sheikh Khoorshed Hossein* v. *Numbee Fatima* (24), *Dost Muhammad Khan* v. *Said Begam* (25), *Assan* v. *Pathuma* 26) and *Ashidbai* v. *Abdulla Haji Mahomad* (27). In the last mentioned case, it will be observed, it was laid down that where a plaintiff brings a suit for partition and fails, it is not open to any of the defendants to claim that the partition suit should go on in order that the share of one or more of the defendants may be determined. The difference is probably attributable to the fact that a conflict between the plaintiff and each defendant or set of defendants involves necessarily, in most cases, a conflict between the defendants or sets of defendants *inter se*. Where in a prior suit for partition certain parties were arrayed as co-defendants and the decision in that suit did not decide any question of partition amongst them *inter se* that decision does not operate as *res judicata*. *Muhammad Ahmad* v. *Zahur Ahmed* (28).

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(20) 12 C. 580; 6 Ind. Dec. (N. S.) 394.

(21) 88 Ind. Cas. 616; 41 C. L. J. 396; A. I. R. 1925 Cal. 996.

(22) 24 Ind. Cas. 294; 41 I. A. 247; 19 C. W. N. 531; 27 M. L. J. 76; 1 L. W. 607; 16 M. L. T. 544; (1914) M. W. N. 948; 21 C. L. J. 23; 17 Bom. L. R. 1 (P. C.).

(23) 6 Ind. Cas. 692; 32 A. 469; 7 A. L. J. 451.

(24) 3 C. 551; 2 C. L. R. 187; 1 Ind. Dec. (N. S.) 935.

(25) 20 A. 81; A. W. N. (1897) 199; 9 Ind. Dec. (N. S.) 411.

(26) 22 M. 494; 9 M. L. J. 37; 8 Ind. Dec. (N. S.) 353.

(27) 31 B. 271; 8 Bom. L. R. 652.

Judgments, orders or decrees which come within s. 41 of the Evidence Act partake of a conclusive character for certain limited purposes on the footing of their being judgments *in rem*. Cases of construction of deeds which all the parties to a litigation submit before the Court in order to ascertain or adjust their respective rights fall within the principle that where the parties to a litigation submit a question for the decision of the Court and the Court gives a decision on being so invited that decision binds all the parties for the future.

Lastly, it is contended that even if the rule of *res judicata* as embodied in s. 11 of the Code does not apply the decision is conclusive on the general principles which relate to the conclusive character of judgments *inter partes*. Reliance has been placed as regards this branch of the contention upon certain cases which have now to be considered. The case of *George Henry Hook* v. *Administrator-General of Bengal* (29) is one of these cases. In this case it was pointd out by the Judicial Committee that the question of *res judicata* is not completely governed by s. 11 of the C. P. C., that the said section prevents the re-trial in a subsequent suit of an issue which was directly and substantially in issue in a previous suit and does not deal with cases where the same issues arise in the same suit but at a later stage of it. Their Lordships quoted with approval the pronouncement of the Board made in the case of *Ram Kirpal Shukul* v. *Rup Kuari* (30) as to the applicability of the generel principles which prevent a case being twice litigated. The next case relied upon is that of *Ramachandra Rao* v. *Ramachandra Rao* (31). In that case it was held that a decision of a competent Court even in proceedings under the Land Acquisition Act, will operate as *res judicata* and the same question cannot be re-opened in subsequent litigation as between the parties, it having been erroneously supposed in the Courts in India on a misapprehension as to the effect of the decision of the Judicial Committee in the case of *Rangoon Botatoung Company* v. *Collector of Rangoon* (32) that the judgment, since it arose out of proceedings under the Land Acquisition Act, could not operate as *res judicata*. The case of *Badar Bee* v. *Habib Merican Noordin* (33) cited in the judgment of the last mentioned case is also referred to. From the judgment of their Lordships in that case it is clear that there was a previous decision *inter partes* in which it had been held that the defendants were estopped from questioning a decree which made certain declaration but they did not appeal from that decision as the interest then at stake was of trifling value and afterwards attempted to question its correctness when the interest at stake was much larger. Their Lordships observed: "It is not competent for the Court in the case of the same question arising between the same parties to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time. Nor can the residuary legatees be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were not admissible there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute."

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(28) 67 Ind. Cas. 523; 44 A. 334: 20 A. L. J. 193; 4 U. P. L. R. (A.) 55; A. I. R. 1922 All. 19.

(29) 60 Ind. Cas. 631; 48 I. A. 187; 48 C. 499; 25 C. W. N. 915; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 14 L. W. 221 (P. C.).

(30) 11 I. A. 37; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.).

(31) 67 Ind. Cas. 408; 26 C. W. N. 713; 35 C. L. J. 545; 30 M. L. T. 154; 45 M. 320; 16 L. W. 1; (1922) M. W. N. 359; 20 A. L. J. 684; 43 M. L. J. 78; 24 Bom. L. R. 963; A. I. R. 1922 P. C. 80; 49 I. A. 129 (P. C.).

(32) 16 Ind. Cas. 188; 39 I. A. 197; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 40 C. 21; 6 L. B. R. 150 (P. C.).

(33) (1909) A. C. 615; 78 L. J. P. C. 161; 101 L. T. 161.

These cases do not in any way qualify the provisions of s. 11 of the C. P. C., so far as regards cases which come within the scope of that section, or affect the question of *res judicata*, when a previous decision of a suit is alleged to operate as a bar in a subsequent one as between persons who were co-defendants in the previous suit. As observed by the Judicial Committee in the case of *Gokul Mandar* v. *Pudmanund Singh* (34) the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction.

For the foregoing reasons I agree with the learned District Judge in holding that the decision in the suit of 1901 does not operate as a bar on the question of construction of cl. 21 of the deed upon which the title of the appellant rests.

I now proceed to consider the second question, namely, the construction of the clause. I have very carefully read the deed several times, especially as I have been unable to agree with the view taken of it by several Bengali Judicial Officers whose interpretation of the deed, which is in Bengali, is naturally entitled to every respect. The governing intention of the author of the deed is to create an endowment in favour of the deity Sri Sri Iswar Sridhar Jieu and the feeding of the guests connected therewith, the house is item No. 1 of Schedule *Uma* which along with the properties in the other schedules, namely, *ka* to *gha* are dedicated in cl. 1 for the worship of the said deity and the feeding of the guests connected therewith. Clause 21 opens with a clear and unambiguous statement making the said house together with the surrounding lands and trees, etc., as *debutter* property of the deity. To construe the remainder of the clause it will have to be seen whether there is anything therein which is necessarily repugnant to the intention so unequivocally expressed in the opening words. The wording of the whole deed is somewhat clumsy but the meaning of the clause does not appear to be ambiguous. The clause has been put into English by the learned Subordinate Judge and I adopt his translation with some slight variation. It would run thus:—

"My Burdwan lodging house (consisting of) a *dalan* (*pucca* building) with lands on all sides and trees, etc., is given to *debutter*. But so long as Sreeman Makhan Lal remains in Burdwan, after educating his son (and) on making him a trustee in his place will enjoy and remain in possession (of the same) *oirup uttaradhikarirupey* and he will remain on paying taxes and making necessary repairs. But the western room in which I put up remains mine. When the trees dry up Makhan Lal will be entitled to use them as fuel. There is a talk of purchasing the lands to the west and north of the *dalan* (*pucca* building) on payment of their price. In future Sriman Saroda, Rajendra or Jegesh will be entitled to build houses. But if any (of them) quarrels with each other, the trustees will disappoint them all. (As to) the house and garden given to Mukshoda by me, no one will have any concern therewith. He will enjoy and remain in possession thereof, *putrapoutradhikramey* (from generation to generation)." The learned Subordinate Judge has translated the words "*oirup uttaradhikarirupey*" as "in the same way as an heir" and in this, in my opinion, he was in error. In my opinion the words mean "as successor in the same way," that is to say, as trustee appointed in the place of Makhan Lal and possessing the same rights and privileges as Makhan Lal. It is noteworthy also that these properties find no place in any of the eight schedules at the end of the deed, namely, schedules 1 to 8 wherein bequests in favour of certain persons are specified. Other grounds have been given by learned District Judge in support of the view he has taken and I agree generally with his reasoning. In my opinion, beyond the right to enjoy the properties in the manner indicated and subject to the conditions prescribed, no other right, far less any absolute interest, was created in favour of Makhan.

The question of limitation has next to be considered. On this question the point to be considered is whether s. 10 of the Limitation Act applies to the case. For this section to apply it will have to be held that the property became vested in Makhan in trust for a specific purpose, that is to say, two conditions must combine; there must be a trustee with an express trust and an estate or interest vested in the trustee; in other words, the trust must have been created for some specific purpose and the property must have become vested in the trustee with the object of carrying that purpose into effect. In this connection, the true effect of the deed has to be construed.

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(34) 29 C. 707; 6 C. W. N. 825; 29 I. A. 196; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.).

The deed expressly dedicates the properties, including the house which is mentioned in schedule *uma* for the worship of Sri Sri Iswar Jieu and the feeding of the guests connected therewith. In the opening lines of para. 21, the house is expressly dedicated to the said deity. In para. 2 the trustees are appointed for the purpose of "protecting, managing and so forth" the properties so dedicated. In para. 1 Annada Prosad Ghose declares thus.—"To all those properties I shall have in future no right other than that of mere superintendence. All the aforesaid properties shall come under the management of the trustees named below from the moment I shall depart from this place for good." The different paragraphs of the deed lay down rules for the guidance of the trustees. In para. 15 it is repeated that the properties are dedicated for the worship of the deity and the feeding of guests. In several places in the deed the estate is called the *debutter* estate. The effect of the deed clearly, in my opinion, is to vest the properties in the deity and not in the trustees for a specific purpose. The mere use of the word "trustee" is of no consequence if what I have said is the real import of the deed The distinction between the two classes of cases has been pointed out in the decision of the Judicial Committee in the case of *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (35) where their Lordships after quoting the words of s. 10 of the Limitation Act observe thus: "The language of s. 10 gives the clue to the meaning and application of Art. 134. It clearly shows that the article refers to cases of specific trust, and relates to property 'conveyed in trust'. Neither under the Hindu Law nor in the Muhammadan system is any property 'conveyed' to a *shebait* or a *mutwalli*, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Muhammadan Law, the moment a *wakf* is created all rights of property pass out of the *waqif*, and vest in God Almighty. The curator, whether called *mutwalli* or *sajjadanishin*, or by any other name, is merely a manager. He is certainly not a 'trustee' as understood in the English system." After this pronouncement it is difficult to maintain that s. 10 has any application to the case of an endowment in which there is a dedication in favour of the deity, as I hold there has been in the present case. To my mind it is clear that the properties vested in the deity and the management, control and possession remained in the so-called "trustee." Certain passages from some of the later decisions of the Judicial Committee were cited before us on behalf of the respondent, namely, from the decision in the case of *Srinivasa Chariar* v. *Evalappa Mudaliar* (36), *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar* (37), *Nainapillai Marakayar* v. *Ramanathan Chettiar* (38) as apparently qualifying to some extent the pronouncement of the law as made in *Vidyavaruthi's case* (35). This matter, however, need not be discussed, for so far as regards the cardinal principle to which I have referred, the law must be taken to have been finally settled. For the contention that s. 10 applies to the case reliance was placed on behalf of the respondent upon the decision of the Judicial Committee in the case of *Srinivasa Moorthy* v. *Venkatavarada Iyengar* (39) but that was a case of an executor and trustee appointed under a Will. In the present case as I have already said the mere use of the word 'trustee,' signifies nothing. The Article which would apply in a case of this nature is either Art. 142 or Art. 144. For this proposition reference may be made to the decision of the Judicial Committee in the case of *Abdur Rahim* v. *Narayan Das Aurora* (40).

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(35) 65 Ind. Cas. 161; 48 I. A. 302 at p. 315; 26 C. W. N. 537; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 24 Bom. L R. 629; 20 A. L. J. 497, A. I. R. 1922 P. C. 123 (P. C).

(36) 68 Ind. Cas. 1; 27 C. W. N. 317; 31 M. L. T. 1; 16 L. W. 247; 45 M. 565; 43 M. L. J. 536; 24 Bom. L. R. 1214; A. I. R. 1922 P. C. 325; 36 C. L J. 524; 21 A. L. J. 250; 49 I. A 237 (P. C.).

(37) 74 Ind. Cas 492; 28 C. W. N. 493; 21 C. L. J. 730; A. I. R. 1923 P. C. 175; 45 M. L. J 588; 25 Bom. L. R. 1275; 46 M 751; 18 L. W. 903; (1924) M. W. N. 65; 2 Pat. L. R. 104; 33 M. L T. 285; 40 C. L. J. 20; 50 I. A. 295 (P. C.).

(38) 82 Ind. Cas. 226; 28 C. W. N. 809; 47 M. 337; A. I. R. 1924 P. C. 65; 19 L. W. 259; 22 A. L. J. 130; 53 M. L. T. 10. (1924) M. W. N 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 51 I. A. 83; L. R. 5 A. (P. C.) 33 (P. C.).

(39) 11 Ind. Cas. 447; 38 I. A. 129; 15 C. W. N. 741; 8 A. L. J. 774; 13 Bom. L. R. 520; (1911) 2 M. W. N. 375; 14 C. L. J. 64; 21 M. L. J. 669; 34 M. 257; 10 M. L. T. 263 (P. C.)

So long as Annoda was alive there is no question that the deity was in possession through him. On the death of Annoda, Makhan came to be in possession, but in view of his knowledge of the deed, it must be taken that he came into possession in the fiduciary character conferred on him by the deed, and the possession of the deity must be presumed to have continued unless it is proved that Makhan set up a title hostile to the deity. The onus is on Makhan to show that he did not come in in that character or if he did, that his possession subsequently became adverse to the *debutter* either by disclaimer or by open and clear assertion of a hostile title. It is, therefore, immaterial whether Art. 142 or Art. 144 applies, and the real question is whether Makhan's possession at any time became adverse and if so has this possession continued for a sufficient length of time to extinguish the plaintiff's title and create a title in Makhan and the appellant.

This brings us to a consideration of the last question which arises in this appeal, namely, whether the appellant and his father Makhan has been in adverse possession for a period of twelve years. On the facts found, Makhan contested the suit of Katyani, but did not do any other act as trustee under the deed. The learned District Judge remarks in his judgment that in the written statement Makhan claimed the house as his own, but in this he has been in error. Nor, on the other hand, was the learned District Judge, in my opinion, right in treating the filing of the written statement in Katyani's suit as acceptance of the trusteeship. No doubt an executor trustee by proving the Will is deemed to have accepted the trusts of the Will; *Mucklow* v. *Fuller* (41). But the filing of a written statement, such as it was in the present case, asserting the validity of the deed and opposing its construction when its validity was challenged by Katyani, in my judgment, does not go so far. At any rate it was not inconsistent with Makhan having accepted the position of a "trustee" not in respect of all the properties included in the deed but only in respect of such of them which were found by the Court at that time to have been dedicated to the deity. On the question of adverse possession the learned Subordinate Judge held that Makhan through his Pleaders in the suit of 1901, must have set up a hostile title to the property, and that as the plaintiff was one of the Pleaders such assertion must have been to the knowledge of the plaintiff.

Though there is no direct evidence of this assertion of a hostile title, yet all the circumstances point to such an assertion having been made on behalf of Makhan by his Pleader and that to the knowledge of the plaintiff who was also one of the Pleaders for Makhan in that suit. The decision of that suit as also of several suits which subsequently came on, all affirmed the view that Makhan was the absolute owner. It is not unreasonable to suppose,—in fact any assumption to the contrary would be most unreasonable,—that Makhan continued to possess the property with the knowledge of the plaintiff on the assertion of the title which was found in his favour in several successive suits. No particular form of expression of an intention is necessary to constitute adverse possession; it is always a question of *animus* which has to be gathered from all the circumstances. The character of the possession of Makhan since the time of those suits, till the time when the appellant has been in possession has remained the same, and the one conclusion that follows is what has been found by the learned Subordinate Judge, namely, that there has been adverse possession for over twelve years, and the plaintiff's title has been extinguished.

The appeal, therefore, must be allowed, the decree of the learned District Judge reversed, and that of the Subordinate Judge restored with costs in this Court as well as in the lower Appellate Court.

Suhrawardy, J.—In Katyani's suit she invited the Court to construe the deed of endowment for the purpose of finding if any term of it was invalid so that the property not validly dedicated would descend on her as the heir of the settlor. She did not ask the Court to construe the terms of the deed in order to determine the real nature and effect of the settlement. The construction in Katyani's suit upon cl 21 of the deed, therefore, is not, in my opinion,

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(40) 71 Ind. Cas. 646; 50 I. A. 84; 28 C. W. N. 121; A. I. R. 1923 P. C. 44; 17 L. W. 509; 32 M. L. T. 153; 44 M. L. J. 624; 25 Bom. L. R. 670; (1923) M. W. N. 441; 38 C. L. J. 242; 50 C. 329 (P. C.).

(41) (1821) Jac. 198; 37 E. R. 824; 23 R. R. 29.

res judicata as between plaintiff and Makhan.

I agree with my learned brother in the interpretation of the document and in holding that the plaintiff's suit is barred by limitation.

R. L. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1067 OF 1921.
March 11, 1926.
Present:—Mr. Justice Martineau and
Mr. Justice Dalip Singh.
THE FIRM SHAM SUNDER-MADAN
GOPAL—DEFENDANTS—APPELLANTS
versus
FATTEH CHAND AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 8—Abatement—Legal representatives brought on record subject to just exceptions—Nature of order.

Where a Judge of the Lahore High Court passes an order subject to just exceptions setting aside abatement and bringing legal representatives of a deceased party on the record, the order in accordance with the usual practice of the Court must be considered as conditional and not an absolute one.

First appeal from the decree of the Senior Subordinate Judge, Shahpur at Sargodha, dated the 31st January 1921.

Mr. *Dev Raj Sawhney*, Bakhshi *Sohan Lal*, R. B., and Bakhshi *Mehr Chand*, for the Appellants.

Lala *Badri Das*, R. B., and Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.— A preliminary objection has been raised in this appeal on the ground that the appeal has abated. It seems that the sole respondent Malik Gur Shahi died on the 15th of July 1925 and no application was made to bring the legal representatives on to the record until the 18th of November 1925. On the application made on that date a Judge of this Court passed an order subject to all just exceptions setting aside the abatement and bringing the legal representatives on to the record. The respondents have now put in an affidavit which shows that on the 8th of October 1925 the appellants either came to know of the date of the death of Malik Gur Sahai and who his legal representatives were or could with ordinary care have come to know both of the *factum* of death and who his legal representatives were. The appellants admit that on the 8th of October 1925 they came to know of the death, but in their affidavit they alleged that they had spent the time between the 8th October and 18th November 1925 in enquiring about the date of the death of Malik Gur Shahi and the names of his legal representatives. It appears that on the 8th October 1925 a suit which had been brought by Malik Gur Shahi against the present appellants in the Bahawalpur State on the basis of the decree now appealed against had been dismissed in default and his legal representatives had applied for restoration on the ground that Malik Gur Shahi had died and hence was absent unavoidably. It is thus clear that by inspecting the record in the Bahawalpur State the appellants could have come to know on the 8th of October or thereabout both the date of the death of Gur Shahi which is mentioned in that application and who were his legal representatives whose names are given in that application. The appellants have urged that the order bringing the legal representatives on to the record having been passed it must be taken that the abatement was set aside *ex parte* and, therefore, there can now be no hearing of this point. It is sufficient in reply to this contention to say that the order passed on the application of the 18th November 1925 was an order passed in accordance with the usual practice of this Court subject to all just exceptions and was conditional not an absolute order.

Secondly, the appellants contend that in the circumstances of the case the delay should be excused. But we are unable to see how the appellants can justify their long delay between the 8th October and 18th November 1925. The appellants seem to have awaited the appearance of one Kishen Chand in a suit in order to ascertain the names and addresses of the legal representatives of Malik Gur Shahi. There is nothing to show that this was the only way in which they could have obtained the requisite information. We hold, therefore, that the appeal has abated and no sufficient ground has been shown for setting aside the abatement, and it is dismissed with costs accordingly.

R. L. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES
NOS. 2268 AND 2269 OF 1923.
December 3, 1925.
Present:—Mr. Justice Cuming and
Mr. Justice B. B. Ghose.
RADHABINODE MONDAL—DEFENDANT
No. 12—APPELLANT
versus
NABA KISHORE MONDAL AND
OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Pleadings, amendment of, in second appeal—Co-owners—Suit for rent by one.

In the absence of a contract to the contrary, one of the joint owners cannot singly bring a suit for his share of rent. He may sue for the enforcement of the entire claim by making other co-owners as party defendants.

The High Court in second appeal will not allow an amendment of plaint where the objection as to incompetency of one of the joint owners to bring a suit for his share of rent was raised in both the Courts below and no amendment was applied for.

Appeals against the decrees of the Subordinate Judge, First Court, 24-Perganahs, dated the 3rd July 1923, modifying those of the Munsif, Third Court, Alipore, dated the 30th June 1921.

Mr. *Atul Chandra Gupta* (with him Babu *Radhika Ranjan Guha)*, for the Appellant.

Mr. *Sarat Chandra Mukerjee* (with him Babus *Indu Bhusan Mukerjee* and *Biraj Mohan Mazumdar)*, for the Respondents.

JUDGMENT.

Ghose, J.—These two appeals arise out of two different suits for rent brought by the plaintiff against a numberof defendants. Defendant No. 12 is the appellant before us; and the only point that requires consideration is whether the plaintiff's suits are maintainable as framed. The plaintiff claims 1/6th share of the rent alleging that that is due to him on account of the holdings.

The finding of the lower Appellate Court is that the co-sharers who own 2/3rd share in the estate were collecting their share of the rent separately for a considerable time, and the plaintiff and his brother were collecting their 1/3rd share jointly. But the plaintiff and his brother started collecting their shares separately from the beginning of 1321 *B. S.* The claim is for the rent of the years 1319 to 1322 *B. S.* Both the Courts below decreed the plaintiff's suit for the rent of his 6th share.

The principal ground urged on behalf of the appellant is that the plaintiff is not entitled to maintain his suit for his 1/6th share of the rent. It is urged that the fact that the plaintiff and his brother Gopi Kishore were collecting their 1/3rd share jointly might raise an inference that the defendants had agreed to pay the rent for the 1/3rd share belonging to the two brothers jointly and the rent for the other 2/3rd share to the other co-sharer, but there is nothing to show that the defendants ever consented to pay the plaintiff the rent for his 1/6th share separately. The question, therefore, is whether the plaintiff and his brother being joint proprietors with regard to the 1/3rd share of the rent payable to them the plaintiff is entitled to enforce his claim to the 1/6th share of the rent as against the defendants without their consent. Obviously he is not so entitled. The plaintiff alone may sue for the enforcement of the entire contract between him and his brother by making his brother a party defendant. But he is not entitled to enforce a part of the contract between himself and his brother on the one hand and the tenants on the other.

It is argued on behalf of the respondents that the defendants are not in any way prejudiced by this procedure and it is supported by the case of *Raj Narayan Mitra* v. *Ekadasi Bag* (1) which has been cited by the learned Subordinate Judge. It is difficult to say that the defendants would not be prejudiced by such a claim of the plaintiff, because the defendants would be liable to be harassed by two suits where one could only have been brought. Moreover if the defendants had succeeded in establishing in the present suit their other plea that they were not liable to pay any rent on account of the *jama* being non-exist and obtained a decree in their favour the brother of the plaintiff would not be bound by such a decree. The case of *Raj Narayan Mitra* v. *Ekadasi Bag* (1) was a different one in which the parties prayed for apportionment of rent by a decree of the Court in the presence of all the parties.

The result, therefore, is that it must be held that the suit as framed by the plaintiff in which he does not show under what circumstances he is entitled to enforce a portion of the claim as maintainable must be dismissed.

A belated prayer was made that the plaintiff should be allowed to amend his plaint. But we are not inclined to grant

(1) 27 C. 479; 4 C. W. N. 494; 1 Ind. Dec. (N. S.) 315.

that application in second appeal having regard to the fact that this objection had been taken by the defendants in the Trial Court as well as in the Court of Appeal below and no application for amendment of the plaint was made at all except at the close of the arguments here.

Another point was urged on behalf of the appellant that by a decree of this Court passed since the decision of the appeal in this case in the lower Appellate Court it has been declared that defendant No. 12 is not liable to pay any rent for the *jama.* We are unable to decide the question in the present appeal as the proper materials have not been placed before us with regard to the identity of the lands concerned in the declaratory decree.

On these grounds the appeals must be allowed and the suit dismissed with costs in all the Courts.

Cuming, J.—I agree.

R. L. *Appeals allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2934 OF 1922.
February 23, 1926.
Present:—Mr. Justice Broadway
and Mr. Justice Fforde.
THE ORIENT BANK OF INDIA,
LIMITED, IN LIQUIDATION—OBJECTOR
—APPELLANT
versus
THE SECRETARY OF STATE FOR
INDIA IN COUNCIL THROUGH THE
COLLECTOR, LAHORE—2ND PARTY—
RESPONDENT.

Land Acquisition Act (I of 1894), ss. 9 (2), 25 (2)—Formal statement of claim, putting in of—Uncertified copy of sale-deed, sending of—District Court, amount to be awarded by.

Section 9 (2) of the Land Acquisition Act requires all persons whose land is taken under the Act and who have any occasion to advance any specific claims to the land which require to be considered, to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests. Merely placing before the Collector an uncertified copy of the sale-deed of the land of which the land acquired formed a part does not satisfy the requirements of the section.

A District Court, when acting under s. 25 (2) of the Land Acquisition Act, cannot award a sum exceeding the amount awarded by the Collector.

Secretary of State for India v. *Gobind Lal Bysak,* 12 C. W. N. 263 and *Secretary of State for India* v. *Bishun Dutt,* 9 Ind. Cas. 423; 33 A. 376; 8 A. L. J. 115, followed.

First appeal from an order of the District Judge, Lahore, dated the 29th May 1922.

Lala *Hargopal,* for the Appellant.
The Government Advocate and Lala *Mehr Chand Mahajan,* for the Respondent.

JUDGMENT.—This appeal has arisen out of a reference under the Land Acquisition Act. Three *kanals,* 12 *marlas* out of a large area that had been acquired by Government belonged to the Orient Bank. An award was made on the 26th April 1920 under which the Orient Bank which was in liquidation was to receive Rs. 197-10 as compensation for the said 3 *kanals* 12 *marlas.* On the 14th June 1920, an application was made on behalf of the Orient Bank in liquidation by the joint liquidator to the Collector in which objection was taken to the amount awarded. It was admitted in this application that the Bank had not thought it necessary to put in any formal statement as required by s. 9 (2) of the Land Acquisition Act. In this application no specific amount of compensation was claimed, but it was asked that a reference should be made to the District Court relating to the value of the property acquired. This reference was made in due course and in it, it was stated that notice under s. 9 of Act I of 1894 had been served on the Orient Bank on the 14th August 1919. No appearance was made on behalf of the Bank before the Collector but an uncertified copy of a sale-deed in favour of the Orient Bank was sent to the Collector which was returned. It will be seen that up to the date of the reference no specific amount had been claimed as compensation for the land acquired. On the 8th November 1921 another application was filed on behalf of the Orient Bank by the joint liquidator to which was attached the original sale-deed. It was pointed out that the joint liquidator had on the 16th November 1920 made a statement in Court claiming Rs. 300 per *kanal* for the land acquired. On this application the learned District Judge recorded an order that the whole case had been finished and judgment was about to be delivered. For that reason nothing could be done on this application. The learned District Judge's award confirmed the Collector's award, that is to say, the award of Rs. 197-10 was maintained. Against this order the Orient Bank in liquidation has preferred this appeal through Mr. Hargopal.

On behalf of the respondent the learned Government Advocate has raised an objection founded on s. 9 (2) of the Land Acquisition Act which requires all persons whose land is taken under this Act and who have any occasion to advance any specific claims to the land which require to be considered, to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests. Admittedly no such claim was ever made to the Collector, that is to say, that no specific amount was ever stated by the Orient Bank in liquidation as being what they wanted for their land. Mr. Hargopal has urged that the fact that on behalf of the Orient Bank an uncertified copy of a sale-deed was placed before the Collector was a sufficient compliance with the provisions of this section. That sale deed purports to convey to the Orient Bank an area of 4 *kanals* and some *marlas* of land for Rs. 1, 200. The land acquired is 3 *kanals* 12 *marlas* out of the land referred to in the sale-deed. The mere fact that the Collector was notified that this land had formed a portion of a plot of land purchased by the Orient Bank Limited cannot, in my opinion, be regarded as the statement of the amount claimed by the Bank as compensation for the land acquired. It was not until the 16th November 1920 that Mr. Mukerji, the joint liquidator, stated that the amount he claimed was at the rate of Rs. 300 per *kanal*. The learned District Judge has not acted under the third subclause of s. 25, and, therefore, under the second clause of that section he could not award a sum exceeding the amount awarded by the Collector. This view is supported by *Secretary of State for India* v. *Gobind Lal Bysak* (1) and the *Secretary of State for India* v. *Bishun Dutt* (2). In these circumstances the appeal fails and I would dismiss it with costs.

R. L. *Appeal dismissed.*

(1) 12 C. W. N. 263.

(2) 9 Ind. Cas. 423; 33 A. 376; 8 A. L. J. 115.

ALLAHABAD HIGH COURT.

LETTERS-PATENT APPEAL No. 189 OF 1924.
March 8, 1926.
Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.
Rai SHIVA PRASAD—PLAINTIFF —APPELLANT
versus
Rai SHAMBHU PRASAD AND OTHERS —DEFENDANTS—RESPONDENTS.

U. P. Court of Wards Act (III of 1899), s. 58—Dispute between wards—Arbitrator, appointment of—Court, power of—Act, retrospective operation of.

The provisions of the Court of Wards Act of 1912 are applicable to an estate handed over to the Court of Wards under the Act of 1899, notwithstanding that the handing over was voluntary on the part of the ward. [p. 248, col. 1.]

Section 58 of the U. P. Court of Wards Act does not bind a Court of Wards to await an agreement between the persons it has appointed to represent the respective wards, between whom a dispute arises, as to an arbitratar to decide the dispute. It can nominate an arbitrator and require the representatives to submit the dispute to him. [p. 247, col. 1; p. 248, col. 2.]

Letters Patent Appeal against a judgment of Mr. Justice Mukerji, dated the 8th of December 1924.

Mr. *Kailas Nath Katju*, for the Appellant.

Mr. *Narain Prasad Asthana*, for the Respondents.

JUDGMENT.

Mears, C. J.—This is the appeal of Rai Shiva Prasad against the judgment of a learned Single Judge of this Court, whereby in effect he dismissed the plaintiff's claim for ejectment against a tenant and incidentally, and what is of more practical importance, declared certain acts of the Court of Wards to be *ultra vires*.

On the 17th of September 1909 Shiva Prasad and Shambhu Prasad, brothers, of full age, on their own application had their estate put under the superintendence of the Court of Wards. On that date the Act of 1899 was in existence. By 1919 presumably the estate had been cleared of its embarrassments, and the time was arriving when the Court of Wards wished to be free of this superintendence, and on the 18th of December 1919 there was an agreement executed by the Court of Wards and by a lady named Gopi Kunwar, who was the mother of the plaintiff and defendant. The Court of Wards were of opinion that there should be a partition of the estate before it passed out of their control, and that gave rise to a question as to the position of the lady *Musammat* Gopi Kunwar. It transpired that she was willing on the partition to have maintenance instead of any share in the estate of her late husband By the agreement of the 18th of December 1919 the lady expressed herself satisfied with the appointment of Mr. Lalit Mohan Banerji as arbitrator, and shortly before that date Mr. Wallach and Dr. Sen had been appointed the representatives of Shiva Prasad under the provisions of s. 58 of the Court of Wards Act of the United Provinces (IV of 1912). For the purposes of this case we assume that with regard to the appointment of Mr. L. M. Banerji there was no discussion, no agreement between the parties' representatives, Mr. Wallach and Dr. Sen. The procedure adopted by the Court of Wards in the appointment of Mr. Lalit Mohan Banerji was based upon the view taken by the Court of Wards that just as they had an undoubted right to appoint a representative on behalf of each such ward without the ward being in a position to raise any questien as to the representative, so equally they had a right to appoint any person as arbitrator and in the words of s. 58 to "require the said representatives to submit the question or dispute to the arbitration of such person." That is the position for which the plaintiff contends today, asserting that what the Board did shortly prior to and on the 18th of December 1919, was done entirely within the powers of the Court of Wards, and was in every way regular and proper. The question of the propriety of the acts of the Court of Wards came up in rather a curious manner. There is no evidence to suggest that Shambhu Prasad or his representative Dr. Sen, ever raised any question that the appointment of Mr. Lalit Mohan Banerji should in the first instance have emanated from Mr. Wallach and Dr. Sen. The arbitration was held, the matter was debated before Mr. Lalit Mohan Banerji and he on the 31st of January 1920 gave an award. We are not concerned with the details of that award other than the question of four shops in Benares. These together with other immoveable property were allotted to the plaintiff as his share, and the plaintiff served notices upon four tenants that the shops had become his by virtue of the award, and that henceforth rent was to be paid to him. Rent in fact was paid in respect of these four shops down to the 31st of January 1921, and then it appeared that Shambhu Prasad instigated the tenants to refuse to pay the rent to Sheo Prasad and on a suit for ejectment being brought the tenants set up the story that they had in fact paid the rent to the co-owner Shambhu Prasad. In that suit Shambhu Prasad asked to be impleaded. For some reason not very clear to us the Munsif did allow his application. When he appeared in this action he raised the question as to the validity of the acts of the Court of Wards, and he contended that he was not bound by the award, that the appointment of Mr. Lalit Mohan Banerji was invalid, and he sought in that way to abtain from the Court a decision that although by the award the shops had been declared to be the sole property of Shiva Prasad, nevertheless by virtue of the invalidity of the acts of the Board the partition was null and void in law, and, therefore, he still remained co-owner with Shiva Prasad of these shops. The case was transferred to the Court of the Subordinate Judge, who said that he was not going into the question with regard to Shambhu Prasad's complaint against the Court of Wards, and intimated his view that if Shambhu Prasad was dissatisfied with the validity of the award, he should take appropriate steps, or should have taken appropriate steps in the Civil Court. The defendants appealed to the District Judge, and the District Judge having considered s. 58 of the Court of Wards Act, came to the opinion that the award was a valid one. From that decision Shambhu Prasad appealed, and although Mr. Harper had stated that the only question raised in the appeal before him was as to the validity of the award, the discussion in the second appeal before Mr. Justice Lal Gopal Mukerji ranged over a diversity of subjects. We have decided today that we could not allow Mr. Narain Prasad Asthana to argue that the whole arbitration was ineffective inasmuch as no question or dispute had arisen between the two wards. Whether there was a question or a dispute was a matter of fact, appropriate to be decided on evidence given in the Court of first instance, if Shambhu Prasad desired to challenge the propriety of the proceedings on that ground. A reference to the written statement filed by him indicates that indeed there was a dispute between the parties relating to jewellery, and the burden of his complaint in the written statement was not that there was no question of dispute but that the question of jewellery was not a matter referred to the arbitrator. However on the ground that this point was not taken in the Court of first instance and before Mr. Harper we refuse to allow it to be discussed before us.

The first point which was argued by Counsel on behalf of Shambhu Prasad was that when he and his brother by their own free will requested the Court of Wards to take their estate under its superintendence, the Court of Wards at that time was working under the Act of 1899 ; and that in that Act is to be found no provision analogous to s. 58 of the Act of 1912, and that, therefore, the parties who voluntarily requested the Court of Wards to superintend their estate in 1909 cannot be bound or affected by any subsequent legislation. This argument has appealed to Mr. Justice Lal Gopal Mukerji ; but we find ourselves in disagreement with the contention of Shambhu Prasad. We are of opinion that when parties like the present plaintiff and defendants submitted their request to the Court of Wards that their estate should be taken under its superintendence, they must have contemplated that legislation might be passed which might affect their rights, and that the Court of Wards Act of 1899 was no more an immutable eternal Statute than any other Statute. In is an impossible position for Shambhu Prasad to take up, namely, that he is entitled to be bound by only the provisions of a wholly repealed Act, and that neither he nor his estate has any concern with subsequent legislation designed to meet the working of the Court of Wards Act in the interest alike of the Court of Wards and the people whose estates are subject to its jurisdiction. By cl. (1) of s. 2 the Act of 1899 was repealed *in toto.* Clause (2) saves certain acts which had already been done, and pronounces that those acts which had been done by virtue of the repealed enactment should, as far as possible, be deemed to have been done under this Act, namely, the Act of 1912. We find ourselves unable to appreciate how it can be said that the voluntarily putting up of an estate into the hands of the Court of Wards in the year 1909, amounted to a bargain, or created in Shambhu Prasad any right to insist that during the continuance of the estate in the hands of the Court of Wards no legislation which should be passed should affect him or the estate. We take it that the Local Government had full power to repeal the Court of Wards Act in 1912, as in fact they did and to substitute for it such an enactment as seemed in their opinion to be for the greater benefit of the estates and persons whose estates it held and for the Court of Wards. We, therefore, hold that Shambhu Prasad was bound by s. 58, and that there was on the true construction of that section no obligation on the part of the Court of Wards to await an agreement between the representatives, whom they had appointed, as to an arbitrator who should sit to decide the question or dispute. The contention of Shambhu Prasad was that if he were bound by s. 58 he could not resist the appointment of a representative on his behalf, nor would he have any say as to who that representative should be ; and similarly Shiva Prasad could not resist the appointment of a representative but it was argued on his behalf that as soon as the representatives were appointed, it was their duty to agree between themselves as to a suitable arbitrator and to submit the name of that arbitrator to the approval of the Court of Wards. We think that that was a strange construction of the section, because the section when looked at as a whole is imperative in its terms as between the Court of Wards and the wards. It appoints a representative for a ward, whether the ward likes the representative or not. Having appointed the representatives for as many wards as may have disputes amongst themselves, it requires the representatives to submit the question or dispute to arbitration of such person or persons as it may approve. We think the word of importance in the latter part of the section is "require" and we think that this section contemplated an absolute right in the Board to nominate any representative they chose and a further absolute right to require those representatives to conduct the cases of the wards whom they were representing before such a person as the Board might approve, and that in practice the Board indicated their approval of the person as arbitrator to the representatives, and whether the representatives liked the appointment or not they were required to submit the question or dispute to that approved arbitrator. In other words no choice by this section is given to the ward as to the representative who should appear for him nor is any choice given to the representative as to the arbitrator. All that is required is that the arbitrator shall be approved by the Court of Wards and thereupon the representatives are required to conduct the case before him. In that view of the section the decision of Mr. Harper was in every way right.

In these circumstances we are of opinion that we must allow the appeal of Shiva Prasad and set aside the decision of the learned Single Judge of this Court and restore the decision of the District Judge. We, therefore, allow this appeal with costs and fees of both hearings in this Court, which in the special circumstances we certify at Rs. 50 in each of the four cases, making one fee of Rs. 200.

N. H. *Appeal allowed.*
F. Q.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2327 OF 1922.
March 2, 1926.
Present:—Mr. Justice Broadway and
Mr. Justice Fforde.
DEO KARAN DAS—OBJECTOR—
APPELLANT
versus
THE SECRETARY OF STATE FOR INDIA
IN COUNCIL THROUGH THE COLLECTOR, LAHORE—2ND PARTY—RESPONDENT.

Land Acquisition Act (I of 1894), s. 54—Appeal, proper stage for—Apportionment of claims—Duty of District Judge.

Section 54 of the Land Acquisition Act contemplates only an appeal from a final award or part of a final award. Where a question as to apportionment has been referred to the District Judge, unless he has decided that question there is no final award which can be appealed against.

A District Judge is bound to decide the question of apportionment when it is referred to him and the existence of a civil suit between the parties does not affect his jurisdiction to decide that question.

First appeal from an order of the District Judge, Lahore, dated the 29th May 1922.

Lala *Gopal Chand* and Mr. *Bishen Nath*, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.—By Notification No. 18061 H, dated the 19th October 1918, a certain area of land was acquired by Government for the extension of Lahore Cantonment East Station Yard. A portion of the land so acquired consisted of a plot 0 90 acre-8 *kanals* 14 *marlas* in area situated in *Mauza* Ganj on which stood a saltpetre factory. Three persons claimed to be interested in this land and factory, namely, Lala Kanshi Parshad, his brother Lala Deo karan Das and one Harnam Singh, who demanded a sum of Rs. 32,000 as compensation for the factory. There was also a dispute between the said three persons as to the ownership of the factory. Lala Kanshi Parshad claimed to be the sole owner and as such entitled to the entire amount awarded; his brother claimed to be a co-sharer to the extent of one-half, while Harnam Singh claimed that he was entitled to a 1/3rd share. On the 13th May 1920 the Collector under Act I of 1894 made an award relating to this area by which a total sum of Rs. 4,616 9-3 was fixed as the amount of the compensation. Harnam Singh accepted the award which was, however, objected to by the other two. The Land Acquisition Officer thereupon referred the matter to the District Court. Acting under the provisions of s. 30 of Act I of 1894 he also referred the question as to the apportionment of the amount awarded. All the references were dealt with together by the learned District Judge who affirmed the award so far as it related to the amount of compensation, but declined to adjudicate on the question of the apportionment. The reason given for this is that a civil suit was pending, at the time of the acquisition relating to the ownership of this factory.

Lala Kanshi Parshad and Lala Deokaran Das preferred separate appeals against the amount of compensation awarded by the learned District Judge. Harnam Singh was not made a party to either of these appeals.

At the hearing Mr. M. S. Bhagat for Lala Kanshi Parshad asked to be allowed to make Harnam Singh and Deokaran Das respondents in his appeal (No. 2933 of 1922) and further prayed that the question of apportionment should be gone into.

Mr. Gopal Chand for Lala Deokaran Das stated that his client did not wish to make Haranam Singh a party in his appeal (No. 2327 of 1922).

The learned Government Advocate raised a preliminary objection to the effect that both appeals were incompetent as being premature. It was urged that s. 54 of Act I of 1894 only contemplated an appeal from a final award, or part of a final award, of the Court, and that until the learned District Judge had decided the question as to apportionment there was no final award which could be appealed against. There seems to be no doubt that the learned District Judge was wrong in holding that the existence of a civil suit, in which the ownership of the factory was in question, affected his jurisdiction to decide the question referred to him. As I read the provisions of Act it was incumbent on him to decide the question. In the present case, however, his refusal of jurisdiction is obviously erroneous for the reason that the civil suit referred to was between Kanshi Parshad and Deokaran Das alone and had no concern with Harnam Singh.

In the circumstances I am of opinion that the learned Government Advocate's objection is well-founded and that both appeals are incompetent [see *Ardeshir Mancherji* v. *Assistant Collector, Poona* (1).] I would, therefore, dismiss both appeals with costs, but in order to avoid further trouble and delay I would direct the learned District Judge to dispose of the reference regarding the apportionment of the compensation as speedily as possible.

In view of the above in Kanshi Parshad's appeal I would not allow the additional grounds of appeal or the addition of parties.

R. L. *Appeals dismissed.*

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(1) 10 Bom. L. R. 517.

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 68 OF 1924.
February 22, 1926.
Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

KEDAR NATH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SHANKAR DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Father, mortgage by—Mortgagee obtaining decree against father—Suit by sons to contest mortgage—Burden of proof.

In a suit by the sons of a Hindu father to contest the legality of a mortgage executed by him of the joint family property, it is the duty of the mortgagee to prove the existence of a legal necessity. [p. 251, col. 1.]

But if the mortgagee obtains a decree upon his mortgage against the father, and thus the mortgage merges in the decree and ceases to subsist independently, the burden lies upon the sons, if they desire to escape liability under the decree, to prove the immoral nature of the judgment-debt. [*ibid.*]

First appeal against the judgment and decree of the Sub-Judge, Bara Banki, dated the 28th July 1924.

Mr. *Motilal Saksena*, for the Appellant.

Mr. *Bisheshwar Nath Srivastava*, for Respondent No. 3.

JUDGMENT.

Stuart, C. J.—This is a plaintiffs' appeal against a decision of the Subordinate Judge of Bara Banki dismissing their suit to recover certain property on the ground that it had been wrongfully alienated by the father of plaintiffs Nos. 1 and 2 and Lal Bahadur who had adopted plaintiff No. 3. The alienation had been effected by a deed of simple mortgage on the basis of which a decree had been passed and the property in question had been brought to sale in execution of that decree. The mortgage deed was executed on the 19th March 1920 by Shankar Dayal and Lal Bahadur. It was executed for a consideration of Rs. 24,000 made up in the following manner:—

	Rs.
In satisfaction of the amount due on a deed of mortgage dated 24th August 1911 executed by certain Paran from whom Shankar Dayal and Lala Bahadur had inherited certain property ..	7,000
In satisfaction of the amount due on deed of mortgege dated 4th June 1914 executed by the same Paran	3,000
In satisfaction of the amount due on a deed of mortgage dated 29th November 1915 executed by Shankar Dayal and Lal Bahadur	2,000
In satisfaction of the amount due on a deed of further charge dated 23rd August 1918 executed by Shankar Dayal and Lal Bahadur	4,000
In satisfaction of the amount due on three deeds of further charge dated respectively the 18th September 1912, and 16th January 1916 and the 17th August 1917 executed by Shankar Dayal and Lal Bahadur	4,000
In satisfaction of the amount due on a promissory note dated 24th September 1919 executed by Shankar Dayal and Lal Bahadur	2,500
Total ...	22,500
Received in cash prior to the date of execution	569
Devoted towards expenses of executing the deed	240
Paid in cash before the Sub-Registrar ...	691
Total ...	1,500

On the 23rd March 1922 the mortgagee obtained a decree against Shankar Dayal and Lal Bahadur on the basis of his deed for Rs. 26,822 and costs. This decree was put into execution and the date fixed for the sale of the property was the 20th November 1923. On the 17th November 1923 this suit was filed by Kedar Nath aged 16 and Siri Ram aged 10, the sons of Shankar Dayal and Sripat aged 4 who is said to be the adopted son of Lal Bahadur. Sripat's real father was Shankar Dayal. The allegations in the plaint were mainly that Shankar Dayal and Lal Bahadur had no right to alienate the family property as there was no legal necessity. It is to be noted that there was no suggestion made in the plaint that the debts were tainted with immorality.

It is thus seen that this was a case where the property had been put up to sale in execution of a decree obtained against the fathers and that the decree in question was final. The property had not actually been sold but the mortgage had become merged in the decree and no longer subsisted. This being the case we hold that if the sons desired to dispute the judgment-debt the burden of proof was upon them to show that the debt was incurred for an illegal or immoral purpose. We accept the view which was taken by Mr. Daniels, Judicial Commissioner in *Gauri Shankar* v. *Jang Bahduar Singh* (1). This decision was considered in an Appeal No. 356 of 1925 [*Nand Lal* v. *Umrai* (2)] which has been decided to-day by another Bench of which my learned brother was a member. I wish to note that I am in complete concurrence with the decision of that Bench which has bearing upon the decision of this appeal. Holding this view it is necessary for us to see whether the debts or any of them are proved to have been incurred for an illegal or immoral purpose. Although it was not pleaded in the plaint that the debts had been contracted for illegal or immoral purposes the plaintiffs were allowed to take the position in the case that the debts were contracted for illegal and immoral purposes. An issue was framed and considerable evidence was received upon the point. The learned Subordinate Judge disbelieved this evidence. We think that he rightly disbelieved it. We have read the evidence ourselves and are satisfied that it has been fabricated in order to support the case. The witnesses who gave evidence appear to us to be absolutely untrustworthy. We, therefore, find that none of the debts were contracted for immoral or illegal purposes and dismiss this appeal with costs.

Raza, J.—I agree.

N. H.

F. Q. .. *Appeal dismissed.*

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(1) 79 Ind. Cas. 1008; 11 O. L. J. 246; 10 O. & A. L. R. 49; 27 O. C. 124; A. I. R. 1924 Oudh 394.

(2) 93 Ind. Cas. 655; 3 O. W. N. 359.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1 OF 1923.
March 15, 1926.
Present:—Mr. Justice Broadway and
Mr. Justice Fforde.
DULO—DEFENDANT—APPELLANT
versus
MUHAMMAD NATHU AND ANOTHER
—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 3—Limitation, point of, in appeal—Registration Act (XVI of 1908), s. 74—Document ordered to be registered on payment of penalty—Requirements of law, meaning of.

The question of limitation though neither raised in the Trial Court nor in the grounds of appeal may be urged at the hearing of appeal for the first time. [p. 252, col. 2.]

Where a document is ordered to be registered by the Registration Officer on payment of certain penalty, failure to pay such penalty is a non-compliance with the requirements of law as contemplated by s. 74 of the Registration Act. [p. 252, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Lahore, dated the 7th October 1922.

Messrs. *Ram Lal*, *M. Obedulla* and Lala *Harish Chandar*, for the Appellant.

Lala *Gopal Chand* and Mr. *M. Akbar Khan*, for the Respondents.

JUDGMENT.

Broadway, J.—On the 29th of September 1920 one Dulo executed a deed of sale relating to certain land which under this deed was sold to Muhammad Nathu and Dilwar Ali Khan, the consideration being a sum of Rs. 27,300. It was said by the vendees that Rs. 11,889 had already been paid to the vendor, the balance of the money being payable at the time of registration. The vendor, however, alleged that he had only received a sum of Rs. 3,500. On the 27th of January 1921 the vendees applied to the Registrar to have the deed of sale compulsorily registered. This application was sent to the Sub-Registrar, the proper officer, by the Registrar who, on the 31st of January 1921, issued notice to the parties. The vendees were very dilatory and frequently allowed the proceedings to go by default. Finally, on the 5th of April 1921 the Sub-

Registrar apparently acting under s. 25 of the Indian Registration Act, passed an order to the effect that the document would be accepted for registration on payment by the vendees of the penalty provided by that section. Notice of this order was directed to be sent to the vendees who, however, refused to accept service. On the 26th of May 1921 the vendees again applied to the Registrar to have the document compulsorily registered. This application was sent at once to the Sub-Registrar who dismissed it on the 27th of May 1921 as the vendees had failed to appear in support of it. In the order dismissing this application the Sub-Registrar pointed out that the vendees had been constantly absent during these proceedings whereas the vendor had been present and that it was evident that the vendees were merely harassing the vendor. This order of the Sub-Registrar was an order refusing to register within the meaning of s. 72 of the Registration Act and as such was appealable to the Registrar. The vendees on the 24th of June 1921 preferred an appeal to the Registrar. The appeal, however, was dismissed on the 15th of September 1921, the order being announced to the vendees' Counsel on that date. On the 15th of October 1921 the vendees prepared a plaint praying that the said sale-deed should be registered. The plaint, however, does not appear to have been filed in Court till the 18th of October 1921, the 16th and 17th being public holidays. Under s. 77 of the Indian Registration Act a period of thirty days is prescribed for the institution of a suit under that section. As the plaint itself was dated the 15th of October 1921 no objection on the ground of limitation was taken before the Trial Court, the suit being contested on other grounds, one of the grounds being that the requirements of law had not been fulfilled and that, therefore, the Registrar acted rightly in refusing to register the document, the requirement of law in this connection being that the vendees had failed to comply with the direction to pay the penalty. The Trial Court fixed one issue, namely, "Did the plaintiff comply with all provisions of law to have the document registered? This issue was decided against the plaintiff, and I think rightly. Nevertheless the Trial Court granted the plaintiffs-vendees a decree to the effect that the document should be registered on their paying the penalty ordered by the Sub-Registrar. The learned Trial Court based its decree on *Hazuri Mal v Kutab-ud-din* (1) and *Nawab v. Arjan Das* (2). A reference to these authorities, however, shows that they have no bearing on the case at all.

Against the decree so passed Dulo has preferred this appeal to this Court, and at the Bar it has been urged that the suit was barred by limitation having been instituted after the period prescribed by s. 77. Mr. Gopal Chand on behalf of respondents-vendees admitted that the suit should have been filed not later than the 15th of October 1921. He urged that this point of limitation had not been raised in the Court below nor in the grounds of appeal to this Court. No doubt that is the case, but the question of limitation can be raised at any time and I think has rightly been raised in this Court. It is obvious from the record that, although the plaint is dated the 15th of October 1921 and the necessary Court-fee labels affixed on the plaint bear that date, nevertheless the actual institution of the suit must be held to be the 18th of October 1921, as that is the date on which it is shown as having been presented and that is date on which the Court-fee labels have been cancelled. It follows, therefore, that the suit having been instituted after the prescribed time should have been dismissed. In this view of the case it is not necessary to discuss the merits in detail and I would only say that the record of the Registration Department shows clearly that the vendees, although apparently desirous of getting the document registered, were equally desirous of postponing the date of registration as long as possible. That is, to my mind, evidenced by the fact that in every case they waited till the last possible moment before they took action; when filing their suit they clearly overreached themselves and I consider that the orders of the Registrar and the Sub-Registrar were justified. I would, therefore, accept the appeal and dismiss the suit with costs throughout.

Fforde, J.—I agree.

R. L. *Appeal accepted.*

(1) 11 P. R. 1903; 84 P. L. R. 1903.
(2) 13 P. R. 1904; 78 P. L. R. 1904.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1125 OF 1922.

November 24, 1925.

Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

SRIKANTA MANDAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Rani JOTIRMOYI DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Mesne profits, indivisible, claim for—Death of some of respondents—Legal representatives not brought on record—Abatement in toto.

Where plaintiffs-appellants claim for mesne profits is based on the allegation that the defendants-respondents jointly dispossessed them from the land in collusion with one another, the claim is one that is not divisible and where in appeal the legal representatives of the deceased respondents are not brought on the record the appeal abates in its entirety.

Appeal against a decree of the District Judge, Murshidabad, dated the 14th December 1921, modifying that of the Subordinate Judge of that District, dated the 27th February 1915.

Dr. *Jadunath Kanjilal* (with him Babus *Purna Chandra Chandra* and *Subodh Chandra Dutt*), for the Appellants.

Mr. *Bankim Chandra Mukerji* (with him Babus *Charu Chandra Ganguli* and *Biraj Mohan Majumdar*), for the Respondents.

JUDGMENT.—In the suit out of which this appeal has arisen the plaintiffs sued for recovery of possession with mesne profits from 32 defendants. Their case was that they had taken settlement of some 98 *bighas* odd of land from defendant No. 32 or rather his predecessors in-interest. Outof this area of 98 *bighas* they were only in possession of some 63 *bighas* odd and their case was that defendant No. 32 in collusion with the other defendants had dispossessed them from these 35 *bighas*, The suit was decreed by the first Court. On appeal to the District Court a part of the claim was disallowed. The plaintiffs appealed to the High Court and the High Court allowed the appeal in part and the decision of the learned District Judge so far as he dismissed the claim for the lands of schedule (*ga*) was set aside and the case was remitted to him so that he might re-consider the question of the land of schedule (*ga*).

The learned District Judge allowed the Appeal No. 28 in part and the judgment of the Subordinate Judge was modified to a certain extent which is unnecessary to specify. The plaintiffs have appealed to this Court.

The respondents have raised a preliminary objection that the appeal is incompetent for want of necessary parties. They point out that four persons Abdul Hossain, Gudath Biswas, Abdul Aziz and Gooljan Bibi who were appellants in the lower Court and who were also respondents in the present appeal have died and their heirs have not been brought on the record. This is admitted by the appellants themselves. It is clear that the appeal cannot proceed in their absence. The case of the plaintiffs was that all the defendants jointly dispossessed them from the land in collusion with each other and they sued for mesne profits from them all. The claim of the plaintiffs is not divisible. The appeal is, therefore, in competent for want of necessary parties and must fails.

The appeal is, therefore, dismissed with costs.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 391 OF 1922.

March 4, 1926.

Present:—Mr. Justice Harrison and Mr. Justice Jai Lal.

RAGHA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DEWA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 15—Pre-emptor having two qualifications higher and lower—Vendee with only higher qualification—Pre-emption.

Where the pre-emptor and the vendee both possess the same higher qualification, the possession of an additional inferior qualification by the pre-emptor does not entitle him to a decree for pre-emption against the vendee.

Jai Deo v. *Bhagwan Das*, 4 Ind. Cas. 483; 82 P. W. R. 1909; 62 P. L. R. 1909, followed.

Naba v. *Pathana*, 18 Ind. Cas. 86; 60 P. R. 1913; 53 P. L. R. 1913; 72 P. W. R. 1913 and *Khair Din* v. *Ghulam Mohi-ud-din*, 22 Ind. Cas. 401; 43 P. R. 1914; 52 P. L. R. 1914; 142 P. W. R. 1914, distinguished.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 24th November 1921, affirming that of the Senior Subordinate Judge, Hoshiarpur, dated the 13th June 1921.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—The same question is involved in these three connected appeals. The plaintiff is an owner in the estate, in which the land is situated, and is also an occupancy tenant in agricultural land in the estate. He, therefore, has two qualifications of which one is superior and the other inferior. The vendee has the superior qualification but lacks the inferior. The contention is that on the strength of the additional inferior qualification the plaintiff has a right to pre-empt. His suits have failed in both the lower Courts and the question has been argued before us by Mr. Tek Chand for the appellant and Mr. Badri Das for the respondent. Both are agreed that there are only three rulings on this or a similar question, *i. e.*, *Jai Deo* v. *Bhagwan Das* (1), *Naba* v. *Pathana* (2) and *Khair Din* v. *Ghulam Mohi-ud-din* (3). Mr. Tek Chand contends that *Jai Das* v. *Bhagwan Das* (1) does not lay down sound law and that it is to be inferred or deduced from *Khair Din* v. *Ghulam Mohi-ud-din* (3) and from the wording of s. 15 (*b*) and (*c*) that the additional inferior qualification strengthens the plaintiff's claim. On the other hand it is pointed out that the word used is 'vest' and once the right has vested there is the end of the matter and it cannot re-vest or additionally vest and this is the view taken in *Jai Deo* v. *Bhagwan Das* (1) which is a clear and conclusive authority. The section lays down the order in which pre-emptors stand and once the place of a pre-emptor has been determined it cannot be affected by the fact that he does or does not hold any further or additional qualification, which, in the absence of the first, or main qualification could or would be taken into account. Mr. Tek Chand contends that it stands to reason that where we find the qualifications under one head equal we must look to any additional qualification in order to decide between the rival claimants, and he points to the fact that in s. 15 (*b*) a co-sharer, who is also an agnate is treated as superior even to a nearer agnate who takes the additional qualification and, therefore, he says, we find credit given to a mere numerical superiority of qualifications. To us it appears that the wording of this sub-section points exactly to the contrary conclusion. The Legislature in s. 15 (*b*) (2) did provide for a compositor double qualification in the case of an agnate, who is also a co-sharer, and the fact that it did not do so in the case of a co-owner, who is also an occupancy tenant, shows, in our opinion, that it was not intended that the combination of these two qualifications should prevail over the simple qualification of a co-owner. It is also true that there is some connection between the co-sharer and the agnate, that is to say, between the two qualifications when combined in the same person whereas there is no connection between the co-ownership and the occupancy tenancy. We hold, that the decision of the learned District Judge is perfectly correct, and that no number of additional inferior qualifications can improve the status of the man claiming in virtue of belonging to a superior class. In both *Khair Din* v. *Ghulam Mohi-ud-din* (3) and *Naba* v. *Pathana* (2) the position was the reverse and the two claimants shared the inferior qualification but one of them had a superior qualification and, naturally, in virtue of that superior qualification he ousted the rival claimant.

We dismiss the appeals with costs.

R. L. *Appeals dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 186 OF 1924.

January 4, 1926.

Present:—Mr. Justice Wallace and
Mr. Justice Madhavan Nair.

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL—PETITIONER—
APPELLANT

versus

SARVEPALLI VENKATA LAKSHMANAYYA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 10—Court-fee decreed to Government in pauper suit—Right to future maintenance, liability of, to be proceeded against—Method of recovery.

The right of the Government to recover the Court-fee decreed as payable to Government from a pauper plaintiff is not unenforceable, merely because plaintiff's property is confined to a right to future maintenance. The proper method of recovering such Court-fee is by the Court appointing a Receiver to collect the maintenance amount and pay to Government (by instalments if necessary in order that plaintiff may have something to live upon) the fee due by the plaintiff.

Rajindra Narain Singh v. *Sunder Bibi*, 87 Ind. Cas. 295; 47 A. 385; 41 C. L. J. 383; 3 Pat. L. R. 142; 27 Bom. L. R. 849; A. I. R. 1925 P. C. 176; 23 A. L. J. 634; 49 M. L. J. 244; 22 L. W. 284; L. R. 6 A. (P. C.) 138; (1925) M. W. N. 630; 52 I. A. 262 (P. C.), followed.

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(1) 4 Ind. Cas. 483; 82 P. L. R. 1909; 62 P. L. R. 1909.

(2) 18 Ind. Cas. 86; 60 P. R. 1913; 53 P. L. R. 1913; 72 P. W. R. 1913.

(3) 22 Ind. Cas. 401; 43 P. R. 1914; 52 P. L. R. 1914; 142 P. W. R. 1914.

Appeal against an order of the District Court, Nellore, dated the 2nd November 1923, in E. P. No. 124 of 1922 (O. S. No. 61 of 1921, Subordinate Judge's Court, Nellore).

Mr. *C. V. Anantakrishna Iyer*, for the Appellants.

Mr. *B. Somayya*, for the Respondent.

JUDGMENT.—We cannot subscribe to the respondent's contention that Government cannot under a decree recover the Court-fee decreed as payable to Government from a pauper plaintiff, whenever plaintiff's property is confined to a right to future maintenance. That contention is negatived by the Privy Council ruling in *Rajindra Narain Singh* v. *Sunder Bibi* (1) which also indicates the proper method of recovering such Court-fee. That method is by the Court appointing a Receiver to collect the maintenance amount and pay to Government (by instalments if necessary in order that plaintiff may have something to live upon) the fee due by plaintiff. The appellant's execution petition as it stands does not ask for relief in that form, and it should be amended. We grant leave to amend it accordingly. The amended petition is forwarded to the lower Court for disposal in the light of the Privy Council decision quoted above. Each party will bear his own costs in this appeal.

V. N. V. *Petition remanded.*
R. L.

(1) 87 Ind. Cas. 295; 47 A. 385; 41 C. L. J. 383; 3 Pat. L. R. 112; 27 Bom. L. R. 849; A. I. R. 1925 P. C. 176; 23 A. L. J. 634; 49 M. L. J. 244; 22 L. W. 234; L. R. 6 A. (P. C.) 138; (1925) M. W. N. 630; 52 I. A. 262 (P. C.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 727 OF 1925.
November 17, 1925
Present:—Mr. Justice Mukerji.
MAJID MIA—DEFENDANT No. 2—PETITIONER
versus
MUNSHI MIA—PLAINTIFF—OPPOSITE PARTY.

Mesne profits—Land in occupation of tenant—Basis of assessment of mesne profits—Co-sharers—Dispossession—Excess of enjoyment, if amounts to ouster.

Where land is in the occupation of the tenants mesne profits should be awarded not on the basis of the produce but on the basis of rent. [p. 256, col. 1.]

Where a decree for mesne profits is passed against a co-sharer there must be a finding as to dispossession. [p. 256, col. 2.]

Mere excess of enjoyment does not itself amount to an ouster. [*ibid.*]

Gora Chand Chatterjee v. *Keshab Chandra Khawas*, 83 Ind. Cas. 122, followed.

Rule against an order of the Sub-Judge, Second Court, Sylhet, exercising the powers of a Court of Small Causes, dated the 5th March 1925, in S. C. C. Suit No. 89 of 1923, (In T. Suit No. 891 of 1919 of the Sadar Munsif, First Court, Sylhet).

Babu *Prya Nath Dutt* and *Satyendra Kishore Ghose*, for the Petitioner.

Babu *Birendra Kumar Dey*, for the Opposite Party.

JUDGMENT.—This Rule has been issued at the instance of the defendant No. 3 in a suit tried by a Court of Small Causes. The plaintiff claimed *wasilat* from certain defendants of whom the defendant No. 3 was one. Previous to the institution of this suit the plaintiff had instituted a suit to establish his title to an undivided 5-annas share in a certain land and also for recovery of possession and mesne profits. The claim for mesne profits was subsequently withdrawn. That suit ultimately ended in a decree in favour of the plaintiff as regards a 4-annas and 10-*gunda* share in the lands and a decree for joint possession of the lands with the defendants. Thereafter the present suit was instituted. It is not necessary to refer to all the proceedings in connection with this suit. It is said that at first it was instituted as a suit for compensation in the Court of the Munsif but ultimately it was found that the Munsif had no jurisdiction to entertain it as it really was a suit for recovery of mesne profits and it was filed in the Court of Small Causes. The suit was ultimately tried by a Subordinate Judge vested with the powers of a Judge of Small Cause Courts. He decreed the suit and the present application is directed against that decree.

Two points have been urged on behalf of the petitioner in this Rule. I propose to deal with the second point first as, in my opinion, having regard to the defence which the petitioner took in the Courts below he is not entitled to succeed on that point. His contention is that mesne profits which have been awarded in the present case should have been, if at all, allowed to the plaintiff not on the basis of the produce but only on the basis of the rents which were being actually realized from the tenants. It appears that in the plaint in the title suit previously instituted, the plaintiff made an allegation to the effect that he was in possession of his 5-annas share (that was the share which he claimed in the suit) by realizing rent from the tenants, that the defendants had mutated their names notwithstanding the plaintiff's objection and had dispossessed the plaintiff from his share. It is said that as the land was in the occupation of tenants, the learned Judge should have awarded mesne profits not on the basis of the produce but on the basis of rent. The proposition is perfectly a sound one and it has abundant authority in support of it. But in the present case looking in the written statement of the defendants, and I have looked into it very carefully, I do not find the slightest suggestion of this contention anywhere in it. On the other hand the defence avers that the produce of the lands was not really at the rate alleged in the plaint but at a different rate. That was the only objection with regard to the mode in which the mesne profits were to be calculated. My attention has been drawn to the cross-examination of some of the plaintiff's witnesses and it has been argued before me that the cross-examination has been directed to bring out the fact that the plaintiff was realizing paddy rent from his tenants. It is argued that the cross-examination shows that the defendant's contention in the Court below on this point was what is now argued before me. I am, however, unable to say that the question as to whether mesne profits should be assessed on the basis of produce or on the basis of rent was seriously disputed on the side of the defence. The learned Judge says in his judgment "the defendants are liable on the produce basis according to the definition of mesne profits. He is not a tenant but a trespasser. I accept the plaintiff's evidence of the value and the quantity produced as it appears to be reasonable". I understand from this passage that the learned Judge found that in so far as the share which did not belong to the defendants they were trespassers. In this the learned Judge may or may not have been right. But to determine the question which has now been urged before me would require an investigation of disputed facts which the Court below was, in my opinion, never asked to investigate. I am unable to accede to this contention inasmuch as to do so would be to allow the defendants to make out a case which does not appear to have been made in the Court below.

The other contention which has been urged on behalf of the petitioner is to the effect that the decree of the learned Judge cannot be sustained as admittedly the plaintiff and the defendants were co-sharers having different shares in the property and inasmuch as there is no finding either in the title suit, or in the present suit for mesne profits, that there was any dispossession by the defendants in respect of the plaintiff's share. It is urged on behalf of the opposite party that the fact that a decree for joint possession was passed taken in conjunction with the fact that in the plaint in the original suit there was an averment as to dispossession by the defendant should be considered to mean that the defendants had actually dispossessed the plaintiff. I am unable to say that this is a sufficient answer to the defendant's contention. There may have been more reasons than one as to why the decree for joint possession was passed and it does not follow from the mere fact that such a decree was passed that the Court meant to find that there was dispossession by the defendants. In the judgment in the present case also there is absolutely no finding with regard to this matter. It is well-settled that in case of co-sharers if a decree for mesne profits or for compensation is to be passed it must be found that there was dispossession. If any authority is needed for the proposition reference may be made to the unreported* decision in the case of *Gora Chand Chatterjee* v. *Keshab Chandra Khawas*, (L. P. A. No. 164 of 1911 decided by Jenkins, C. J. and Chatterjea, J.), where it was held that in order to award mesne profits as against a co-sharer, there must be a finding of actual ouster and that mere excess of enjoyment does not in itself amount to an ouster. In the present case there is no finding of ouster and inasmuch as in the absence of a finding to this effect the decree cannot possibly be sustained, I set aside the decree against which the present Rule is directed and direct the case to be sent back to the Court of the learned Judge in order that he may arrive at a proper finding on this question It will be open to the learned Judge if he thinks necessary to do so to allow the parties to adduce fresh or further evidence on this point. Having regard to the circumstances of this case I am of opinion that each party should bear his own costs of this Rule.

M. F. *Rule made absolute;*
R. L. *Case remanded.*

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*Since reported as 23 Ind. Cas. 122.—[*Ed.*]

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 99 OF 1926.
March 15, 1926.
Present:—Mr. Justice Broadway.
EMPEROR—PROSECUTOR
versus
SAIN DASS—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 439 (2) (6)—Alteration of sentence, issue of notice for, to accused—Right of accused to show cause against conviction—Penal Code (Act XLV of 1860), s. 377—Evidence to substantiate charge—Criminal trial—Defence, weakness of.

Where a notice under s. 439 (2), Cr. P. C., is issued to the accused to show cause why the sentence should not be altered, sub-cl. (6) of the section becomes applicable and the accused becomes entitled to show cause against his conviction. [p. 257, col. 2.]

Evidence to support a charge under s. 377, Penal Code, must be very convincing as it is very easy to bring such a charge but extremely difficult to refute it. [p. 258, col. 1.]

The guilt of a person accused of a crime has to be established by the evidence for the prosecution and not by the weakness of the defence. [*ibid.*]

Case reported by the Sessions Judge, Gurdaspore, with his No. 46 of 11th January 1926.

FACTS.—The accused Sain Dass has been convicted by a Magistrate and the conviction has been upheld by me on appeal, of attempting to commit sodomy on a boy of 12. My judgment, a copy of which is attached, gives the facts in detail.

GROUNDS.—The appellant has been sentenced to six months' simple imprisonment by an inexperienced Magistrate. He is 19 years of age, and it is hard to imagine a sentence more unsuitable for a youth with tendencies of this kind. He is to sit in Jail day after day staring into vacancy. Apparently the Magistrate could not pass a sentence of whipping for an attempt at sodomy, and in any case I would not suggest whipping after so long a period has elapsed, but in the interests of the prisoner himself I suggest that the simple imprisonment be converted into a term of rigorous imprisonment. The exact length of the term is not very important; in my opinion, three months would be ample.

Lala *Fakir Chand*, for the Respondent.

ORDER.—Sain Dass son of Ishar Dass, a *Khatri* of Pathankot, was convicted of having attempted to commit sodomy on a boy named Muhammad Ishaq of the same place. The boy is said to be of 12 years of age and Sain Dass is about 19. Under s. 377/511 of the Indian Penal Code he was sentenced to six months' simple imprisonment. He appealed to the Sessions Court and the learned Sessions Judge, after making a remand for certain enquiries to be made, maintained the conviction and sentence. At the same time he reported the case to this Court under s. 438 of the Cr. P. C. recommending that the sentence of imprisonment should be altered from six months' simple imprisonment to three months' rigorous imprisonment.

It appears that Sain Dass has been in Jail now for almost three months. As notice was issued to Sain Dass under s. 439 (2) of the Cr. P. C., to show cause why the sentence should not be altered as above stated, sub-cl. (6) of that section becomes applicable and he was, therefore, entitled to show cause against his conviction. Mr. Fakir Chand on his behalf has urged that the evidence on the record is such as did not warrant the conclusion arrived at by the Courts below. The evidence against Sain Dass consists of the statements of the boy Muhammad Ishaq, Ismail (P. W. No. 3) Chiragh (P. W. No. 4) and Chuhar P. W. No. 5. As the offence of sodomy was not completed it is quite unnecessary to discuss the medical evidence. Suffice it to say that that evidence shows that there were no marks of injury either on the boy or on Sain Dass. Now, the story for the prosecution is that shortly after the 8 A. M. train had left Muhammad Ishaq went on to the Railway line to collect coal and that he was there seized by Sain Dass who picked him up and threw him into an empty truck about 6½ feet from the ground the doors of the truck which was an open one, being closed at the time. Having thrown Muhammad Ishaq into the truck Sain Dass himself got into it and there in broad day light forcibly attempted to commit sodomy. Attracted by the cries of this boy Chuhar (P. W. No. 5) asked Chiragh and Ismail to see what was going on. Chuhar himself did not go to the truck. Ismail (P. W. No. 3) and Chiragh P. W. No. 4 went to the truck, and according to Ismail saw the boy lying naked with his head down and the accused standing by his side folding his *dhoti*. The boy was weeping and saying that Sain Dass was committing an unnatural offence. Chiragh (P. W. No. 4) says that at the instance of Chuhar he and Ismail both got into the truck and found Muhammad Ishaq lying there naked and Sain Dass actually committing an unnaturae offence. The boy was weeping. A charge of this nature is one very easy to bring and very difficult to refute. Therefore to my mind the evidence in support of such a charge has to be very convincing. Ismaïl is a man of 25 and Chiragh is 30 years of age. Although, according to them, they found Sain Dass committing this disgusting offence nevertheless they never said anything to him. It has been urged that the whole story is improbable and that it is improbable that in broad day light at a time when people were bound to be about Sain Dass would have forcibly seized the boy thrown him into a wagon and there forcibly attempted to commit this unnatural offence. After a careful consideration I am forced to the conclusion that the story is an improbable one. It has to be borne in mind that the case for the prosecution is that the boy was not a willing participator in this offence. Therefore Sain Das' action was nothing less than rape, and I find it a little hard to believe that a shop-keeper such as Sain Dass would have seized a boy such as Muhammad Ishaq in a public place and attempted to commit such an offence in the manner alleged. It may be that the view taken of the defence evidence by the Courts below is correct and that it is a fabrication. Nevertheless the guilt of a person accused of a crime has to be established by the evidence for the prosecution and the evidence for the prosecution in this case is not to my mind convincing.

In these circumstances I am constrained to set aside the conviction and sentence and direct that Sain Dass be released forthwith.

R. L. *Conviction set aside.*

PATNA HIGH COURT.

CRIMINAL APPEAL NO 199 OF 1925.
February 24, 1926.
Present:—Mr. Justice Ross and
Mr. Justice Kulwant Sahai.
BIGNA KUMHAR AND OTHERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 288—Evidence before Committing Magistrate—Admissibility at trial—Weight to be attached.

Section 288 of the Cr. P. C. makes the previous evidence of a witness taken before a Committing Magistrate, evidence admissible at the trial and the limitation imposed to such admission by the words 'subject to the provisions of the Evidence Act' merely means, that such evidence can be used at the trial for all purposes so long as the evidence is evidence within the meaning of the Evidence Act. [p. 260, col. 2; p. 261, col. 1.]

Jehal Teli v. *Emperor*, 84 Ind. Cas. 334; 3 Pat. 781; A. I. R. 1925 Pat. 51; 6 P. L. T. 53; 26 Cr. L. J. 270, followed.

Unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of the conviction. [p. 261, col. 1.]

In re Bachala Peda Somudu, 81 Ind. Cas. 203; 47 M. 232; 18 L. W. 705; 45 M. L. J. 602; 33 M. L. T. 159; A. I. R. 1924 Mad. 379; 25 Cr. L. J. 715, referred to.

Jehal Teli v. *Emperor*, 84 Ind. Cas. 334; 3 Pat. 781; A. I. R. 1925 Pat. 51; 6 P. L. T. 53; 26 Cr. L. J. 270, followed.

Criminal appeal from an order of the Judicial Commissioner, Chota Nagpur at Ranchi, dated the 27th October 1925.

Messrs. *Anand Prosad* and *Sudhansu Rajan Sen Gupta*, for the Appellants.

The Assistant Government Advocate, for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—The six appellants with three others were charged with offences under ss. 302 and 147 of the Indian Penal Code. They were charged with committing murder by intentionally causing the death of *Musammat* Ghasin and with being members of an unlawful assembly with the common object to kill and cause hurt to *Musammat* Ghasin in prosecution of which common object the said *Musammat* Ghasin was beaten by the members of the assembly causing her death. The trial was held with the aid of four assessors. Three of the assessors were of opinion that it was doubtful if *Musammat* Ghasin was dead or alive and missing and that the evidence was not sufficient to convict the accused. One assessor was of opinion that *Musammat* Ghasin had been killed but that the charge under s. 302 had not been proved. He considered that the charge under s. 147 had been proved. The learned Judicial Commissioner agreed with the assessors that the charge under s. 302, Indian Penal Code, had not been established against any individual accused. He, however, came to the conclusion that a riot had been committed and that those who took part in the riot were guilty under s. 147, Indian Penal Code. He was of opinion that the six appellants were guilty under s. 147 and convicted them under the said section and sentenced them to undergo rigorous imprisonment for two years. He acquitted three of the accused, being of opinion that the evidence against them was not sufficient.

This Court in admitting the appeal also directed notice to issue on the appellants to shew cause why they shall not be convicted of an offence under s. 302, Indian Penal Code. We have, therefore, to consider not only the question as to whether the conviction under s. 147, Indian Penal Code, should stand, but also as to whether the evidence on the record leads to the conclusion that the appellants were guilty under s. 302, Indian Penal Code.

The appeal has been very ably and fully argued by Mr. Anand Prasad on behalf of the appellants and the learned Assistant Government Advocate, with his usual fairness, has conceded that the evidence is not sufficient to convict the appellants of an offence under s. 302, Indian Penal Code. I propose, however, to discuss the evidence as regards both the offences.

Musammat Ghasin was a widow living with her only son Lohra Kumhar, a child ten years old. The appellant, Bigna Kumhar, is her husband's brother and her house was situated in the same *angan* as that of Bigna. The other appellants are all related with each other, and with Bigna.

The prosecution case is that the deceased *Musammat* Ghasin was supposed to be a witch or possessed by some evil spirit and that she was the cause of illness of several persons in the village. The appellant, Bucha Kumhar, had a son named Bandhan and he died on the 1st of May 1925. The prosecution case is that the appellants believed that the death of Bandhan had been caused by the witch-craft of Ghasin. The appellants and one Tipru Sawasi, who is a Bhandari of the landlord of the village, went to bury the body of Bandhan and there was some talk about the death of the boy having been caused by *Musammat* Ghasin and there was a proposal that *Musammat* Ghasin should be got rid of. After the burial a meeting is said to have taken place in the house of Bucha after sunset, to which Tipru was also called, where it was resolved to kill Ghasin. Tipru says that he warned them not to do so, and that he went straight from the meeting to *Musammat* Ghasin and told her to run away as there was a proposal to kill her. It is said that at about midnight the deceased *Musammat* Ghasin and her son Lohra were sleeping on a *khatia* in a room facing the verandah of her house when the appellants went and Bigna called Ghasin and asked her to come out. She did come out and according to one version, Bigna caught her by the throat and threw her down and according to another version, Harakh caught and threw her down. They are said to have throttled her and to have trampled upon her and killed her and to have carried her either dead or alive.

Now this is said to have taken place on the night of the 1st May 1925. Nothing happened until the 17th of May. The boy, Lohra, used to live with his uncle, the appellant Bigna. On the 17th of May, Lohra's sister's husband, Kandna and his father, Mahesh who live at *Mouza* Tingaria went to *Musammat* Ghasin's house and enquired of Lohra as to where she was, and then Lohra is said to have told them at once that she had been killed by the appellants and others and that her body had been thrown away. They apparently did not believe him, and they took him to the house of Dukhan and Ladhu, who are the brothers of the deceased woman and lived at *Mouza* Timra: and there they enquired as to whether *Musammat* Ghasin was there. On being informed that she was not there, Lohra told them about her death and they all resolved to go to the *thana* and lodge the First Information. It appears that Kandna and Mahesh before going to Timra, had gone to the *chaukidar*, Sohrai and informed him; but that Sohrai told them that he would first go to the village and enquire into the matter and then go to the *thana* the next day. The First Information was lodged at the *thana* at Karra on the 18th of May 1925 at about 2 P. M. by the boy, Lohra. He was accompanied by the *chaukidar* Sohrai, by Mahesh and Kandna and by his maternal uncles Dukhan and Ladhu. He stated that Bigna Kumhar came to the house at about midnight and asked his mother to open the door and that his mother opened the door and that the other appellants then came up and they all accused her of being a witch and of bringing about the death of Bucha Kumhar's son. Bigna is said, in this First Information Report, to have seized his mother by the throat and knocked her down and the other appellants to have kicked and fisted her and killed her by trampling. Lohra stated in this First Information that he was awakened when Bigna first came to the house and that he had seen all that had happened. He further stated that Bigna had warned him not to speak about the affair to any one and that he was threatened and that they would kill him if he told anybody about it. He stated that on the previous day when his sister's husband Kandna and the latter's father Mahesh came to his house and enquired about his mother, he told them that she had been killed.

Now the evidence of this boy, Lohra, is the most important evidence in the case. He is the only eye-witness of the occurrence and if his evidence is believed, the whole of the occurrence as stated by him is proved. The other important evidence is that of Tipru Sawasi, the Bhandari of the village. The cause of the murder is said to be the general belief that the deceased woman was a witch. It is said that the appellants and others believed that she was the cause of the illness of the people in the village and that the death of Bucha's son was the immediate cause of the murder. There is no doubt upon the evidence that there was some sort of belief in the minds of the accused and others that the illness in the village was caused by Ghasin. But it seems that the belief was not that she was really a which but that she was herself possessed by some evil spirit. In *Chait* or *Baisakh* preceding the occurrence there appears to have been a *panchayat*, which Tipru and others attended, and there a proposal was made to take steps to drive away the evil spirit from her and that one of the *panchayat* undertook to do so if he was given expenses for making certain sacrifices. This appears to have been a friendly proposal to relieve, *Musammat* Ghasin of the evil spirit which possessed her. The evidence is that during the illness of Budhan and others, *Musammat* Ghasin used to go and see the sick men and there was no objection to her doing so. She used to go and visit the appellants and others and to dine with them and no objection appears to have been taken to this. There does not appear to be any strong feeling in the mind of the accused and others to get rid of *Musammat* Ghasin herself on account of her being a witch. Therefore, although there appears to be some sort of belief in the mind of the accused of *Musammat* Ghasin being either a witch or possessed by some evil spirit, and although it has been established by the evidence that Bucha's son died on the 1st of May, the evidence falls short to prove that the appellants resolved to kill *Musammat* Ghasin on account of such a belief and on account of the death of Bucha's son.

The meeting of the villagers at the funeral and the resolution to dispose of *Musammat* Ghasin is deposed to by Tipru alone. As regards his evidence it is clear that one cannot place great reliance upon it. He made conflicting statements before the Committing Magistrate and in the Sessions Court. The learned Judicial Commissioner has relied upon his evidence before the Committing Magistrate which was admitted under s. 288 of the Cr. P. C. It was contended by the learned Vakil for the appellants that the evidence before the Committing Magistrate was not admissible at the trial. Reliance was placed upon the words "subject to the provisions of the Indian Evidence Act, 1872" introduced into the section by the Amending Act of 1923. By this Amending Act, the evidence of a witness taken before a Committing Magistrate may be treated as evidence in the case, if such witness is produced and examined at the trial "for all purposes subject to the provisions of the Indian Evidence Act". These words have introduced a certain amount of ambiguity in the section. One cannot be certain as to what is exactly meant by these words. Under the provisions of the Indian Evidence Act, the evidence of a witness examined before a Committing Magistrate would not be admissible in evidence except under s. 145 or under s. 155 of the Evidence Act for the purposes of the witness being examined as to his previous statement and relevant matters in question or with the intention to contradict him with the statement made by him in previous depositions or generally in order to impeach the credibility of the witness; or under s. 157 for the purpose of corroborating the testimony of the witness given at the trial. To my mind s. 288 makes the previous evidence of a witness taken before a Committing Magistrate, evidence admissible at the trial and the limitation imposed to such admission by the introduction of the words "subject to the provisions of the Indian Evidence Act" merely means, as laid down by this Court in *Jehal Teli* v. *Emperor* (1) that such evidence can be used at the trial for all purposes so long as the evidence is evidence within the meaning of the Evidence Act. In other words, that the deposition recorded by the Committing Magistrate can be utilized at the trial if the matter contained therein is according to the rules of evidence laid down in the Evidence Act of evidential value. To limit the admissibility of such evidence at the trial only to cases where the evidence is admissible under the Evidence Act would be to frustrate the object in enacting s. 288 of the Cr. P. C. In my opinion the previous deposition of Tipru taken before the Committing Magistrate was rightly admitted at the trial.

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(1) 84 Ind. Cas. 334; 3 Pat. 781; A. I. R. 1925 Pat. 51; 6 P. L. T. 53; 26 Cr. L. J. 270.

The question, however, is as to what is the weight of such evidence. This point has been discussed in a number of cases some of which have been noticed by the learned Judges in the case of *Jehal Teli* v. *Emperor* (1). In addition to this, reference may be made to the case of *In re Bachala Peda Somudu* (2). It is difficult to lay down any precise rule as regards the weight to be placed on a piece of evidence admitted at the trial. Each case will depend upon its own peculiar fact and the nature of the other evidence adduced in the case. It can, however, be said that if a witness makes two contradictory statements, his evidence cannot be implicitly relied upon and must be taken with a good deal of caution. In *Jehal Teli's case* (1) after consideration of the cases bearing on the point, the learned Judges observed as follows:—

"I think, therefore, that the principle is quite clearly settled by this line of cases that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of a conviction".

I entirely agree with this expression of opinion and unless Tipru's statement before the Committing Magistrate is materially corroborated by other evidence or is shewn by facts clearly established by other evidence that the statement made by him before the Magistrate was a true statement, the conviction ought not to be sustained upon such evidence.

Now Tipru's account of the meeting of the villagers at the funeral is not corroborated by any other evidence in the present case. Tipru also speaks of the subsequent meeting at the house of Bucha where he says he was called by Harakh. Here also there is no sufficient corroboration of his statement. He tries to keep himself aloof as much as possible from any participation in the meeting and from the resolution come to at that meeting. He says that at the meeting he endeavoured to dissuade the appellants from committing murder and that from the meeting he went to *Musammat* Ghasin's house and warned her. In this he is no doubt corroborated by Lohra, but the subsequent events throw a good deal of suspicion upon the truth of this story. It is said by Tipru in his examination-in-chief that he told *Mussammat* Ghasin to clear out as they were talking of killing her, but she did not make any answer. In cross-examination he says that Ghasin told him that she would run away. Lohra says that when the appellants came at midnight and Bigna called out Ghasin, she at once came out. But it seems incredible to suppose that *Musammat* Ghasin would readily come out from her room on being called by the appellants at the dead of night when she had been warned previously that they were preparing to kill her that night. The door was closed from inside and it was expected that she would at least try to prevent the assailants from entering the house and would not open the door quietly and come out on being called. To my mind the account given by Tipru of the meeting at Bucha's house and of warning *Musammat* Ghasin has not been satisfactorily proved.

Then as regards the occurrence itself it is entirely based upon the evidence of Lohra. He is a boy of ten years of age. He states that he went to sleep with his mother on one *khatia*, the door of the room was closed and Bigna called his mother saying that she was wanted and his mother at once went out. Then Bigna, Harakh, Boro, Phagu, Bucha, Ranghia and Dhirju beat her. They pressed her throat and trampled on her and all the time he remained quietly on the *khatia*. He says that his mother was assaulted just in front of the door and he recognized the accused by their voices and also saw them and they continued to assault her till she was dead. They then shut the door and took away the body. He raised no alarm because Bigna said to him that if he did, he would kill him too. In the morning he asked Bigna where his mother was and he told him that she had gone on a visit to her relatives. In cross-examination he says that when Bigna came in the night he was awake and so was his mother They were awake because they had heard that she was going to be killed and yet as soon as she is called, she opens the door and comes out. He says that there was no light inside the house. It was dark outside: there was no lantern nor was there any moon. It is hard to believe that under those circumstances the boy would be able to identify who the assailants of his mother were. He could, perhaps, have recognized Bigna by his voice when he called out *Musammat* Ghasin to come out, but I am not prepared to believe that he could identify all the appellants in the dark night when he was still on his *khatia* and did not move from it and the whole place was in darkness. Then although he states that he saw that his mother had been throttled and trampled and killed, yet when Bigna told him the next morning that his mother had been on a visit to her relatives he readily believed that story and he quietly lived in the house of Bigna for 17 days without informing any person about the occurrence. The conduct of *Musammat* Ghasin herself after she was warned by Tipru and of Lohra after the occurrence until the 17th of May raise a good deal of suspicion as regards the truth of the account given by the witnesses Tipru and Lohra.

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(2) 81 Ind. Cas. 203; 47 M. 232; 18 L. W. 705; 45 M. L. J. 602; 33 M. L. T. 159; A. I. R. 1924 Mad. 379; 25 Cr. L. J. 715.

Then we come to the question as to whether *Musammat* Ghasin has actually been killed. The prosecution wanted to establish this by the fact of certain bones and ornaments of the deceased having been discovered on account of certain statements made by Bigna to the Sub-Inspector. The Sub-Inspector says that Bigna made a statement to him and first took him to a place on the borders of Kedli and Galiondo saying that the body had been buried there. He went there but the body was not found buried at that place. After that Bigna showed him another place on the borders of the villages Birsirang and Kedli, but there also the body was not found. The Sub-Inspector says that on a raised ground above the river and a water-course and a little jungle which appeared to be an unfrequented spot, he found some bones and bangles, some long heirs and a piece of *molia sari* with red borders and a jaw with eight teeth and two loose teeth and one leg bone. This was on the 18th May. On the next day he says that he found the rest of a red bordered *sari*, a bead necklace, a bangle and armlets and the sole of a foot. The bones were sent to the Sub-Assistant Surgeon on the 23rd of May. His opinion was that the bones were of an adult human being probably that of a female. The lower jaw from its colour, smoothness and thickness did not seem to be a member of the group of other bones. In his opinion the jaw did not appear to belong to a female. The jaw, according to him, could not belong to an adult because it had 14 sockets for the teeth whereas an adult should have 16. In his view the jaw bone appeared to be that of a boy between 14 and 17 years. The bones were taken to the Sub-Assistant Surgeon by the *chowkidar* Soma. He stated in his deposition before the Committing Magistrate that he brought the bones to the doctor, the doctor gave him a letter to be taken to the *thana* and returned the bones saying that he had finished with them and the witness says that as he was not directed to take the bones to the *thana* he disposed of them on the way. Now it is said that the same bones were again produced before the Civil Surgeon on the 25th of June. The Sub Inspector says that the bones were returned to him on the 23rd of June by the *chowkidars* Soma and Bijua and that in the meantime they were with the *chowkidars*; that after the 23rd June he kept them at the *thana*. The Civil Surgeon says that on an examination of the bones it was impossible to determine the sex, but that the bones were of an adult. He was of opinion that the lower jaw could belong to the same set of bones.

Now if the opinion of the Doctor be correct that the jaw bone was that of a male and if it could belong to the same set of bones, it is impossible to come to a definite finding that the bones produced were the bones of a female. Moreover, we have it in the evidence of Tipru that the bones were found beyond the boundaries of his village, that bodies were buried, half a mile from the village : but the bones were found two and a-half miles from the village and that he could not say if there was at that place, the burial ground of another village. The learned Judicial Commissioner was also of opinion that it could not be said with any amount of certainty that the bones were the bones of *Musammat* Ghasin, but the fact of the discovery of her ornaments and her *sari* led him to believe that *Musammat* Ghasin had been killed. The ornaments were ordinary ornaments and not of much value. The witnesses who identified the ornaments and the *sari* admitted that there was nothing to distinguish those articles as having belonged to *Musammat* Ghasin and that they were ordinary articles commonly worn by the women in the locality. One of the ornaments found was an ornament worn by boys and not by women and it was found around one of the bones. The explanation offered was that this ornament belonged to Lohra, but that it was too big for him and it was generally worn by his mother. Lohra, however, was not asked about it. As regards the *sari* it appears that a whole *sari* was not discovered but several pieces of a *sari* were discovered and that one of those pieces had not got a red border which the others had. It is deposed to by Kandna and Mahesh that they had seen *Musammat* Ghasin wearing that *sari* and it is also deposed to by her brothers as being the *sari* which she was wearing when they saw her in her house. I do not believe this evidence. It is rather remarkable that she would be putting on the same *sari* on each of the occasions deposed to by the witnesses. The *sari* itself is said to be an ordinary *motia sari* which is generally used in that part of the country.

I now come to the confession of Bigna. It appears that on the 27th of May 1925 he made a statement before the Sub-Divisional Officer in which he stated that on a Saturday or Sunday at the end of *Baisakh*, Harakh, Hathi, Sibu Kumhar, Dhirju Naua, Ramjia, Phagu, and Bora Kumhar killed *Musammat* Ghasin and threw away her corpse. The Sub-Divisional Officer then asked him as to what had happened and he stated that when Bucha's son died, Phagu called him (Bigna) and said "see the child is dead, why have *you* killed him, have *you* eaten him or what have *you* done, say or else I will kill *you* and throw *you* away, if you go by what your sister-in-law says we shall kill you, if you go by what we say nothing will happen to you"; that there was a meeting about sunset in the *angan* of Ranghia and Bucha; that it was decided to kill his sister-in-law. He gave the names of all the appellants and of others as being present. He says that he was also present as Boro and Phagu had gone to call him. He then says that they came during the first part of the night when Harakh called his sister-in-law saying that he wanted to speak something to her and asked her to come out for a drink of Haria. His sister-in law said that she would not go at night and that Harakh said that he had got something to tell her and thereupon his sister-in-law came out of the room and sat in the verandah: Harakh asked her if she had Haria, to which she replied that she had not got Haria. Harakh then seized her by the throat, Phagu seized her legs and some of the others trampled and some kicked her; Sibu thrust cloth in her mouth and Harakh throttled her to death. On being asked as to where did he see the occurrence from, he said that Harakh woke him and took him to the spot and told him that if he would lodge information they would kill him. That is why he did not give information. On being asked where did they throw the corpse of his sister-in-law, he said that after they had killed her they immediately carried her corpse and buried her in the sands in Karo river on the boundary between villages Bilsiring and Kadli.

Now the question is whether this is a confession at all and whether it could be used as evidence not only against Bigna but also against the other accused. Section 30 of the Evidence Act is quite clear. Confessions of an accused can be used against other accused persons who are tried jointly with the accused making the confession when such confession affects the person making it. A confession must be a confession of guilt. The statement made by Bigna could, in no sense, be considered to be a confession of guilt. He does not inculpate himself in any way. He states that he himself was accused by Phagu as being instrumental in killing the son of Bucha and he was himself threatened with being killed. He accounts for his presence there as he was called there by Phagu and Boro. His statement does not make it out that he was a member of the assembly with the common object of killing or causing hurt to *Musammat* Ghasin. I am, therefore, clearly of opinion that his statement is not a confession at all which can be used in evidence either as against Bigna or against the other accused. This confession was retracted subsequently and it was stated that he had made the statement at the instance of Tipru.

It is then contended that his statement to the Police which led to the discovery of the bones and the ornaments could be used as evidence. It is clear that the bones were not discovered on account of the statement made by Bigna. His statement was that the body was buried at a certain place. The Sub-Inspector went there and did not find the body there. He next stated that it was removed to another place and there also no trace of the body was found. The bones were discovered at a third place and as I have said above the bones have not been proved to be the bones of *Musammat* Ghasin. In the circumstances the charges under s. 302 cannot stand.

The charge under s. 147 also cannot stand as it is based entirely upon the evidence of Tipru and Lohra, whose evidence is not sufficient to prove that the appellants were members of an unlawful assembly. The learned Judicial Commissioner has found that the present accused persons were members of the unlawful assembly on account of the discovery of the stains of human blood on the cloths of the accused. A *motia chadar* was found on the person of Ranghia; a *dhoti* was found on the person of Boro; a *chadar* was found in the house of Boro; a *dhoti* was found on the person of Phagu; a *chadar* was found on the person of Bucha and another *chadar* on the person of Bigna on all of which were stains of human blood. These cloths were discovered about three weeks after the occurrence and it is hard to believe that if the stains of blood were the stains caused by the murder of *Musammat* Ghasin the accused persons would not have taken the ordinary precaution of washing the stains from the cloths. In my opinion the finding of the stains of blood on the cloths is not a circumstance which would prove the complicity of the accused in the crime.

After careful consideration of the entire evidence in the case, I am of opinion that the charge under s. 302 has not been established and that the charge under s. 147, Indian Penal Code, has also not been sufficiently proved as against the accused. I would, therefore, set aside the conviction and sentence passed upon the appellants and direct that they be set at liberty.

Ross, J.—I agree.

P. D. *Conviction and Sentence set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 468 OF 1925.
January 20, 1926.
Present:—Mr. Justice Zafar Ali.
MUNSHI AND OTHERS—CONVICTS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 114, illus. (b)—Approver—Corroboration—Corroboration of approvers inter se—*Penal Code (Act XLV of 1860), s. 411, offence under—Corroboration required.*

An approver is unworthy of credit as against each accused unless corroborated in material particulars. [p. 265, col. 1.]

One approver cannot corroborate another approver unless there is something on the record to show that they had no chance of collaboration before giving evidence. [*ibid.*]

The evidence that the accused appeared before certain *panchayats* which made certain enquiries into certain thefts or that they received moneys (*bhungas*) promising to restore property cannot be corroborative evidence of an offence under s. 401, Penal Code. [p. 265, col. 2.]

The corroborative evidence of witnesses that the assembling of the accused at a particular well was always followed by a theft is not sufficient corroboration where none of the witnesses ever reported to the Police at the time of the occurrence of any one of the thefts that it was preceded by a meeting of the accused at a particular well. [*ibid.*]

Appeal from an order of the Assistant Sessions Judge, Karnal, dated the 7th April 1925.

Dr. Sir *Mian Muhammad Shafi*, KT., for the Appellants.

Lala *Amar Nath Chona*, for the Government Advocate, for the Respondent.

JUDGMENT.—One Hasna, who has several previous convictions against him and was under arrest on a charge under s. 458, Indian Penal Code, made an offer to the Police to give information about a gang of thieves who had been associated with him for the purpose of habitually committing theft, if he were made an approver. This was agreed to and Hasna accepted a tender of pardon and his statement was duly recorded by a Magistrate on the 22nd and 23rd February 1924. In consequence of the information given by him, Barkat, Ghafur and Hasham were arrested on the 23rd February and they accepted a tender of pardon on the 11th, 14th and 18th March respectively. The result of the Police investigation was that seventy men in all were arrested out of whom sixty-two were sent up for trial on a charge under s. 401, Indian Penal Code. Some were discharged by the Committing Magistrate and the trial of the remaining forty-seven commenced in the

Court of the Assistant Sessions Judge, Karnal, on the 11th October 1924 and ended on the 7th April 1925 on which date the judgment was announced acquitting thirty-seven men and convicting ten only. Seven out of these ten convicts have lodged a joint appeal through Mr. Muhammad Rafi, one has appealed through Mr. Shamair Chand and two have appealed separately through the Superintendent of the Jail in which they are confined.

The principal witnesses for the prosecution are the four approvers who are admittedly men of no character and whose evidence against as many as thirty-seven men was not relied upon by the Court below. Mr. Amar Nath Chona, who appears for the Crown, frankly concedes that the evidence of any one of these four approvers cannot be said in this case to corroborate others as there is nothing on the records to show that they had had no chance of collaboration before giving evidence, and that their evidence according to the general rule is unworthy of credit as against each accused unless corroborated in material particulars. It will not be out of place to give here a few excerpts from the judgment of the lower Court relating to these approvers. "In the case of Fajra whom he (Hasna) named as present in four thefts, while he was actually in the Police custody when those thefts occurred, that he named Ali Mohammed accused on account of personal grudge as an accomplice in the Panipat Barber theft although he was undergoing a sentence of imprisonment in the Jind State at the time of that theft," "that though Hasna was the head of this alleged gang he could not identify in Jail 8 persons out of those accused."

"In my opinion all these defects are due to the anxiety on the part of these approvers to implicate a large number of persons to simply feed their personal grudge and consequently they have said many things which were not true or which could not be supported."

"I am distinctly of opinion that it is not proved that Hasna had any central gang consising of a very large number of persons as alleged."

"All the four assessors who gave their opinion separately are unanimously of opinion that there was no gang of Hasna formed for purposes of committing habitual thefts or robberies."

Now the corroborative evidence that has been relied upon as against almost every appellant is (1) that he took part in one or more of the thirty-two thefts which, according to Hasna, were committed by the members of his gang from time to time and (2) that the members of the gang associated with each other. Against some of the appellants there is the further evidence that they appeared before certain *panchayats* which made enquiries into certain thefts or that they received moneys (*bhungas*) promising to restore stolen cattle. But it is clear that the evidence that a *panchayat* made an enquiry into a theft and called a person before it as a suspect, or that a person accepted money and agreed to make a search for stolen animal and to restore it to the owner, does not as against that person prove any of the ingredients of the offence punishable under s. 401, Indian Penal Code.

The principal witnesses who give evidence with regard to association and whose names are given in the margin,* deposed that the accused used to assemble at the well of Bundu (P. W. No. 152) and that whenever they assembled there a theft was committed in Panipat. But though they include two *Lambardars*, one *Zaildar* and one *Sufedposh*, none of them ever reported to the Police at the time of the occurrence of any one of the thefts that it was preceded by a meeting of the so-called members of Hasna's gang at Bundu's well, and that their assembling at that well was always followed by a theft. This being so their belated story cannot be given credence to. The learned Counsel for the Crown frankly states that he cannot say whether this evidence of association is sufficient to uphold the convictions.

*Bundu (P. W. No. 152), Muhammad Ishaq (P. W. No. 158), Zahur Ali Khan (P. W. No. 159), Mazhar-ul-haq (P. W. No. 160), Balla (P. W. No. 162), Umra (P. W. No. 163), Allah Din (P. W. No. 164), Hasham Ali (P. W. No. 167) and Alli (P. W. No. 168).

With these preliminay remarks I proceed to examine some of the cases separately and take up the appeal of Sahelu first.

As already stated Hasna gave a list of 32 thefts and the lower Court has held that Sahelu took part in two of them, *i. e.*, Nos. 8 and 11 of the list. But in an earlier part of the judgment the Court has held that theft No. 8 was not proved. As regards theft No. 11, Counsel for the Crown admits that on the evidence on the record it cannot be said that Sahelu took part in it.

The theft seems to have taken place and the property stolen was two bullocks which were recovered through Barkat approver who received Rs. 160 as *bhunga* from the owner Molu (P. W. No. 32). It was stated that this *bhunga* was paid to Barkat in the presence of Sahelu and Dossu, that is to say, Sahelu and Dossu happened to be with Barkat when he received this amount. But Molu who paid the *bhunga* had paid two visits to Barkat previously and the amount had already been settled with him. Sahelu and Dossu were, therefore, in no way concerned in the bargain for and acceptance of the *bhunga* by Barkat,

That Sahelu attended twelve *panchayats* is of no consequence because he being a *badmash* having been bound down five times under s. 110 of the Cr. P. C., it was quite natural for the *panchayats* to call him as a suspect whenever a theft was enquired into by them.

With regard to his association with Hasna etc. the Assistant Sessions Judge has referred to the evidence of Banwari and Nanak (P. Ws. Nos 230 and 231). Banwari is himself an old *badmash* whose name has been on the Police Register No. 10 for fifteen years. Nanak is a *lambardar*: and his story was that he saw Hasna, Sahelu and two others taking away a bullock and came to know the next day of the theft of a bullock belonging to some *Arains* of Panipat who came to him and informed him of the theft. But neither did the *Arains* nor did Nanak himself give information to the Police that Hasna, Sahelu etc., were seen taking away the bullocks. The story now told, therefore, does not appear to be probable.

Kale Khan was said to have taken part in two thefts Nos. 17 and 20. There is no independent evidence that he did so, and neither of these thefts was ever reported to the Police. Kale Khan urged that he could not be a member of Hasna's gang because Hasna had stolen his own horse.

Nathu was stated by the approvers to have taken part in thefts Nos. 9, 10, 13 and 30. The lower Court held that theft No. 10 was not proved and thefts Nos. 9 and 30 were never reported to the Police and as regards No. 9, the so called complainant Jamal-ud-din (P. W. No. 25) made conflicting statements on different dates from which it appears that the theft deposed to by him never took place.

With regard to Munshi son of Bhika, the lower Court remarked that he being a resident of Gharaunda, where Ghafur also resided, his association with the latter and others was not of very great importance, but that he was seen in their Company outside of his village also. But his conviction was based mainly on the evidence of the approver as the lower Court remarks: "There is no reason why these approvers falsely implicate him."

As regards Dossu, it was proved that in 1920 he pointed out Lala Chatar Bhuj's stolen bullock in Hasna's house. Hasna, therefore, bore him a grudge and has sufficient reason to implicate him.

It is not necessary to deal with the cases of the remaining appellants individually. The approver's evidence and the evidence as to association being unreliable none of them could be convicted. I, therefore, accept all the appeals, set aside the convictions and sentences and direct that the appellants be released forthwith.

R. L. *Appeals accepted;*
Convictions and sentences set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 98 OF 1926.
February 1, 1926.
Present:—Justice Sir Ewart Greaves, KT., and Justice Sir Charu Chandra Ghose, KT.
SATYA CHARAN MITTER—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Calcutta Police Act (V of 1866), s. 78-A—Procedure in Police investigation—Inherent powers of Police.

Attendance and questionings of any person during Police investigation under s. 78-A, Police Act, are intended to take place within the Presidency Town itself. But if information is to be obtained from a person outside the Presidency whose attendance cannot be procured for some reason in the Presidency Town the procedure laid down in cl. (3) of the section is to be followed. [p. 268, col. 1.]

There are no inherent powers possessed by the Police. All investigations by the Police in the *Mofussil* must be controlled by the Cr. P. C. and in Calcutta by the Police Act itself or by any Circular Orders issued. [p. 268, col. 2.]

Rule against an order of commitment of the petitioner for trial at the Sessions made by the Chief Presidency Magistrate, Calcutta, on the 21st January 1926.

Mr. *B. C. Chatterjee*, Babus *Mritunjoy Chattopadhya* and *Biraj Mohan Roy*, for the Petitioner.

Messrs. *B. L. Mitter* (Advocate-General), *Khundkar* (Deputy Legal Remembrancer), *S*, *K. Sen* and *Narendra Kumar Bose*, for the Crown.

JUDGMENT.

Greaves, J.—This Rule was granted by my learned brother Mr. Justice C. C. Ghose sitting with Mr. Justice Mukerji and the object of the Rule was to secure the quashing of an order of commitment passed by the Chief Presidency Magistrate of Calcutta. The statement contained in the petition upon which the Rule is based is that on the 10th November one Girija Bhusan Sarkar on behalf of his mother-in-law preferred a complaint before the Chief Presidency Magistrate, Calcutta, charging the petitioner and the petitioner's son and another person with forgery, cheating, theft etc., and it is said that the Chief Presidency Magistrate, therefore, took cognizance of the complaint under s. 190, Cr. P. C., examined the complainant under s. 200 and directed an enquiry under s. 202 and that under these circumstances a certain statement which was taken from the petitioner by an Investigating Police Officer is not admissible in evidence under the provisions of s. 162 of the Cr. P. C. I do not think, however, that this contention is well-founded. If one turns to the original application which was made to the Chief Presidency Magistrate one finds that it is made in general terms. It stated that a certain Satya Charan Mitter died and that he was the holder of certain Government securities and that some difficulties having arisen after his death with regard to these securities it was necessary that certain enquiries should be made, and the actual application that was made to the Chief Presidency Magistrate was for a stop order in respect of the securities referred to in the petition and for a direction on the C. I. D. Police to make enquiry into the matter. The order passed on that application by the Chief Presidency Magistrate was to send the matter to the C. I. D. for enquiry and report, and with regard to the stop order the Magistrate stated that the evidence is not sufficient to justify the order at that stage. I think, therefore, that the arguments based on the contention to which I have referred are not well-founded and that the Chief Presidency Magistrate was merely acting under the provisions of s. 156 (3) of the Cr. P. C., which empower the Magistrate to order an investigation in the terms stated in the section. But the real point that we have got to decide is based on a consideration of the powers of the Calcutta Police under the Calcutta Police Act. The facts being as I have stated they clearly show that s. 162, Cr. P. C., does not directly apply, for the investigation that was directed was carried on by the Calcutta Police under the provisions of the Calcutta Police Act, and it appears that what happened was that after the Chief Presidency Magistrate made his order the petitioner's son having been already arrested the Police Officer went to the petitioner and took from him a statement which is now sought to be used in evidence against the petitioner, and on the strength of which he was committed by the Magistrate for trial at the Sessions, it being admitted that apart from this statement obtained from the petitioner the evidence on the record is not sufficient to justify the committal, and indeed the Magistrate very frankly so states.

Turning to the provisions of s. 78-A of the Calcutta Police Act, which is the Act applicable as the Cr. P. C. does not apply to the Calcutta Police except as expressly indicated in that Act, one finds that according to the provisions of s. 78-A (1) the Commissioner of Police, if in the course of any investigation he thinks a cognizable offence has been committed can by an order in writing require the attendance before himself or any officer serving under him not below the rank of an Inspector, who is investigating a cognizable offence, of a person within the limits of Calcutta or within a radius of 30 miles. Sub-section (2) provides that the Commissioner of Police can examine orally the person who attends in accordance with the order passed under s. 78-A (1) and that the person so attending is bound to answer all questions. Then comes sub-s. (3). That provides that the Commissioner of Police may forward to the Superintendent of Police of the District in which any person from whom any information is required relating to the facts or circumstances of the case under investigation is believed to be, such questions and such statement as may be necessary for the purpose of obtaining the information desired, that is to say, the scheme of s. 78-A in my reading of the section is to enable the Commissioner of Police to procure the attendance before him or any officer deputed in that behalf of any person for the purpose of obtaining information from such person; and as I have already stated sub-s. (2) authorises the oral examination of the person whose attendance is procured. Then under sub-s. (3) the Commissioner of Police is empowered to obtain the assistance of the Superintendent of Police in a District outside Calcutta for the purpose of having questions put to a person from whom information is desired but who for some reason cannot attend. As I understand s. 78A (1) and (2) the attendance and questionings are intended to take place within the Presidency Town itself; and sub-s. (3) only comes into force if for some reason it is difficult or unadvisable to require the attendance of the person from whom information is desired within the precincts of the Presidency Town itself. Now what the Investigating Officer apparently did in this case was to go to Howrah and take from the petitioner a statement which contains the evidence upon which the committed order has been made by the Magistrate. I do not think, therefore, that he was acting under the provisions of either s. 78A (1) or (2), nor do I think that he was in fact acting under the provisions of s. 78-A (3), for I do not understand that any requisition was made to the Superintendent of Police of Howrah for the purpose of procuring the information which was desired, and if in fact the Investigating Officer had been acting under the provisions of sub-s. (3) he would by virtue of cl. (3) of the Police Act III of 1888, be acting under the direction of the Superintendent of Police of Howrah and the matter would accordingly be governed by the provisions of s. 162 of the Cr. P. C., for that Act, of course, applies to Howrah. I think, therefore, we are met with this difficulty that if what the Police Officer says he did falls within s. 78A (3) then s. 162, Cr. P. C., applies for the reasons I have indicated. But, in my opinion, the Investigating Officer was not acting under s. 78-A at all, and the question, therefore, we have got to see is whether he was justified in the course which he took, and whether the statement which he took from the petitioner is under the circumstances admissible in evidence.

It is suggested by the Advocate-General that the Calcutta Police Act does not contain all the powers vested in the Calcutta Police and then there are in existence certain Circular Orders which give or may give wider powers in this matter than are contained in s. 78-A, but no such order has been produced before us and I do not think we are justified in assuming that such an order exists. Then a further contention is urged before us. It is said that the power to investigate contains an inherent power to take a statement such as this and that accordingly under the general law this particular statement is admissible in evidence against the accused, and we are referred in support of this argument to the case of *Queen-Empress* v. *Nilmadhub Mitter* (1), which is a decision of the Full Bench of this Court, as an authority for the proposition that there are certain powers inherent in the Police which are not expressly set out in the four corners of the Calcutta Police Act; for instance, it is said that there is no provision in the Calcutta Police Act providing for the taking of confessions; and yet according to the decision of the Full Bench the confession that was taken in that case was admitted in evidence although as I have stated there was no power to take confession expressly included within the provisions of the Calcutta Police Act. But in that case the confession was taken within the town of Calcutta itself and consequently that case cannot be prayed in aid to support the procedure adopted here. And we are not prepared to assent to the proposition that in criminal matters there is this inherent power such as the Advocate-General contends exists. All investigations by the Police, it seems to me, must be controlled, in the *mofussil*, by the Code of Criminal Procedure and in Calcutta by the Police Act itself or by any Circular Orders issued. I am not prepared to say that in a matter of this nature we can safely import a power such as the Advocate-General seeks to import of taking statements generally by the Police apart from the provisions of any Act and then put the statements so taken in evidence against the person by whom they were made. I think that would be to strike at the principles, to preserve which the provisions of s. 162, Cr. P. C., were enacted and would introduce a very dangerous principle.

For the reasons, therefore, we have indicated I think the Rule should be made absolute and the commitment order of the petitioner should be quashed.

C. C. Ghose, J.—I agree.

R. L. *Rule made absolute.*

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(1) 15 C. 595; 7 Ind. Dec. (N. S.) 980 (F. B.).

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1246 OF 1925.

March 20, 1926.

Present:—Mr. Justice Addison.

WARYAM SINGH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 402—Assemblage of accused—Preparation for dacoity.

Where the accused belonging to different villages are found at a lonely well at a long distance from their homes fully armed and equipped for committing dacoity, a conviction under s. 402, Penal Code, is maintainable.

Queen-Empress v. *Bholu,* 23 A. 124; A. W. N. (1908) 16, *Bhola* v. *Emperor*, 84 Ind. Cas. 860; 22 A. L. J. 1028; L. R. 5 A. 156 Cr.; A. I. R 1925 All. 62; 26 Cr. L. J. 380 and *Karmun* v. *Emperor*, 34 Ind. Cas. 1000; 6 P. R. 1916 Cr.; 17 Cr. L. J. 280; 37 P. W. R. 1916 Cr., referred to.

Appeal from an order of the Magistrate, First Class, exercising enhanced powers under s. 30 of the Cr. P. C., at Amritsar, dated the 25th November 1925.

Mr. *Brij Lal*, for the Appellants.

Mr. *R. C. Soni*, for the Government Advocate, for the Respondent.

JUDGMENT.—Five persons, Waryam Singh, Labh Singh, Teja Singh *alias* Amar Singh and Chanda Singh of different villages in the Lahore District and Khuda Baksh, *alias* Chola, of the Amritsar District have been sentenced under s. 402, Indian Penal Code, the first four to four years' rigorous imprisonment together with a fine of Rs. 100 each and the last to seven years' rigorous imprisonment on the ground that he is a previous convict. Each of these persons was also tried separately for an offence under s. 19 of the Arms Act, namely, being in possession of a *chhavi*. They were sentenced under that section each to three years' rigorous imprisonment but it was ordered that the sentences under s. 402, Indian Penal Code, and under the Arms Act should run concurrently. In effect, therefore, there is only one sentence upon each person. Against their convictions and sentence they have appealed.

It has been clearly established that the Sub-Inspector of the Police Station, Ajnala, in the Amritsar District received information about 8 P. M. on the 20th August 1925 that the five appellants who were all strangers had collected at the Jhalarwala well about 1½ miles from Ajnala with the object of committing a dacoity in the well-to-do village of Chamyari about two miles away from that well. Accordingly two Sub-Inspectors of Police, two Zaildars, a Sufed-posh and others set out and surrounded this lonely well which has a grove of trees. They drew the cordon tighter and finally arrested the five appellants in front of the small house there. Each of them was carrying a *dang* while concealed on the person of each was the blade of a *chhavi* which fitted his *dang*. In addition Waryam Singh had a house-breaking implement while Chola had eight candles and Chanda Singh ten *patakhas*. There was also a horse there tied to a tree.

Waryam Singh, his servant Labh Singh and Teja Singh *alias* Amar Singh, stated that they were going to Dhurian village to get the cattle of Waryam Singh and were arrested at the Ajnala *ekka* stand. Chanda Singh also said that he was arrested at that place when he was going to Ludoke. Chola explained that he was going to get medicine when he was arrested at Ajnala. This means that these five appellants were arrested on three different occasions inside Ajnala according to their own story.

Certain witnesses have been examined to show that Waryam Singh had cattle grazing at Dhurian and that he was going there when he and the two others already mentioned were arrested at the Ajnala *ekka* stand by the Police. Similarly Chanda Singh produced evidedce to the effect that he was arrested there on another occasion. Chola, however, produced no evidence.

It is clear that the defence put forward is false and has not been established by the evidence produced by the appellants. There is not the slightest doubt that they were caught as already described at the lonely well in question, fully armed and equipped for committing a dacoity. In these circumstances they were properly found guilty under s. 402, Indian Penal Code, see *Queen-Empress* v. *Bholu* (1), *Bhola* v. *Emperor* (2) and *Karmun* v. *Emperor* (3). These appellants belong to different villages and were at long distances from their respective homes and they could have been there for no other object. There was no reason why any of the prosecution witnesses should have got up a false case against the appellants. The sentences are not excessive, seeing that the last sentence on Chola was one of four years under s. 457, Indian Penal Code, and that dacoities are very rife in the Amritsar District.

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(1) 23 A. 124; A. W. N. (1908) 16.

(2) 84 Ind. Cas. 860; 22 A. L. J. 1028; L. R 5 A. 156 Cr.; A. I. R. 1925 All. 62; 26 Cr. L. J. 380.

(3) 34 Ind. Cas. 1000; 6 P. R. 1916 Cr.; 17 Cr. L. J. 280; 37 P. W. R. 1916 Cr.

I accordingly dismiss all the six appeals.

R. L. *Appeals dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 482 OF 1925.

December 1, 1925.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Duval.

HARUN RASHID—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 236, 237—Penal Code (Act XLV of 1860), ss. 467, 471—Charge of abetting forgery—Conviction for using forged document—Legality.

An offence of abetment of forgery is quite distinct from one of using a forged document. In a trial on a charge of abetment of forgery, an accused cannot be convicted for an offence of using a forged document. [p. 271, col. 1.]

Before a person is convicted under a particular section of the Penal Code or of any other enactment it is imperative that subject to the provisions of s. 237, Cr. P. C., he should be formally charged with having committed the offence specified in the section and be given an opportunity to defend himself against the specified charge. [p. 271, cols. 1 & 2.]

Criminal appeal against an order of the Sessions Judge, Cachar, dated the 4th June 1925.

Babus *Debendra Narain Bhattacharjee* and *Satyendra Kishore Ghose*, for the Appellant.

Mr. *Ashraf Ali*, for the Crown.

JUDGMENT.—The appellant before us has been convicted by the learned Sessions Judge of Cachar under ss. 467/471, Indian Penal Code, and has been sentenced to undergo rigorous imprisonment for a period of six years. He was put on his trial along with four others—Shajid Ali, Atar Ali, Yakub Ali and Salim Mia, they being charged under s. 467 with forgery and he being charged under s. 467 read with s. 109 of abetment of forgery. The four others were acquitted. The trial was with the aid of three assessors who found the accused guilty of having abetted the forgery of a certain document.

The case for the prosecution was that the accused Shajid Ali had written out a *kobala* by which Mahomed Yusuf, and Sultan Mahomed purported to convey to the accused, Harun Rashid, 120 *bighas* of land for Rs. 4,000, the consideration being accounted for as follows, namely, Rs. 2,000 due to Harun Rashid on account of a certain debt and Rs. 2,000 commission due to him from them. In other words, no money was alleged to have been paid at the time of the execution of the *kobala*. The three witnesses to the execution of the *kabala* were the accused Atar Ali, Yakub Ali and Salim Mia who were discharged by the Judge as not knowing that the deed was a forgery. As regards the accused Shajid Ali, there was evidence that he had written out the *kabala* in question. The assessors found him guilty of forgery but the learned Sessions Judge, being of opinion that there was nothing to show that Shajid Ali did not write out the *kobala bona fide* at Harun's request, acquitted him as stated above. The charge against the appellant Harun Rashid was that he had abetted the forgery of a valuable security which was forged in consequence of his abetment.

The evidence goes to show that he presented the *kobala* for registration at the Sub-Registrar's Office. The Sub-Registrar thereupon called on the alleged executants to attend and thereafter the alleged executants appeared and denied execution of the document. The learned Sessions Judge found on the evidence that there could be no doubt whatsoever that the *kobala* in question was a false document. It was clearly a valuable security and its very nature showed that it was made with intent to cause the alleged executants to part with property. It was, therefore, a forged document. He found that there was no evidence worth the name that Harun had abetted the forgery by entering into a conspiracy to procure the forgery, but he was of opinion that the transaction as disclosed in the evidence pointed rather to Harun having committed an offence punishable under s. 471 of the Indian Penal Code, *i. e.* Harun had used the document as a genuine one knowing that it was a forgery and that the recitals in the said document were all untrue and that his intention was to cause wrongful loss to the alleged executants. The learned Sessions Judge was of opinion that Harun should have been charged under ss. 467/471, Indian Penal

Code, the user of the forged document being its presentation to the Sub-Registrar for registration. He accordingly convicted him under the said sections and sentenced him as stated above.

On behalf of the appellant it has been argued that he having been tried on a charge of abetment of forgery cannot be convicted under s. 471 of using a forged document as genuine without a trial having been held on a charge under s. 471, Indian Penal Code. It appears from the record that the learned Sessions Judge relied upon the provisions of s. 237, Cr. P. C., as authorising him to convict the appellant under s. 471, Indian Penal Code. It, therefore, becomes necessary for us to examine the provisions of s. 237, Cr. P. C., and see whether the procedure adopted by the learned Sessions Judge is legal. Section 237, Cr. P. C., runs as follows:—"If, in the case mentioned in s. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." It will be seen that s. 237 is only applicable to cases which properly fall within the scope of s. 236 of the Cr. P. C. which says: "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." We do not think that s 236 and s. 237 can apply in this case. The charge was abetment of forgery—an offence which is complete when the document was written and signed. But the conviction is for a subsequent act. The forgery purports to be on the 30th March 1924. The date the document was presented for registration and used was the 31st July 1924. The user is, therefore, a distinct and different offence for which the accused is entitled to be separately charged.

Before a person is convicted under a particular section of the Indian Penal Code or of any other enactment it is imperative that subject to the provisions of s. 237, Cr. P. C., he should be formally charged with having committed the offence specified in the second and be given an opportunity to defend himself against the specified charge. That has not been done in this case and we are constrained to hold that the conviction and sentence in the present case cannot stand. The result, therefore, is that the conviction and sentence in this case are set aside and the case is sent back in order that the appellant may be re-tried according to the provisions of the law after framing suitable charges. The appellant will remain on the same bail as he is on now, pending further orders of the Sessions Judge.

R. L. *Conviction and Sentence set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1308 OF 1925.

March 17, 1926.

Present:—Mr. Justice Harrison.

THE MUNICIPAL COMMITTEE, SIMLA—COMPLAINANT—PETITIONER

versus

MUKAND SINGH—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 162, 250—'Vexatious' case, meaning of—Acquittal—Compensation—Police diaries, use of.

An accusation cannot be said to be vexatious unless the main intention of the complainant is to cause annoyance to the person accused and not merely to further the ends of justice. [p. 272, col. 1.]

Where a report regarding the conduct of the accused, a Municipal Supervisor, was made by the Municipal Engineer, on which the President set a more or less informal inquiry on foot through the Police, and the report of the Police showed that the Supervisor had been guilty of falsification of accounts but the accused was acquitted on trial, it cannot be said under the circumstances that the object in instituting the proceedings was primarily to annoy the accused. [p. 272, cols. 1 & 2.]

A Magistrate is not justified in referring to the statements made in the Police diaries unless and until the witnesses have been confronted by these statements. [p. 272, col. 2.]

Petition for revision of an order of the Sessions Judge, Ambala, dated the 16th February 1925, affirming that of the Magistrate, First Class, Simla, dated the 17th December 1924.

Mr. *C. H. Cardon Noad*, Dewan *Ram Lal* and Sheikh *Muhammad Umar*, for the Petitioner.

Mr. *M. S. Bhagat*, for the Respondent.

JUDGMENT.—B. Mukand Singh Work Supervisor lately in the employment of the Municipal Committee, Simla, was sent up for trial by the Police under s. 477-A of the Indian Penal Code. He was acquitted by the Trial Magistrate and a sum of Rs. 100 was awarded to him by way of compensation under s. 250 of the Cr. P. C. An appeal was lodged by the Municipal Committee, who had been ordered to pay the compensation and this was dismissed by the Sessions Judge. A revision has been admitted from that order.

Without going into the facts or questioning the correctness of the findings Counsel has urged that, although the accusation had been held to be unproved and unsubstantiated, there is no reason for holding that the case was false in the sence in which this word is used in s. 250 of the Cr. P. C., or even vexatious in the sense in which the word is used in that section. On the latter point Counsel relies on *Emperor* v. *Kouro* (1), where it is explained that an accusation cannot be said to be vexatious unless the main intention of the complainant was to cause annoyance to the person accused, and not merely to further the ends of justice. A report was made regarding the conduct of this Supervisor by the Municipal Engineer on which the President, the Deputy Commissioner, set a more or less informal inquiry on foot through the Police, and the Superintendent of Police reported four days later that his inquiry showed that the Supervisor had been guilty of falsification of accounts. The matter went before the Committee and at a meeting of the 17th February 1921 it was resolved that instead of proceeding further with the case the Committee decided to give one month's notice to B. Mukand Singh and to dispense with his services. On receiving a notice to this effect B. Mukand Singh protested against being treated in this way without any explanation being demanded from him. To this the Secretary of the Committee replied that if he wished to furnish any explanation the Committee was prepared to consider it. He replied that it would be of no avail to do so as his services had been dispensed with and asked for the payment of his Provident Fund or rather the Municipal contribution towards it. This was refused on the ground that the order of discharge combined with the failure of Mukand Singh to furnish any explanation made that order tantamount to an order of dismissal. The Commissioner set aside this order so far as it related to the payment of the contribution and the Commissioner's order was enforced by the Local Government. Subsequently Mukand Singh made a further claim for two years' pay and on this the Committee ordered the matter of the falsification of the accounts to be proceeded with and a report was duly made to the Police. Mukand Singh was chalaned and acquitted.

What has been shown, therefore, is that the Committee withheld a sum of money which they were not entitled to withhold and that on a claim being made, which they considered unjustifiable, they ordered the question of the falsification of accounts which had once been dropped to be re-opened. I do not agree with many of the findings of the Magistrate which Counsel has been unable to substantiate, such as that the Police was unduly influenced by the representatives of the Municipal Committee, Simla, or that the investigating Officer was dissuaded by the Municipal Counsel or Municipal Engineer from examining witnesses whom he should have examined, or that the Committee was responsible for any shortcoming, if there be any shortcoming, in the investigation. I find that the Magistrate was not justified in referring to the statements made in the Police diaries unless and until the witnesses had been confronted by these statements. I cannot discover, nor has Counsel been able to show me, how it is clear that up to the date of the institution of the present proceedings Mukand Singh was ready any time to submit a complete explanation of his case to the Muncipality. On the contrary the position seems to have been precisely reverse. I do not find that it is shown in any way that the Committee persevered with this case knowing or suspecting it to be untrue and I do not find it established that the object in instituting the proceedings was primarily to annoy the accused.

I, therefore, set aside the order of compensation. The sum, if paid, will be refunded.

R. L. *Order set aside.*

(1) 42 Ind. Cas. 733; 18 Cr. L. J. 1C05; 11 S. L. R. 55.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 138 OF 1922.

December 9, 1925.

Present:—Justice Sir Jwala Prasad, KT., and Justice Sir John Bucknill, KT.

F. H. MANISTY AND OTHERS—PLAINTIFFS —APPELLANTS

versus

J. V. JAMESON AND ANOTHER— DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 59, 61—Debtor and creditor—Payment—Appropriation.

The rights to adopt the manner of appropriation rests directly with the debtor. In the absence of any direction of the debtor it is open to his creditor to appropriate the payment towards any of his debts, and lastly, if there is no intimation by the debtor at the time of payment with regard to appropriation by the creditor, then it is open to the creditor to insist upon the appropriation being made in the chronological order in which the debts stand. [p. 277, col. 2.]

Cory Brothers & Co., Ltd. v. *Owners of the Turkish Steamship "Mecca"*, (1897) A. C. 285, followed.

Appeal from a decision of the Subordinate Judge, Muzaffarpur, dated the 16th January 1922.

Mr. *B. N. Mitter*, for the Appellants,

Mr. *S. N. Palit*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—The plaintiffs are appellants. They are (1) Francis Henry Manisty, (2) James Boyd Simpson Hill and (3) Henry Walter Dunlop Hill. The defendants are (1) Julian Veitch Jameson and (2) Mrs. Georgina Gertrude Munro Jameson. Defendant No. 2 is the wife of defendant No. 1.

The plaintiffs brought an action to enforce a simple mortgage set forth in an Indenture (Ex. 1), dated the 15th January 1920, and confirmed by an agreement (Ex. 2), dated the 12th March 1920. The indentures were executed by both the defendants in respect of a debt of Rs. 21,000 due from Mr. J. V. Jameson alone to the plaintiffs, and as security for re-payment of the debt Mr. Jameson mortgaged the whole of the Jalaha Indigo Concern which belonged to him and Mrs. Jameson mortgaged her undivided two-sixteenth share in an Indigo Concern called the Karnowl Indigo Concern. The loan was to be re-paid in four instalments, namely,

(1) Rs. 3,000 on the day of handing over the indenture;

(2) Rs. 6,000 on the 30th June, 1920;

(3) Rs. 6,000 on the 31st December 1920; and

(4) Rs. 6,000 on the 30th June, 1921, with a stipulation that in case any of the instalments remained unpaid on the due date the mortgagees will have a right to take action on the Indenture to recover the whole of the balance due after giving the said Mr. Jameson one month's notice in writing of their intention to do so. The mortgagor, however, had a right to pay any instalment or any part thereof before the date mentioned as that on which it falls due. As Mrs. Jameson was not the principal debtor it was stipulated for her benefit that as soon as the total amount due under the mortgage became less than Rs. 12,001 and the rents due to the Bettiah Estate on account of the lease hold properties—whether *mukarrari* or otherwise—shall have been paid the liability of Mrs. Jameson under the Indenture shall cease and determine and thereafter the remaining amount unpaid shall continue to be the first charge on Mr. Jameson's Jalaha Indigo Concern alone.

The first instalment of Rs. 3,000 was paid on the day the mortgage indenture was executed; *i. e.*, on 15th January 1920; the second instalment of the 30th of June 1920 was not paid on the due date. On the 27th September 1920, Rs. 3,500 was sent by Mr. Parmer on behalf of Mr. Jameson to Mr. J. B. S. Hill through one Mr. Kasturi Lal and received by Mr. Hill on the 28th September 1920 (receipt Exhibit 3). Mr. Parmer did not direct as to whether the said sum of Rs. 3,500 was to be credited towards the mortgage loan or the personal loan which admittedly Mr. Jameson owed at that time to Mr. J. B. S. Hill. On the 8th November Mr. Parmer sent another sum of Rs. 3,000, stating in his letter (Ex. 9) of that date that it was paid on account of the mortgage on behalf of Mr. Jameson. On the 18th November J. B. S. Hill intimated to Mr. Jameson by his letter of that date (Ex. 4) that he had appropriated Rs. 2,083 due to him on account of the personal loan from Mr. Jameson out of Rs. 3,500 and the balance together with Rs. 3,000 was credited towards the mortgage loan, thus leaving a balance of Rs. 2,524-4 due in respect of the June *kist* under the mortgage. He asked him to send this sum so as to clear off the June *kist*. On the 25th November 1920 Mr. Parmer as Manager of the Jalaha Indigo Concern wrote a letter (Ex. 12) to Mr. J. B. S. Hill on behalf of Mr. Jameson, sending Rs. 1,515-12-6 along with two statements of account up to the 27th November 1920; (1) for the personal loan and (2) for the mortgage (Exs, 12 and 12-b respectively). He credited the entire sum of Rs. 6,500 aforesaid towards the mortgage loan, and out of Rs. 1,515-12 6 he credited Rs. 541 towards the mortgage and the balance of Rs. 974-12-6 towards the personal loan, thus reducing the loan account to Rs. 1,200 and the mortgage to Rs. 11,900. As the mortgage loan was brought down under Rs. 12,000 he claimed in his letter the release of Mrs. Jameson's undivided two sixteenth share in the Karnowl Indigo Concern in accordance with the stipulation in the mortgage bond, the *kist* due to the Bettiah Estate having been paid in full on the 30th September 1920 on account of the lease hold properties and *mukrrarri*. Mr. Hill acknowledged the letter and the sum of Rs. 1,515-12-6 on the very day he received them per letter (Ex. A) and said that as he was going that night to the *mela* he would send his reply later which he did on the 9th December (Ex. 10). In this letter he credited the aforesaid Rs.1,515-12-6 towards the unpaid amount of June *kist* referred to in his letter of the 18th November (Ex. 4) reducing it to Rs. 1,008 7-6 (*i. e.*, Rs. 2,524-4 minus Rs. 1,515-12 6). He insisted upon the appropriation made by him in his earlier letter of the 18th November on the ground that Mr. Jameson had promised payment of his personal loan in June. He also pointed out certain small inaccuracies in the accounts given by Mr. Parmer.

The December *kist* of Rs. 6,000 fell due on the 21st December and was not paid. Mr. Hill accordingly on the 9th January 1921 wrote a letter (Ex. 6) to Mr. Jameson stating that as the balance of June *kist* according to his letter of the 9th December and also the December instalment were not paid he would give due notice that if the full amount was not paid within a month he would take action to realise the whole amount of the mortgage under the terms of the deed. He sent the notice that very day (Ex. 13) which was received by Mr. Jameson on the 14th January per acknowledgment (Ex. 5). On the 13th February 1921 Mr. Jameson wrote to Mr. Hill refusing to accept Mr. Hill's mode of appropriation of the payments made by him and asking him to appropriate the same in the manner stated by Mr. Parmer in his letter of the 25th November. He also asked him to release the Karnowl Indigo Concern of his wife from the mortgage. Mr. Hill wrote back to him (Ex. 11) on the 19th February refusing to accede to his request and insisting upon his right to appropriate Rs. 3,500 paid in September 1920 towards his personal loan inasmuch as it was not suggested to him that it was to be credited to the mortgage account.

Mr. Hill brought his suit to enforce the mortgage against both the defendants Mr. and Mrs. Jameson, inasmuch as according to him Rs. 1,008-7-6 was due to him in respect of the June *kist* of 1920 and Rs.12,000 for the December *kist* of 1920 and June *kist* of 1921 making a total of Rs. 13,008-7-6, which with interest on the date of the suit amounted to Rs. 13,265-12-5.

The defendants filed separate written statements. The principal contention, however, on their behalf has been that the plaintiffs ought to have credited the entire sum of Rs.3,500 paid on the 27th September 1920 to the mortgage account instead of crediting only a portion of it, namely, Rs. 1,417 after paying off the personal loan of Mr. J. B. S. Hill amounting to Rs. 2,083, and that the plaintiffs' claim should thus be reduced which would bring down their claim to less than Rs. 12,000 on the 8th of November 1920 the date on which another sum of Rs. 3,000 was paid. Accordingly, on behalf of defendant No. 2 it was contended that her liability under the mortgage ceased and determined and that the plaintiffs were not entitled to a decree against her own share in the Karnowl Indigo Concern. The other pleas of the defendants were of minor importance as the issues framed would show, and the Court below decided those issues against them. They do not arise in this appeal.

The principal contentions of the defendants referred to above gave rise to the following issues:—

"Whether the plaintiffs were entitled to credit Rs. 3,500 towards the loan account as alleged by them ?" (Issue No. 3) Did the defendant No. 1 promise to pay up the loan account in June? If so, does it entitle the plaintiffs to credit Rs 3,500 to the loan account?" (Issue No. 4).

The Court below decided the two issues together and held that the defendant No. 1 had promised to pay the personal loan to the plaintiff No. 2 along with the June instalment of 1920 but that the plaintiffs were not entitled to credit any amount out of the sum of Rs. 3,500 against the loan account and ought to have credited the same towards the mortgage account. Accordingly, the Court below reduced the claim of the plaintiffs to Rs. 11,900 on the 8th of November 1920 as contended for by the defendants and as this sum was under Rs. 12,000 and the arrears of rent due to the Bettiah Estate were paid up the Court below released Mrs. Jameson and Mr. Karnowl Indigo Concern from the mortgage.

The plaintiffs have appealed against this decision. Mr. Jameson has not appeared in this Court, and the appeal is resisted only by Mrs. Jameson.

The only question before us is whether Mr. J. B. S. Hill, one of the plaintiffs, was entitled to appropriate Rs. 2,083 out of Rs. 3,500 paid on the 27th of September 1920 towards his personal loan then due from Mr. Jameson. In order to appreciate the point it is necessary to give shortly a history of both the personal loan due to Mr. J. B. S. Hill, one of the plaintiffs, and the mortgage-debt due to him along with the other two plaintiffs, Messrs. F. H. Manisty and H. W. D. Hill.

It appears from an agreement (Ex. 17), dated the 27th January 1919, that the three plaintiffs and the defendant Mr. Jameson were owners of the Jalaha Indigo Concern. Mr. J. B. S. Hill had advanced from his own pocket a large sum of money for the outlay of the said concern during the year 1915 which together with interest amounted to Rs. 8,964-7-9 on the day the agreement was executed. The plaintiffs and the defendant Mr. Jameson hypothecated the whole of the indigo made by the Jalaha Concern in 1918, which on the day of the agreement was lying in the godowns of Messrs. Moran and Company and Messrs. Thomas & Company, Calcutta, weighing 28 maunds, 25 seers and 8 *chhataks* as security for re-payment of the aforesaid loan of Rs. 8,964 7-9 due to Mr. J. B S. Hill, one of the proprietors. By the agreement the proprietors of the Concern promised to pay the amount due with interest on demand, or, if no demand was made, then within one month from the date of the agreement.

The Indenture (Ex. 1), dated the 15th January 1920, on foot of which the mortgage action was brought, shows that Mr. Jameson had an undivided half in the Jalaha Concern. The remaining eight annas belonged to the plaintiffs. The plaintiffs sold their 8-annas share to Mr. Jameson. Thus Mr. Jameson became the proprietor of the 16 annas of the Jalaha Indigo Concern. On the date of the mortgage indenture Rs. 12,000 out of the purchase-money due to the plaintiffs remained unpaid, and Rs 9,000 out of the plaintiffs' share of monies outstanding and owing to the said concern was also due to the plaintiffs from the Concern. Thus, Mr. Jameson as 16 annas proprietor of the Jalaha Indigo Concern owed to the plaintiffs Rs. 21,000. The negotiations for the sale of the plaintiffs' share in the Jalaha Indigo Concern to Mr. Jameson were carried through Mr. J. B. S. Hill as is apparent from Mr. Jameson's letter (Ex. 8), dated the 15th October 1919. While the negotiations were going on Mr. J. B. S. Hill insisted on having some definite date of payment of his personal loan fixed, and Mr. Jameson as proprietor of the Jalaha Indigo Concern agreed to fix the 30th of June as the date on which the personal loan of Mr. J. B. S. Hill would be re-payable whether the hypothecated indigo was sold by that date or not: *vide* Exs. 7 and 8, dated the 11th and 15th October 1919 respectively. They hypothecated indigo lying in the firms referred to in Ex. 17 was in the meantime sold and the sale proceeds were paid to Mr. J. B. S. Hill to the credit of his personal loan account. The indenture was discovered to be defective for want of valid attestation and negotiations for curing the defects arose. When this was going on, Mr. J. B. S. Hill insisted on payment of the balance of his personal loan and before the agreement (Ex. 2) curing the defects in the mortgage indenture and confirming it was executed on the 12th March 1920, Mr. J. B. S. Hill obtained from Mr. Jameson a definite promise that his loan would be paid at the same time as the June *kist* of 1920. In his letter (Ex. 15), dated the 8th March 1920 Mr. Jameson says "I propose to pay the balance of your loan at the same time as the June instalment of 1920." This was in reply to Mr. Hill's letter (Ex. 16) of the same date.

Thus when Rs. 3,500 was paid on the 27th September 1920 Mr. Jameson owed to Mr. J. B. S. Hill Rs. 2,083 under the personal loan account (*vide* the account given in Ex. 4). The June *kist* under the mortgage payable to Mr. J. B. S. Hill and the other plaintiffs had become over due. Mr Parmer on behalf of Mr. Jameson sen Rs. 3,500 on the 27th September 1920 pe Kasturi Lal. Mr. J. B. S. Hill was not a all told as to how this money was to be appropriated and whether it was paid towards the mortgage-debt or the personal loan. Mr. Parmer subsequently sent Rs.3,000 on the 8th November 1920 with a letter in which he ear-marked the payment as being "on account of the mortgage on behalf of Jameson." In these circumstances Mr. Hill out of Rs. 3,500 first paid off his personal debt of Rs. 2,083 and appropriated the balance towards the mortgage-debt due to himself and the other plaintiffs. The learned Subordinate Judge says that he had no right to do this although he holds that "the money due on the loan account was promised by Mr. Jameson to be paid on the 30th June 1920" and that "Mr. Parmer the Manager of the Jalaha Concern on behalf of Mr. Jameson, however, sent Rs. 3,500 to Mr. Hill without any intimation as to how the money was to be appropriated, whether towards the loan account or the mortgage account......................" and that "Kasturi Lall who had taken the said loan to Mr.Hill have not been examined to prove any verbal intimation"; yet the learned Subordinate Judge refuses to accept the contention of the plaintiffs that "they had a right of an option to credit it towards any of the debts and, therefore, they preferred clearing off the loan account to the mortgage account." Argues the learned Subordinate Judge "the money due under the loan account was a debt due from Mr. Jameson and not from Mrs. Jameson to the plaintiff No. 2 only and not to all the plaintiffs and that the money sent was in excess of the amount due under the loan account and the June *kist* of the mortgage was also due. The plaintiff No 2 alone had no option to clear off his loan account first and leave the balance to his mortgage loan." The fallacy in the latter portion of the argument is obvious. On the day the sum of Rs. 3,500 was received by Mr. J. B. S. Hill plaintiff No. 2 it was not sufficient to pay off the June *kist* of Rs. 6,000, whereas his personal debt was only Rs. 2,083 which was less than Rs. 3,500. The personal loan could thus be fully satisfied out of the sum of Rs. 3,500 received, and the June *kist* could not be satisfied in full, it had already become overdue. There was no meaning in paying off the mortgage-debt because the liability under the mortgage for payment of the *kists* had occurred on account of the default of the June *kist* and would have continued even if Rs. 3,500 was credited towards the June *kist*. The first portion of the argument that the mortgage debt was payable by both Mr. and Mrs. Jameson to plaintiff No. 2 and the other plaintiffs whereas the personal loan was payable by Mr. Jameson only to Mr. J. B. S. Hill alone, overlooks the fact that the mortgage-debt was due from Mr. Jameson and Mrs. Jameson had only given her property as security for the sake of her husband. It was Mr. Jameson as proprietor of the Jalaha Indigo Concern who had to pay the mortgage loan and as such he had also to pay the personal loan to Mr. J. B. S. Hill advanced to the factory. Therefore, Mr. Jameson was the debtor with respect to both the loans and both the liabilities were incurred by him as proprietor of the Jalaha Indigo Concern. The payment of Rs. 3,500 was made by Mr. Parmer as Manager of the Jalaha Concern on behalf of Mr. Jameson. All though there were three mortgagees Mr. J. B. S. Hill was acting on behalf of all the plaintiffs and was practically representing them, and the plaintiffs do not dispute his right to appropriate the payment towards his personal loan in preference to the mortgage loan.

From Mr. Hill's letter (Ex. 4) dated the 18th November 1920 wherein he stated that he had appropriated the aforesaid sum of Rs. 3,500 towards the personal loan account and from the fact that no ledger or cash book showing the appropriation had been produced, the learned Subordinate Judge infers that the loan had not been cleared off on the date of the receipt of Rs. 3,500." He says "it struck Mr. Hill to appropriate the said sum towards the loan account when he received Rs. 3,300 on the 18th November 1920 from Mr. Parmer to be credited towards the mortgage account, but as a matter of fact he had not done so on the date he received the said sum of Rs. 3,500." The inference drawn is not legitimate; the letter only shows how he had already appropriated the amount. Suppose for the sake of argument that Mr. J. B. S. Hill had not appropriated the said amount earlier than the 18th November, his right to appropriate it towards any of the debts had not extinguished, it continued up to the time that he had communicated the appropriation to Mr. Jameson. Admittedly he was not done so before he wrote the letter of the 18th November wherein he stated how he had appropriated the said sum of Rs. 3,500.

In the case of *Simson* v. *Ingham* (1) it was laid down that the right of the creditor to appropriate the payment towards any of the debts due to him continues up to the time that he intimates the appropriation to the debtor. The decision goes further and holds that the creditor has a right to cancel his own appropriation towards a particular debt and to appropriate subsequently towards another debt provided he does so before he had communicated the previous appropriation to the debtor. Referring to the aforesaid case Sir Henry Cunningham and Sir Horatio Shepherd in their commentary on the Indian Contract Act under s. 60 observe: "This is contrary to the rule of civil law according to which an appropriation, whether by debtor or creditor is necessarily made at the time of payment." The learned Subordinate Judge tries to get round the principle enunciated in the aforesaid case by holding that it was the intention of Mr. Jameson to pay of the mortgage-debt, and this intention he infers from the fact that the penalty for non-payment of the personal debt in June was only the charge of interest according to the stipulated rate, whereas the penalty for non-payment of June *kist* of the mortgage was more serious; consequently, says the learned Subordinate Judge "the payment of the mortgage-money was prominent and predominent in the mind of the mortgagors and, therefore, they would have naturally wished to pay off the June *kist* of the mortgage. The circumstances are such that they clearly implied that the payment was not only intended but made to be applied to the liquidation of the mortgage-debt." It seems to be an assumption only on the part of the learned Subordinate Judge to say that the payment was "made to be applied to the liquidation of the mortgage debt." He has already held that there was no intimation given to Mr. J. B. S. Hill as to how the money was to be appropriated. Mr. Parmer, who sent the money, and Kasturi Lal, who carried the money, have not been examined in the case. Mr. Jameson in his evidence does not say that the payment was expressly made towards the mortgage-debt. He only says that he intended to send the loan account and the June *kist* of the mortgage money and possibly he may have directed Mr. Parmer to send the June *kist* of the mortgage-debt, but he confesses that he has no copy of the letter he wrote to Mr. Parmer pressing him to make arrangements for the payment of the mortgage-money of the June *kist*." He says "I have no proof to show that I wrote to Mr. Parmer to clear off the June *kist* of the mortgage-debt first".

It seems that a fair inference from the evidence can be raised that Mr. Jameson instructed Mr. Parmer to send Rs. 3,500 without any direction or without any intention for which of the debts the money was to be appropriated. This is the reason why the money was paid without any intimation as to appropriation. It is more likely that it was intended that the money be appropriated towards the personal loan account as naturally Mr. Hill would do, insistent as he was from the very beginning that his loan account should be satisfied and he had obtained a solemn promise from Mr. Jameson to that effect.

Therefore, the finding of the learned Subordinate Judge referred to above is erroneous.

Suppose for a moment that Mr. Jameson intended that the said sum of Rs. 3,500 should be appropriated towards the June *kist* of the mortgage, but his intention will not be of any avail until it was communicated to the creditor. The principle of appropriation of payments made by a debtor who owes several debts, to a creditor has been enunciated in the case of *Cory Brothers & Compauy, Limited* v. *Owners of the Turkish Steamship, "Mecca"* (2) where it has been laid down that the right to adopt the manner of appropriation rests directly with the debtor. In the absence of any direction of the debtor it is open to his creditor to appropriate the payment towards any of his debts, and, lastly, if there is no intimation by the debtor at the time of payment with regard to appropriation by the creditor, then it is open to the creditor to insist upon the appropriation being made in the chronological order in which the debts stand. These principles have been so firmly established that it is needless to refer to any further authority. Suffice it to say that the principles have been crystalised in the Indian Contract Act in ss. 59 to 61. The present case lies in a nutshell. Mr. Jameson as proprietor of the Jalaha Indigo Concern owed two debts to Mr. J. B. S. Hill: (1) on account of his loan advanced to the Jalaha factory at a time when he along with the other plaintiffs and Mr. Jameson was the proprietor and which subsequently became the sole property of Mr. Jameson; and (2) the mortgage-debt due to Mr. J. B. S. Hill and the other two plaintiffs in the case, Mr. Hill acting on their behalf and representing them throughout the transactions. Mr. Jameson had promised to pay off the personal loan along with the June *kist* under the mortgage. In September 1920, long after the June *kist* had become due Mr. Jameson paid Rs. 3,500 on the 27th September 1920 to Mr. Hill without telling him towards which of the two debts payment was to be appropriated. In the absence of any such direction Mr. Hill appropriated the same towards the full satisfaction of his personal loan and the balance towards the mortgage-debt, and he indicated the same to Mr. Jameson on the 18th of November, 1920. Mr. Jameson subsequently asked him to credit the entire sum of Rs. 3,500 towards the mortgage loan, and not towards his personal loan. Mr. Hill refused to do so. Thereafter Mr. Jameson on the 13th January 1921 objected to the appropriation and asked Mr. Hill to appropriate the entire sum of Rs. 3,000 towards the June *kist*, which Mr. Hill refused in the following words:—

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(1) (1823) 2 B. & C. 65; 3 D. & R. 249; 1 L. J. K. B. (O. S.) 234; 107 E. R. 307; 26 R. R. 273.

(2) (1897) A. C. 286.

"With reference to your letter, dated 13th instant. I have to write to you that I am sorry I cannot accept the suggestions made in your said letter.

At the time of the payment of Rs. 3,500 in September, 1920, it was not suggested to me that the payment should be first credited to the mortgage account B or that any specified amount should be credited to the mortgage account B. I had the right to credit to whichever account I liked B and as I considered it proper to credit it first to the loan account I did so and you were duly informed about it. You are wrong in thinking now that you have a right to ask me to credit any portion of the sum credited to the loan account to the mortgage account".

The position taken by Mr. Hill in this letter is fully in consonance with the law on the subject as stated above. Therefore, Rs. 3,500 was properly credited towards the personal loan account of Mr. J. B. S. Hill. The result of this appropriation is that the mortgage-debt due at the date of the suit, or when the cause of action arose, was not under Rs. 12,000 but it was as claimed in the plaint and, therefore, Mr. Jameson or Mrs. Jameson or her two sixteenth share in the Kornowl Indigo Concern could not be exempted from the mortgage. The view taken by the learned Subordinate Judge is wrong, and differing from him I set aside the decree made by him and decree the appeal with costs.

Accordingly, we decree the plaintiffs' suit in terms of the reliefs sought for by them against both the defendants and the properties mortgaged in the mortgage indenture (Ex. 1), dated the 15th January, 1920. The plaintiffs will get an ordinary mortgage decree with six months' grace allowed to the defendants to pay up the principal sum claimed with interest at the stipulated rate, failing which the plaintiffs will be entitled to sell the properties mortgaged. After the expiry of the period of grace interest will run at the rate of 6 per cent. per annum. The plaintiffs will also get a decree under O. XXXIV, r. 4 of the C. P. C.

Bucknill, J.—I should like to add only a few words to the judgment of my learned brother. I think that the law on this subject is clear. In the House of Lords in the case of *Cory Brothers & Company Limited* v. *The owners of the Turkish Steamship "Mecca"* (2) his Lordship Lord Macnaghten there states in clear language that when a debtor is making a payment to his creditor he may appropriate the money as he pleases and that the creditor must apply it accordingly. But if the debtor does not make any appropriation at the time when he makes the payment the right of appropriation devolves upon the creditor. In the old and famous case of *Devaynes* v. *Noble* (3) (usually known as *Clayton's case*) which was decided in 1816, it was held that the creditor was bound to make his election at once or within a reasonable time. But Lord Macnaghten observes that it had long been held and is now quite settled law that the creditor has the right of election up to the very last moment. It was also stated in the same case decided in the House of Lords to which I have already referred that the appropriation of the money is governed, not by any rigid rule of law, but by the intention of the creditor, expressed, implied or presumed, and the same principle is no doubt applicable to appropriation by the debtor. Now in this appeal now before this Court it is common ground that there certainly was no express information given by the debtor to the creditor as to the appropriation of the sum; nor, so far as I could see, was there any ground for suggesting that with regard to this sum (the appropriation of which is now in dispute) there had taken place anything from which the creditor could or should have extracted any implied intention on the part of the debtor as to the method of its appropriation. Still less was there, in my view, any presumption which could be fastened upon the creditor that the debtor's intention was that the money should be appropriated to the later of the two specific debts *i. e*, to the mortgage-debt. Under these circumstances it appears to me that in this case, as the law stands, it is hopeless to argue and it cannot seriously be maintained that Mr. Hill could not have had the right of appropriating this sum in whatever manner he might have thought fit.

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(3) (1816) 1 Mer. 572 at p. 585; 35 E. R 781, 15 . . . . 161.

P. D. *Order accordingly.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL
No. 2894 OF 1925.
March 20, 1926.
Present:—Mr. Justice Harrison.
DUKH BHANJAN RAM—DECREE-HOLDER—APPELLANT
versus
SARFRAZ KHAN—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 40—Arrest of judgment-debtor, when can be refused—Judgment-debtor's right to apply for insolvency—Duty of Court.

Unless a Court finds that the judgment-debtor is unable to pay his debts because of poverty or any other sufficient cause, the decree-holder is entitled to have the warrant of arrest issued against the judgment-debtor, even though the latter be prepared to farm out his land to the decree-holder or have his salary attached.

Hargobind-Kishan Chand v. *Hakim Singh & Co.*, 93 Ind. Cas. 54; 6 L. 548; A. I. R. 1926 Lah. 110, followed.

When judgment-debtor is brought before the Court, it is the duty of the Court to inform him that he can avoid arrest by presenting a petition in insolvency.

Miscellaneous second appeal from an order of the District Judge, Mianwali, dated the 16th June 1925, affirming that of the Senior Subordinate Judge, Mianwali, dated the 5th May 1925.

Lala *Parkash Chandra*, for the Appellant.
Lala *Devi Das*, for the Respondent.

JUDGMENT.—The Senior Subordinate Judge, Mianwali, refused to order the arrest of three judgment-debtors. He gave no finding under O. XXI, r. 40 of the C. P. C., that they were unable to pay their debts because of poverty or any other sufficient cause and he declined to issue warrants, because the decree-holder refused to take a farm of the judgment-debtors' land. The appeal was dismissed by the District Judge on the ground that it was open to the decree-holder to realise half of the salary of the principal judgment-debtor and also to take a farm of his land. This was no sufficient reason as explained in *Hargobind-Kishan Chand* v. *Hakim Singh & Co.* (1), and indeed the judgment-debtors have never even stated that they are unable to pay the decree but simply that they do not wish to beyond being prepared to farm their land, while Sarfraz Khan, one of the judgment-debtors and a *Kanungo*, has no objection to half of his salary being attached. There is nothing on the record to show that the judgment-debtors were informed that they could avoid arrest by presenting a petition in insolvency, and before issuing warrants I think it will be well for the Senior Subordinate Judge to issue a fresh notice under O. XLI, r. 37 of the C. P. C., and to explain to the decree-holder that this is so.

I, therefore, accept the appeal and set aside the order refusing unconditionally to issue warrants and direct the Executing Court to proceed in this manner.

R. L. *Appeal accepted.*

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(1) 93 Ind. Cas. 54; 6 L. 548; A. I. R. 1926 Lah. 110.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1336 OF 1923.
December 3, 1925.
Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.
MANMATHA NATH KAR—DEFENDANT—APPELLANT
versus
PROBODH CHANDRA RATARI—PLAINTIFF—RESPONDENT.

Evidence—Relevant evidence, admission of, without objection, effect of—Omission to object to inadmissible evidence, effect of.

Where evidence is admitted in the first Court without objection and the evidence is admissible as relevant, no party will be allowed to object to the reception of such evidence at any later stage of the litigation. [p. 281, col. 2; p. 282, col. 1.]

Shahazadi Begam v. *Secretary of State for India*, 34 C. 1059; 6 C. L. J. 678; 9 Bom. L. R. 1192; 2 M. L. T. 439; 34 I. A. 194 (P. C) and *Chooni Lal Khemani* v. *Nil Madhab Barik*, 86 Ind. Cas. 734; 41 C. L. J. 374; A. I. R. 1925 Cal. 1031, referred to.

An omission to take objection to reception of a document which is irrelevant or inadmissible in evidence does not make it admissible. [p. 282, col. 1.]

Miller v. *Babu Madho Das*, 23 I. A. 106; 19 A. 76; 7 Sar. P. C. J. 73; 9 Ind. Dec. (N. S.) 50 (P. C.), referred to.

Appeal against a decree of the Subordinate Judge, Second Court, Midnapore, dated the 15th January 1923, reversing that of the Munsif, Second Court at that place, dated the 13th of November 1919.

Dr. *Dwarka Nath Mitter* and Babu *Pyari Mohan Chatterjee*, for the Appellant.

Mr. *Amarendra Nath Bose* and Babu *Jati Nath Ghose*, for the Respondent.

JUDGMENT.—The plaintiff-respondent is the landlord of a non-transferable occupancy holding. His case is that there were two non-transferable occupancy holdings which were amalgamated and formed into one occupancy holding and held by Durga Charan and other heirs of the original tenant. He found that the defendant was in possession of the holding whereupon he brought the present suit for recovery of possession from the defendant who was a trespasser according to him. The defence was that there was a mortgage of a portion of the holding by the original tenant in favour of a third party and that in execution of the decree upon that mortgage the defendant purchased the portion mortgaged and was in possession thereof. He further stated that the entire holding was not mortgaged and that the original tenant did not leave possession of the portion of the holding not mortgaged. The controversy between the parties was limited to the question as to whether the mortgage-deed and the decree thereon covered the entire holding or whether they related only to a portion of the holding. In order to prove his contention the defendant produced some copies of the Settlement *khatians*. It appears that these *khatians* were not certified copies of the original Settlement *khatian* but are said to be copies served upon the defendant by the Settlement Officer. When the copies of the *khaitans* were produced they were received in evidence without any objection being taken by the plaintiff. By these copies of the *khatian* the defendant attempted to show that one of the plots mentioned in the *khatians* (Plot No. 996) was not within the mortgage or the decree and, therefore, the whole holding was not transferred to him. His case was that plot No. 2 of the mortgage-deed was not this plot No. 996 but a different plot No. 319, outside that holding. The plaintiff, on the other hand, contends that the second plot of the schedule to the mortgage is plot No. 996 and, therefore, the whole holding was included within the mortgage and the decree following it. Two objections were taken on behalf of the defendant: (1) that the holding in suit was not a non-transferable occupancy holding but a holding at a fixed rate of rent or a *maurasi mokarrari* holding; (2) that he was recognised by the plaintiff landlord who demanded rent from him after his purchase. The Trial Court dismissed the plaintiff's suit holding that the entire holding was not mortgaged and transferred to him. On the other two points the finding of the Trial Court was against the defendant. There was an appeal to the District Court which reversed the decision of the Munsif and held that the sale certificate covered the entire land of both the holdings and, therefore, the plaintiff was entitled to re-enter. There was a further appeal to this Court by the defendant, which set aside the decree of the lower Appellate Court and sent the case back for re-hearing of the appeal on all the three points taken by the defendant. At the re-hearing of the appeal the lower Appellate Court has come to the same conclusion as before and held that the defendant purchased the entire holding and, therefore, the plaintiff was entitled to a decree in ejectment of the defendant. On the other two points the lower Appellate Court has found against the defendant in agreement with the Trial Court.

With regard to the first point, namely, that the holding is *maurasi mokarrari* holding, an objection is taken on behalf of the appellant to the finding by the lower Appellate Court on the ground that that Court has overlooked the oral evidence on the record in respect of the defendant's plea. The learned Subordinate Judge has found that the evidence discloses that the tenancy existed since 1312 and there is nothing to show 'that the tenancy existed before that year'. He has, therefore, held that the defendant has failed to prove uniform payment of rent for a period of 20 years—the suit having been brought in 1919 or 1326 *B. S.* The defendant contends that there is some oral evidence on the record which the Court should have taken into account and the statement that there is nothing to show that the tenancy existed before 1312 is unwarranted. There is only one witness examined on behalf of the defendant who speaks about this matter. We have looked into his evidence and we think that it does not carry the matter far and the learned Subordinate Judge was entitled to disregard it. He knows nothing of the *jama* or the creation of it. The vague statement that it existed for a long time is not sufficient evidence in support of the defendant's case. We do not think that there is any defect in the Judge's judgment in so far as the first point is concerned.

With regard to the third point, namely, the recognition by the plaintiff of the defendant as his tenant by demanding rent from him, it has been found on the evidence against the defendant. The learned Judge enters his finding in the following words: I, therefore, do not find even the evidence of an intention to recognise the title of the defendant. My finding on this point too will, therefore, be against the defendant." The learned Advocate for the appellant has fairly admitted that this finding of fact concludes this point.

The second point is of some importance and has given rise to different decisions. The real controversy between the parties, as we have said, is whether plot No. 996 of the Settlement *khatian* is or is not included in the mortgage and the decree. It may be noted here that the mortgage was executed before the settlement proceedings were commenced. The deed accordingly does not contain the plot numbers, but it is attempted to identify the plots in the schedule to the mortgage-deed with the settlement plots by a comparison of the boundaries. The Trial Court on a comparison of the boundaries given in the mortgage-deed and the decree and those in the Settlement *khatian* came to the conclusion that the boundaries tally more with the boundaries of plot No. 319 as stated by the defendant than with the boundaries of plot No. 996; and in this view it held that what was mortgaged and purchased by the defendant was the holding *minus* plot No. 996 and accordingly the original tenants did not part with their entire interest in the holding. The learned Subordinate Judge held that copies of the *khatian* produced in the case were not certified copies and, therefore, no *judicial* notice should be taken of them. After making this remark he observes thus: "There is, therefore, no legal evidence on the record on which it can be found that plot No. 996 appertains to the disputed *jote* and was not sold in execution of the mortgage-decree". This statement that there is no legal evidence on the record on which it can be found that plot No. 996 appertains to the disputed *jote*, has been challenged before us and we think rightly. The plaintiff himself admits in the plaint that plot No. 2 corresponds to plot No. 996 of the Settlement *khatian*. The only point in dispute between the parties, therefore, was as to whether plot No. 2 was plot No. 996 as alleged by the plaintiff or was plot No. 319 as alleged by the defendant. The lower Appellate Court did not examine this question from the correct stand point and it is not correct to say that even apart from the *khatian* there is no legal evidence to show that plot No. 996 was included in the disputed *jote*. The learned Subordinate Judge has taken into consideration all the other evidence in the case and found that the plots mentioned in the mortgage-deed constituted the entire *jote*. But his conclusion cannot be considered to be satisfactory in view of the fact that the learned Subordinate Judge has missed the real point in controversy between the parties.

Then with regard to the admissibility of the copies of the *khatians* produced by the defendant. They were put in in the Trial Court and received without objection. The defendant-appellant contends that if objections were taken in time by the plaintiff on the ground that they were not certified copies the defect could have been cured by putting in the certified copies and as such objection was not taken at the earliest opportunity the plaintiff should not be allowed to take it at a later stage of the litigation; and the Court of Appeal below was not justified in treating the *khatians* as no evidence at all in the case. For this contention reliance has been placed upon the case of *Shahazadi Begam* v. *Secretary of State for India* (1). It may be taken as settled at the present time that where evi-

(1) 31 C. 1059; 6 C. L. J. 678; 9 Bom. L. R. 1192; 2 M. L. T. 439; 34 I. A. 194 (P. C.).

dence is admitted in the first Court without any objection being taken to its reception and the evidence is admissible as relevant no party will be allowed to object to the reception of such evidence at any later stage of the litigation. Reference may in this connection be made to the case of *Chooni Lal Khemani* v. *Nil Madhab Barik* (2). It is also settled that an omission to take objection to the reception of a document which is irrelevant or inadmissible in evidence in the case does not make it admissible, *Miller* v. *Babu Madhab Das* (3). In the present case it cannot be said that the *khatians* are totally inadmissible in evidence or irrelevant. But it is argued on behalf of the respondent that uncertified copies of the *khatians* could not be received in evidence under s. 65 (*e*) of the Evidence Act read with the second sub-clause under it. It is argued that only certified copies can be produced as evidence to prove a public document like the Settlement *khatians* and as no other mode of evidence is admissible under the law, uncertified copies of the *khatians* should not be used as evidence even though not objected to by the plaintiff. It is not necessary to decide this question in the present case for we are of opinion that this case must go back to the lower Appellate Court for a re-hearing of the appeal and thus the defendant will get an opportunity of producing certified copies of the *khatians*. There cannot be any doubt that rightly or wrongly the defendant was misled by the omission of the objection to the admissibility of the copies of the *khatians* produced by him and we think that in the interest of justice and fairness he should be put in the same position as he would have occupied had the objection to the inadmissibility of the documents been taken in proper time.

We accordingly set aside the decree of the lower Appellate Court and send back the case to that Court for a re-hearing of the appeal on the second point raised in the case namely, whether the entire holding was the subject of the mortgage and of the purchase by the defendant or whether the defendant purchased and is in possession of only a portion of the holding. The defendant is permitted to put in, if so advised, certified copies of the *kkatians* of which uncertified copies were put in by him and exhibited in the Trial Court. The appeal will be re-heard on a consideration of such documents and of the remarks made above. It is to be understood that the appeal is to be re-heard upon this point alone. Costs will abide the result.

M. B.
R. L. *Appeal allowed;*
Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 207 OF 1924.
February 10, 1926.
Present:—Mr. Findlay, Officiating J. C.
CHHOTELAL—PLAINTIFF—APPELLANT
versus
R. B. Seth LAKHMICHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 53, 118—Hindu Law—Partition, whether transfer—Distinction between transfer and exchange—Mala fide *partition in fraud of father's unsecured debt—Decree—Son's share, whether liable to be attached.*

A partition cannot be considered a transfer in so far as it does not in effect change the rights of the parties; what it does do is to effect a change in the mode of enjoyment. [p. 283, col. 2.]

Partition in certain aspects approximates to exchange as defined in s. 118 of the Transfer of Property Act, but even so the distinction emerges that in exchange two persons owing two specific properties transfer or convey their respective ownership, one to the other. [*ibid.*]

Gyannessa v. *Mobarakannessa*, 25 C. 210; 2 C. W. N. 91; 13 Ind. Dec. (N. S.) 142, referred to.

A fraudulent partition cannot, however, be regarded as entirely divorced from the principles of s. 53 of the Transfer of Property Act. [*ibid.*]

Ordinarily property taken by a Hindu son in partition cannot be seized in execution of a decree in respect of an unsecured personal debt of the father, but it is liable for the father's debt if it be shown that the partition was made with a view to defraud or defeat creditors. [p. 284, col. 1.]

[Case-law discussed.]

Krishnasami Konan v. *Ramasami Ayyar*, 22 M. 519; 9 M. L. J. 127; 8 Ind. Dec. (N. S.) 371, *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu*, 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55 and *Kulada Prosad Pandey* v. *Haripada Chattopadhyaya*, 17 Ind. Cas. 257; 40 C. 407 at p. 421; 16 C. L. J. 311; 17 C. W. N. 102, relied on.

Second appeal against a decree of the District Judge, Bhandara, dated the 25th January 1925, in Civil Appeal No. 75 of 1925.

Mr. *P. C. Datta*, for the Appellant.

Mr. *W. B. Pendharkar*, for the Respondents.

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(2) 86 Ind. Cas. 734; 41 C. L. J. 374; A. I. R. 1925 Cal. 1034.

(3) 23 I. A. 106; 19 A. 76; 7 Sar. P. C. J. 73; 9 Ind. Dec. (N. S.) 50 (P. C.).

JUDGMENT.—The plaintiff-appellant Chhotelal, a minor, through his mother Muktabai, filed the present suit in the Court of the Subordinate Judge, Balaghat, for a declaration that his 4-annas share in *Mauza* Agarwara, Tahsil Waraseoni, was not liable to attachment and sale in execution of certain decrees obtained by the defendants against his father Tularam.

The main facts of the case have been sufficiently stated in the judgments of the two lower Courts. The Subordinate Judge held that there had been no partition, as alleged by the plaintiff, between him and his father on *Akhatij* day of 1925; that in February 1923 an imperfect partition was carried through in the Revenue Courts, but that the partition effected was not a *bona fide* one. He further held that the partition was not effected in the minor's interests but was a fraudulent one carried through for the purpose of defeating the claims of the defendants-respondents. A further finding was that the debts owing to the defendants-respondents had not been incurred by the father Tularam for immoral or illegal purposes. The plaintiff's suit was accordingly dismissed.

The plaintiff's appeal to the Court of the District Judge, Bhandara, also met with no success. The learned District Judge, after a careful survey of the evidence, came to the conclusion that the partition, if it could be regarded as one at all, was a fraudulent one made with a view to defraud or delay the creditors of Tularam, and was, therefore, not binding on the respondents.

These are findings of fact which it is now impossible to challenge in this Court, and indeed, so far as the fraudulent nature of the transaction is concerned, no attempt has been made to argue that the findings of the lower Courts were illegally or improperly arrived at. The case is, no doubt, redolent of fraud, and the preposterous circumstances under which this child, aged 1, is alleged to have separated from his father, taking with him half the property without any responsibility for the heavy debts binding on the estate, are too obvious to require emphasis. The learned District Judge further held, relying on the decision in *Krishnasami Konan* v. *Ramasami Ayyar* (1) that the creditors were entitled to enforce their claims against the separated share of the plaintiff in view of the fact that it had been established as regards the so-called partition that it was a fraudulent one. On these findings the plaintiff's appeal was dismissed and he has now come up to this Court on second appeal.

The main argument offered on behalf of the appellant is that the partition in question cannot be considered a transfer within the meaning of the definition contained in s. 3 of the Transfer of Property Act. This is so far true, for partition as such does not, in effect, change the rights of the parties. What it does do is to effect a change in the mode of an enjoyment of property. Partition, it is true, in certain aspects approximates to exchange, as defined in s. 118 of the Transfer of the Property Act, but, even so, the distinction emerges that in exchange two persons, owing two specific properties, transfer or convey their respective ownership, one to the other : *cf. Gyannessa* v. *Mubarakannessa* (2). At the same time, it is impossible to regard a transaction like the present as entirely divorced from the principles laid down in s. 53 of the Transfer of Property Act. In *Ishwar Lingo Desai* v. *Dattu Gopal Desai* (3) it was held that the partition concerned in that case fell within s. 52 of the Transfer of Property Act, but the position therein was simplified by the fact that the phraseology of the provision reads as follows: "the property cannot be transferred or otherwise dealt with," and the partition in question, if not a transfer, could at least be regarded as falling within the words "or otherwise dealt with".

In my opinion, therefore, the provisions contained in s. 53 of the Transfer of Property Act cannot be applied *proprio vigore* here. Reference has been made to the decision in *Bali* v. *Girji* (4) as to the right of any co-parcener to claim partition: *cf. Balkishen Das* v. *Ram Narain Sahu* (5). That right is unquestionable, but the argument is entirely beside the point in the present case, where the vital question involved is that this partition has been proved to be a *mala fide* one entered into for the purpose of defrauding the creditors.

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(1) 22 M. 519; 9 M. L. J. 127; 8 Ind. Dec. (N. S.) 371.

(2) 25 C. 210; 2 C. W. N. 91; 13 Ind. Dec. (N. S.) 142.

(3) 19 Ind. Cas. 885; 37 B. 427; 15 Bom. L. R. 366.

(4) 20 Ind. Cas. 563; 9 N. L. R. 111.

(5) 30 C. 738; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489; 30 I. A. 139 (P. C.).

For my own part, I entertain not the slightest doubt but that the present case must be decided on the lines of the principle underlying s. 53 of the Transfer of Property Act. We have here a so-called partition found by both the lower Courts to be a *mala fide* one entered into for the sole purpose of defeating the claims of the present respondents. It is settled law that an exception has been grafted on to the general proposition that the property taken by a son in partition cannot be seized in execution in respect of an unsecured personal debt of the father. The exception is that the son's property is liable for the father's debt if it be shown that the partition was made with a view to defraud or defeat creditors: *cf. Krishnasami Konan* v. *Ramasami Ayyar* (1), *Vinjanampatti Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (6) and *Kulada Prosad Pandey* v. *Haripada Chattopadhyaya* (7) where, as in the present case, the very object, not to mention the effect of the partition, was to defeat creditors, and the share of the separated son is clearly, in my opinion, liable. Even, therefore, although the partition does not come within the letter of s. 53 of the Transfer of Property Act, I am of opinion that, for the reasons given by the Judge of the lower Appellate Court as well as those advanced in this judgment, the respondents are entitled to follow the property, of which the plaintiff is now alleged to be in separate possession, in satisfaction of their debts. I may add that the plaintiff was apparently not even born when the debts in question were contracted.

From another point of view, it only remains to add that, on the findings of fact arrived at by the lower Courts, there was, in reality no genuine or *bona fide* partition but only a colourable form of the same. In either event, it is perfectly clear that the plaintiff's suit was liable to failure.

The appeal is accordingly dismissed. The appellant must bear the respondents' costs. Costs in the lower Courts as already ordered.

G. R. D.

R. L. *Appeal dismissed.*

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(6) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

(7) 17 Ind Cas. 257; 40 C. 407 at p. 421; 16 C. L. J. 311; 17 C. W. N. 102.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 398 OF 1923.
March 11, 1926.
Present:—Justice Sir B. K. Mullick, KT.,
and Mr. Justice Kulwant Sahay.
Musammat RAMJHARI KOER—
PLAINTIFF—APPELLANT
versus
Lala KASHI NATH SAHAI AND OTHERS
—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 148—Suit by second mortgagee decreed—First mortgagee not party—Sale in execution of decree—Second mortgagee's right to redeem first mortgage—Limitation.

A second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgage and is not bound either by the decree in the suit of the prior mortgagee or by the sale held in execution thereof. [p. 285, col. 2.]

The period of limitation for such a suit is 60 years under Art. 148, Sch. I, Limitation Act. [*ibid.*]

Nidhiram Bandopadhya v. *Sarbessar Biswas*, 5 Ind. Cas. 877; 14 C. W. N. 439, *Bitragunta Appayya* v. *Addanki Venkataramanayya*, 82 Ind. Cas. 864; 20 L. W. 620; A. I. R. 1925 Mad. 150 and *Lakshmanan Chettiar* v. *Sella Muthu Naicker*, 84 Ind. Cas. 301; (1924) M. W. N. 508; 47 M. L. J. 602; A. I. R. 1925 Mad. 76, distinguished.

Basanta v. *Indar Singh*, 2 L. L. J. 419, *Priya Lal* v. *Bhora Champa Ram*, 79 Ind. Cas. 498; 45 A. 268; A. I. R. 1923 All. 271 and *Har Persad Lal* v. *Dalmardan Singh*, 32 C. 891; 9 C. W. N. 728; 1 C. L. J. 371, followed.

Appeal from a decision of the Subordinate Judge, Saran, dated the 18th January 1923, reversing that of the Munsif, Chapra, dated the 31st December 1921.

Messrs. *Jayaswal*, *B. N. Mitter* and *Sunder Lal*, for the Appellant.

Mr. *P. Dayal* for Mr. *Jadubans Sahay*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This appeal arises out of a suit for redemption of a mortgage which has been dismissed by the learned Subordinate Judge on the ground of limitation.

In *Mouza* Sarai Srikant Touzi No. 10752 a 5-annas 4-pies share belonged to Lala Fatah Bahadur and Lala Lal Bahadur. On the 11th of December 1886 they executed a *zarpeshgi* in respect of a 4-annas share to the plaintiff's mother and the defendants Nos. 11 to 13. On the 28th of March 1892 they mortgaged a 6-pies share to the defendant No. 5 and it seems to have been the case of both parties that this 6 pies was out of the 4-annas given in the *zarpeshgi*. On the 16th of February 1893 they executed a second mortgage to the plaintiff's mother and the defendants Nos. 11 to 13 in respect of the 4-annas share which had already been given in *zarpeshgi* in the year 1886 and which included the 6 pies already mortgaged to defendant No. 5. It appears that the remaining 1 anna 4 pies out of 5 annas 4 pies has passed to defendants Nos. 8 to 10. Defendant No. 5 instituted a suit to enforce his mortgage which was Suit No. 50 of 1894. In this suit the subsequent mortgagees were not made parties. A decree was obtained and the mortgaged property *viz.*, 6-pies share was sold on the 26th October 1895 and purchased by the defendants Nos. 1 to 3 in the *farzi* name of the defendant No. 4. Subsequently the second mortgagees, namely, the plaintiff's mother and the defendants Nos. 11 to 13 instituted a suit to enforce their mortgage of the 16th of February 1893. In this suit neither the first mortgagee nor the purchasers in execution of his decree were made parties. A decree was obtainted on the 26th February 1896 and in execution of the decree the 4-annas share was sold on the 8th January 1897 and purchased by the decree-holders themselves. The plaintiff's mother being dead, the plaintiff now claims the 4-annas share as her heiress on the allegation that by a private partition she has been allotted the entire 4-annas share and the defendants Nos. 11 to 13 have no interest therein.

The present suit for redemption was instituted on the 17th of January 1919. The contesting defendants, namely, defendants Nos. 1 to 3 pleaded *inter alia* that the suit was barred by limitation, they having been in possession for more than 20 years and the claim of the plaintiff to enforce her second mortgage having been barred by lapse of time.

The learned Munsif held that the suit was governed by Art. 148 of the Schedule to the Indian Limitation Act; and that the plaintiff had, therefore, 60 years to bring the suit from the date when the right to redeem accrued to her. He further held that as the plaintiff's predecessors-in-interest were not made parties in the suit of the first mortgagee, the plaintiff had still the right to redeem. He accordingly made a decree for redemption in favour of the plaintiff.

On appeal the learned Subordinate Judge set aside the decree of the Munsif on the ground that although the plaintiff had got the right of redemption as her predecessors-in-interest were not made parties to the suit of the prior mortgagee, but her right was barred by limitation as, in his opinion, the Article applicable to the present suit was not Art. 148, but Art. 132 of the Indian Limitation Act, and he relied upon the decision of the Calcutta High Court in the case of *Nidhiram Bandopadhya* v. *Sarbessar Biswas* (1). He accordingly dismissed the suit on the ground of limitation.

Against this decision of the Subordinate Judge the plaintiff has come up in second appeal to this Court, and the only question for consideration in this second appeal is as to what is the period of limitation for the present suit.

It is clear that a second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgage and is not bound either by the decree in the suit of the prior mortgagee or by the sale held in execution thereof. It has been contended on behalf of the respondents that after the sale in execution of the decree of the prior mortgagee, the mortgage was extinguished and the purchasers remained in possession not as representatives of the prior mortgagee but as representatives of the mortgagor; and that, therefore, Art. 148 has no application inasmuch as it provides for a suit against a mortgagee to redeem or to recover possession of the mortgaged property.

In my opinion this contention is not sound. So far as the second mortgagee is concerned, he is not bound by the decree or the sale in enforcement of the prior mortgage. His position as a second mortgagee remains unaffected by the decree and the sale. He was a necessary party in the suit brought by the prior mortgagee and a decree obtained in his absence on the basis of the prior mortgage did not affect his right to redeem the prior mortgage. The fact that the purchaser in execution of the decree of the prior mortgage has been in possession for more than 20 years does not, in my opinion, affect the rights of the second mortgagee to redeem the first mortgage.

The question, however, remains as to whether Art. 132 or Art. 148 of the Indian Limitation Act applies to the present case. In my opinion Art. 132 has no application to the present suit. In the case of *Nidhi-*

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(1) 5 Ind. Cas. 877; 14 C. W. N. 439.

ram Bandhopadhya v. *Sarbessar Biswas* (1) mentioned above the reasoning adopted was that the second mortgagee by his purchase at the sale in satisfaction of his mortgage-debt cannot acquire any right of redemption which he had not as mortgagee. With very great respect to the learned Judges, I am unable to follow this reasoning. The right to redeem the prior mortgage was vested in the second mortgagee by virtue of his being a second mortgagee. This right was not acquired by him by his purchase at the sale in satisfaction of his mortgage-debt. The learned Judges observed that "the omission of the prior mortgagee to include the second mortgagee in his suit has been held by this Court not to deprive the second mortgagee of his right to redeem the prior mortgage, but it cannot be held that this interpretation of the law, which is intended merely to save his right as second mortgagee, gives him any additional right, or extends the period during which, under the law, he can sue to enforce his rights. The right to redeem was held not to be lost. It was not held, and, in our opinion, it was intended to be held, that a fresh period to enforce his right to redeem under his mortgage was given to him from the date of the purchase. We hold that Arts. 134 and 148 of Sch. II of the Indian Limitation Act have no application in this case. The Article that applies is Article 132 of that Schedule under which limitation begins to run from the date when the mortgage-debt became due". I regret I am unable to agree with this reasoning. Once it is conceded that the second mortgagee had still the right to redeem and was not affected by the sale in execution of the prior mortgage, it must necessarily follow that whatever right the second mortgagee had before the sale in execution of the decree on the prior mortgage remained in tact. Under Art. 148 the second mortgagee had 60 years to redeem the first mortgage and this right was consequently not affected by the sale in execution of the decree upon the prior mortgage. Article 132 provides for enforcement of payment of money charged upon immoveable property. The second mortgagee's right of redemption cannot, in my opinion, be considered to be a right to enforce payment of money charged upon immoveable property. The second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgage. This Article has, therefore, no application to a suit for redemption brought by the second mortgagee.

I am, therefore, unable to accept the view taken in the case of *Nidhiram Bandhopadya* v. *Sarbessar Biswas* (1). This case was followed in two cases in the Madras High Court in *Bitragunta Appayya* v. *Addanki Venkataramanayya* (2) and *Lakshmanan Chettiar* v. *Sella Muthu Naicker* (3) and the reasoning adopted in these cases is similar to the reasoning adopted by the learned Judges in *Nidhi Ram's case* (1). The Lahore High Court has, however, differed from the view taken in *Nidhi Ram's case* (1) in *Basanta* v. *Indur Singh* (4). That Art. 148 of the Schedule to the Limitation Act applies to the present case is supported by the view taken by the Allahabad High Court in *Priya Lal* v. *Bhora Champa Ram* (5) and by the Calcutta High Court in *Har Persad Lal* v. *Dalmardan Singh* (6).

I would, therefore, hold that the present suit was not barred by limitation and that the plaintiff was entitled to a decree for redemption.

The question remains what should be the form of the decree. The learned Munsif has ordered that the plaintiff will be entitled to redeem on payment of Rs. 50 together with interest thereon at the rate of 12 per cent. per annum from the date of sale that is, 26th October, 1895 to the defendants Nos. 1-3. This sum of Rs. 50 represents the price of the property fetched at the sale in execution of the decree upon the first mortgage. This is not a correct principle upon which redemption should be allowed. The puisne mortgagee is held to be entitled to redeem the prior mortgage on the hypothesis that so far as he is concerned the mortgage has not been extinguished and is still in existence. He must, therefore, pay to the prior mortgagee the entire amount due upon the prior mortgage on an account being taken less the sum of Rs. 50 being the purchase-money at the first sale already paid to him. Upon such payment being made the plaintiff will acquire the right of the prior mortgagee because what he redeems is not the premises but the prior encumbrance and he is entitled not to a conveyance of the premises, but to an assignment of the security.

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(2) 82 Ind. Cas. 864; 20 L. W. 620; A. I. R. 1925 Mad. 150.

(3) 84 Ind. Cas. 301; (1924) M. W. N. 508; 47 M. L. J. 602; A. I. R. 1925 Mad. 76.

(4) 2 L. L. J. 419.

(5) 79 Ind. Cas. 498; 45 A. 268; A. I. R. 1923 All. 271.

(6) 32 C. 891; 9 C. W. N. 728; 1 C. L. J. 371.

This would necessitate a remand for the taking of the account and also directions declaring the rights of the parties to redeem each other and relating to other matters which would create complications. The parties have, however, come to terms and desire that a decree be made in the following terms; that the plaintiff's right to redeem be declared, that it be declared that she will be entitled to redeem on payment to the defendants Nos. 1-3 of a sum of Rs. 100 only within three months from this date, that on her failure to do so, the suit will stand dismissed with costs. Each party is to bear its own costs throughout in the event of payment being made by plaintiff within the three months. It is represented that the plaintiff has deposited in the Trial Court a sum of money in accordance with the decree of that Court. If so, and if there be no other objection to her doing so, she will be entitled to take the sum back from the Court.

The appeal be decreed by consent on the above terms. The decrees of the Courts will be set aside and the suit decreed as directed above.

Mullick, J.—I agree.

K. L. *Decree set aside.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 612 OF 1924.
February 8, 1926.
Present:—Mr Lobo, A. J. C.
GORDHANDAS KALIDAS—PLAINTIFFS
versus
DOWLATRAM KANAYALAL—
DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 20—Jurisdiction—Principal and agent—Suit for account—Negligence and misconduct alleged—Contract of agency, where made—Cause of action, where arises.

The cause of action in a suit for account between a principal and agent arises where the contract of agency is made or where it was to be performed and where the refusal to account takes place. [p. 290, col. 2.]

Ram Das-Uttam Chand v. *Dhanpat Diwan Chand*, 88 Ind. Cas. 950; 6 L. 153; A. I. R. 1925 Lah. 387; 7 L. L. J. 562 and *Rowther* v. *Rowther*, 55 Ind. Cas. 266; 12 Bur. L. T. 198, relied upon.

In the absence of proof as to where any express contract of agency was made, it must be deemed to have been made where the agent receives orders from his principal and accepts the orders thus indicating his consent to act. [*ibid.*]

Firm of Vishinji Goverdhandass v. *Firm of Jasraj Girdharilal*, 50 Ind. Cas. 146; 12 S. L. R. 93, relied upon.

In the absence of a contract to the contrary the accounting and payment by an agent must necessarily be done where all the business is transacted. [p. 291, col. 1.]

Tika Ram v. *Daulat Ram*, 80 Ind. Cas. 661; 46 A. 465; 22 A. L. J. 591; A. I. R. 1924 All. 530; L. R. 6 A. 9 Civ., relied upon.

Ponnuswamy Iyer v. *Damodar Hunsraj*, 79 Ind. Cas. 800; 46 M. L. J. 82; 19 L. W. 168; (1924) M. W. N. 178; 34 M. L. T. 7; 47 M. 403; A. I. R. 1924 Mad. 464, *Cheemalapatti Venkata Reddi* v. *Nataraja Setti*, 84 Ind. Cas. 691; 46 M. L. J. 371; 19 L. W. 499; 34 M. L. T. 116; (1924) M. W. N. 336; A. I. R. 1924 Mad. 789, *Kooverbhan Sukhanand* v. *Louis Dreyfus & Co.*, 79 Ind. Cas. 30; A. I. R. 1925 Sind 132, *Motilal* v. *Surajmal*, 30 B. 167; 6 Bom. L. R. 1038 and *Hemandas Thakurdas* v. *Devishah Din Dayal*, 19 Ind. Cas. 433; 6 S. L. R. 181, distinguished.

Where a principal charges his agent with various acts of negligence and misconduct on the latter's part in the course of agency, the cause of action arises where the agent commits the alleged acts of negligence and misconduct, even though the suit may ostensibly be for rendition of accounts. [*ibid.*]

Tika Ram v. *Daulat Ram*, 80 Ind. Cas. 661; 46 A. 465; 22 A. L. J. 591; A. I. R. 1924 All. 530; L. R. 6 A. 9 Civ. and *Firm of Chandaji Khubaji* v. *Firm of Devji Ladha*, 76 Ind. Cas. 197; A. I. R. 1924 Sind 22, relied upon.

Mr. *Kundanmal Dayaram*, for the Plaintiffs.

Mr. *Pahlajsiny B. Advani*, for the Defendants.

JUDGMENT.—This is a suit by the plaintiffs a firm of merchants at Karachi for rendition of accounts against the defendants who reside and carry on business at Agra and who between October 1922 and July 1924 acted at Agra as commission agents of the plaintiffs.

Various defences have been raised to the suit including the defence that this Court has no jurisdiction to try the suit. The defendants filed along with their written statement a copy of the account between them and the plaintiffs to which objections have been filed by the plaintiffs.

Issues were framed on 15th September 1925 and at the request of the parties the first issue as to the jurisdiction of this Court to try the suit has been heard by me as a preliminary issue. Subsequent to the filing of this suit by the plaintiffs the defendants have filed a suit against the plaintiffs on the same account in the Court of the Subordinate Judge of Agra which has been stayed under s. 10 C. P. C.

The grounds on which the plaintiffs assert that this Court has jurisdiction to try the suit are (*a*) that the contract of agency was made at Karachi where the plaintiffs received and accepted the defendants' offer to act as their agents (*b*) that in pursuance of the contract of agency the defendants had to deliver goods to the plaintiffs at Karachi (*c*) that the plaintiffs had to pay and did pay for these goods at Karachi (*d*) that accounts in respect of the agency had to be settled at Karchi.

The defendants, on the other hand, alleged that no part of the cause of action has arisen within the jurisidction of this Court that the defendants reside and carry on business at Agra that the contract of agency was made at Agra that all payments were to be made at Agra that all transactions took place in Agra and that the accounts had to be settled there. Their position is further amplified in para. 1 of their written statement which runs as follows: —

"With reference to para. 1 of the plaint it is submitted that there was a commission agency account between the parties in respect of transactions of purchase of various commodities made by defendants at the request and for and on account of the plaintiffs at Agra and the goods used to be forwarded by the defendants at the risk and cost of the plaintiffs, some 1197 bags of *moong* having, however, been sold at Agra at the risk and cost of the plaintiffs as they failed to pay for them and the sale-proceeds debited to them in the account between the parties. The purchase price of the goods used to be paid at Karachi by the plaintiffs either in cash or by means of *hundies* drawn either by the plaintiffs in favour of the defendants or by the defendants on the plaintiffs and negotiated and their values realised at Agra".

As regards the contention of the plaintiffs that the contract of agency was made at Karachi and that, therefore, this Court has jurisdiction on to try this suit, their case is that prior to October 1922 the firm of Keshowdas Shivparsad of Agra used to act as their commission agents. That one Valabdas was the manager of that firm. That a little before October 1922 Valabdas severed his connection with the firm of Keshowdas Shivparsad and joined the defendants' firm at Agra. That Valabdas then wrote to the plaintiffs at Karachi requesting them to deal with the defendants instead of with Keshowdas Shivparsad. That in compliance with the offer of Valabdas that the defendants' firm should act as commission agents of the plaintiffs the plaintiffs by telegram placed their first order with the defendant firm in October or November 1922.

They thus contend that the contract of agency was made at Karachi where the defendants' offer to act as commission agents of the plaintiffs was received and accepted by the placing of orders with the defendants.

Now this contention of the plaintiffs is contained in the evidence of their proprietor Jeramdas Ex. 5 who has been examined as a witness. Valabdas himself has not been examined and no valid reason has been given for the omission to examine him. An attempt was made to put in evidence several letters alleged to have been written by Valabdas to the plaintiffs containing the offer made by him on behalf of the defendants to act as commission agents of the plaintiffs. These letters had not been produced and filed in Court when they should have been and consequently being objected to by the Pleader for the defendants had mostly to be rejected. The plaintiffs were, however, able to have admitted in evidence two post-cards written by Valabdas to the plaintiffs cards specially prepared for and used by the defendant firm at Agra. These two cards are Exs. 14 and 15 in the case. But I am unable to find therein anything amounting to an offer by Valabdas on behalf of the defendant firm to act as commission agents of the plaintiffs.

Bhagwandas, Ex. 13, the manager of the defendant firm for twelve to fifteen years has given evidence in the case. He denies that Valabdas after leaving the firm of Keshowdas Shivparsad came over to the defendant firm. He states that Valabdas after severing connection with Keshowdas Shivparsad opened a business of his own at Agra. That his only connection with the defendant firm was that he used occasionally to be asked to read *Gujrati* letters received by the firm and to write letters in *Gujrati* at the dictation of the manager of the defendants' firm. That besides this Valabdas used to get commission from the defendants on any business influenced by him.

Bhagwandas further alleges that the relations of commission agent and principals between the defendants and the plaintiffs came into existence by reason of an arrangement made with the defendants by Naraindas and brother of Jeramdas Ex. 5 and co-proprietor in the plaintiffs' firm. He states that while the plaintiffs were dealing with Keshwodas Shivparsad as their commission agents Naraindas had occasion to visit Agra. That he then called on the defendants and arrived at an arrangement with the witness that the plaintiffs would engage the services of the defendants as their commission agents severing their connection with Keshowdas Shivparsad.

Though Naraindas has not been examined as a witness in the case I am not inclined to accept the evidence of Bhagwandas that the contract of agency was made at Agra between Naraindas on behalf of the plaintiffs and himself on behalf of the defendants. Bhagwandas admits that Naraindas was a stranger to him prior to the interview at which the alleged arrangement referred to above was made. There does not besides appear to be any reason why the plaintiffs should suddenly elect to sever their business relations with Keshowdas Shivparsad and transfer their business to the defendants with whom they had no acquaintance before.

But at the same time the plaintiffs have, in my opinion, failed to establish that the contract of agency was made at Karachi in the manner alleged by them. The story put forward by Jeramdas does not appear improbable but in the face of the defendants' denial, in the absence of the evidence of Valabdas himself and in the absence too of any documentary evidence on the point, I cannot hold that the plaintiffs have established that it was the offer of Valabdas accepted by them at Karachi which created the contract of agency. Further the plaintiffs allege that Valabdas after leaving the firm of Keshowdas Shivparsad became the manager of the defendants' firm. The fact is denied by the defendants. Therefore even if the probabilities are that it was Valabdas' influence which obtained for the defendants the business of the plaintiffs there is nothing to show that Valabdas was ever authorized to make an offer to the plaintiffs which would legally bind the defendants.

It is next contended that this Court has jurisdiction to try the suit because the defendants had in pursuance of the contract of agency to deliver goods to the plaintiffs at Karachi.

The course of business between the parties was roughly as follows:—

The plaintiffs by telegrams from Karachi requested the defendants at Agra to purchase specified goods on their behalf. The defendants complied with the orders by purchasing the goods. They then handed the goods over to the Railway at Agra and obtained Railway receipts in their own name as consignors and consignees which they endorsed in favour of the plaintiffs and despatched to Karachi.

The relations between the parties were not those of buyer and seller but of principal and agent. There was no contract to deliver the goods ordered at Karachi and the course of business referred to above clearly indicates that all that the defendants had to do with regard to goods ordered by the plaintiffs was to purchase them and hand them over to the Railway for transmission to the plaintiffs. It must be remembered that as the parties were principal and agent goods purchased by the defendants in pursuance of an order from the plaintiffs became the property of the plaintiffs the moment they were purchased and appropriated by the defendants. The defendants were merely bailees thereof till they handed over the goods to the Railway and when they had done so the Railway became the bailees of the plaintiffs' goods The defendants, therefore, had not to deliver the plaintiffs at Karachi the goods ordered by the plaintiffs and the fact that such goods were ultimately received by the plaintiffs at Karachi cannot give this Court jurisdiction to try the suit.

It is next argued that this Court has jurisdiction because the plaintiffs had to pay and did pay for the goods ordered by them and sent to them by the defendants at Karachi.

Here again the argument of the Pleader for the plaintiffs confuses the relation of buyer and seller with that of principal and agent. The parties here were principal and agent the plaintiffs had not to pay for goods ordered by them in the sense that a buyer has to pay for goods ordered by him the defendants paid for the plaintiffs' goods and it was the duty of the plaintiffs to put them in funds to enable them to do so. Now according to the evidence how was this done? Jeramdas first wished the Court to believe that the defendants during the period of the agency sent the Railway receipt and a *hundi* covering the value of the goods referred to in the said receipt to their agents at Karachi and that the plaintiffs received the Railway receipt from the said agents at Karachi of the defendants on payment to them of the amount of the *hundi*. This is clearly indicated in his evidence at lines 12-20. In cross-examination he was forced to admit that this procedure was adopted by the defendants only during the first 8-10 months of the agency during which the Railway receipts and *hundis* were sent to Messrs. Ram Partab Ramchander and Lakhmichand Naraindas as agents of the defendants and that thereafter the defendants used to post direct to the plaintiffs the said Railway receipts and *hundis*. But the plaintiffs have not been able to substantiate either of these statements of Jeramdas. The best evidence available on the point would have been that of Rampartab Ramchander and Lakhmichand Naraindas the alleged agents of the defendants and their books. Neither of these firms has been called. The defendants emphatically deny that they had any agents at Karachi or that the Railway receipts and *hundies* covering the value of the goods were dealt with at any time during the period of the agency in the manner alleged by Jeramdas. According to Bhagwandas their *munim* the defendants in every case placed themselves in funds by drawing *hundies* on the plaintiffs which in almost all cases they negotiated at Agra. The discount which they had to pay being debited to the plaintiffs. In a very few instances as there was difficulty in negotiating at Agra a *hundi* drawn on the plaintiffs the defendants drew *hundies* on Messrs. Rampartab Ramchander of Karachi. The fact that of the three or four hundred *hundies* admittedly drawn by the defendants on the plaintiffs during the period of the agency all except a very few have been, as a matter of fact negotiated at Agra strongly supports the defendants' contention. It is true that their explanation in regard to three of the *hundies* drawn on Rampartab Ramchander Ex. 17 does not appear satisfactory but I am satisfied that the evidence of Jeramdas for the plaintiffs is untrue on this point and that the plaintiffs, as a matter of fact, almost invariably during the continuance of the agency permitted the defendants to place themselves in funds to carry out the plaintiffs' orders for goods in the manner alleged by the defendants. It cannot, in these circumstances, be said having in mind that the relations between the parties were those of principal and agent that the plaintiffs had to pay and did pay for the goods ordered by them at Karachi so as to give jurisdictions to this Court to try the suit.

Lastly it is sought to invest this Court with jurisdiction on the ground that accounts had to be settled at Karachi. On the plaintiffs' side there is nothing in support of the contention. On the contrary the defendants establish the fact that during the period of the agency Naraindas co-proprietor in the plaintiffs' firm was at Agra for over three months and while there settled the account for the year 1880 as per Ex. 16 the entry in defendants *nakalvahi*. The plaintiffs must, therefore, fail on this ground as well.

Now it is pretty well-established that in a suit between principal and agent the cause of action arises where the contract of agency is made or where it was to be performed and where the refusal to account takes place.

The cases of *Ram Das Uttam Chand* v. *Dhanpat Diwan Chand* (1) and of *Rowther* v. *Rowther* (2) are sufficient authority for the proposition.

In the present case the plaintiffs as I have held before failed to prove that the contract of agency was made at Karachi and I have disbelieved the evidence to the effect that Naraindas at Agra made the contract. In the absence of proof as to where any express contract of agency was made it must be deemed to have been made where the agent receives orders from his principal and accepts the orders thus indicating his consent to act *vide* Halsbury's Laws of England, Vol. 1, p. 147. The case of *Firm of Vishinji Goverdhandass* v. *Firm of Jasraj Girdharilal* (3) a ruling of Crouch, A. J. C., is also in point. It, therefore, follows that the contract of agency between the plaintiffs and defendants must be deemed to have been made at Agra where the defendants received and carried out of the plaintiffs' orders. In the present case also the contract had to be performed at Agra for everything that the agents had to do in performance of the contract of agency was done at Agra, and none of their acts as agents were performed outside Agra or at any rate within the jurisdiction of this Court. I have discussed the evidence on this point before and do not propose to repeat myself. In the case of *Tika Ram* v. *Daulat Ram* (4) it was held that in absence of a contract to the contrary the accounting and payment of an agent must be necessarily be done where all the business is transacted. In the present case, therefore, the defendants in the absence of any agreement on the point have no account and pay at Agra.

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(1) 88 Ind. Cas. 950; 6 L. 153; A. I. R. 1925 Lah 387; 7 L. L. J. 562.

(2) 55 Ind Cas. 206; 12 Bur. L. T. 198

(3) 50 Ind. Cas. 146; 12 S. L. R. 93,

Another point to be borne in mind in connection with the issue of jurisdiction in this case is that though the suit is ostensibly for rendition of accounts by principals against their agents the objections of the plaintiffs to the account filed by the defendants with their written statement and the issues framed in the suit makes it clear that the plaintiffs do not really contest the account so filed by the defendants but charge the defendants with various acts of negligence and misconduct on their part in the conduct of the agency and claim damages from them as resulting from such acts of negligence and misconduct. These alleged acts of negligence and misconduct all took place at Agra.

In such a suit by a principal against his agent the cause of action has been held to arise where the agent committed the alleged acts of negligence and misconduct *vide Tika Ram* v. *Daulat Ram* (4) already referred to. *Firm of Premji Mulji* v. *Firm of Tarachand Thawerdas* (5) a judgment of Rupchand, A. J. C. and *Firm of Chandaji Khubaji* v. *Firm of Devji Ladha* (6) a Bench ruling of our Court.

Before concluding I would briefly refer to the authorities relied on by Mr. Kundanmal for the plaintiffs.

The case of *Ponnuswamy Iyer* v. *Damodar Hunsraj* (7) was not between a principal and an agent. The parties therein were buyer and seller. Moreover under the contract between the parties the plaintiffs' firm had to honour and pay at Madras *hundies* drawn at Calcutta and negotiated outside Madras. It was in these circumstances that the High Court held that a Court in Madras had jurisdiction. In *Chemalapatti Venkata Reddi* v. *Nataraja Setti* (8) the Court at Madras was held to have jurisdiction on the ground that the parties intended that the rendering of accounts and payment of money by the agent should be at the place where the plaintiffs resided. *Kooverbhan Sukhanand* v. *Louis Dreyfus & Co.* (9) has no application. It was a case between buyer and seller on K. P. terms involving the question as to when property in goods sold at Lyallpur passed to the buyer at Karachi. The case of *Motilal* v. *Surajmal* (10) is of some assistance to the plaintiffs but is again distinguishable on the ground that Tyabji, J., found as a fact that the correspondence between the parties clearly showed that payment was to be made at Bombay. This was in itself sufficient to give the High Court at Bombay jurisdiction. Lastly with regard to the case of *Hemandas Thakurdas* v. *Devishah Din Dayal* (11) a Bench of this Court held on the construction of agreement that the agreement was one to be performed without application and that as it fixed no place or time for its performance it was open to the plaintiff to fix his place of residence as the place of performance. The learned Judges in this case did not proceed on the ground that it was the duty of the agent to find his principal and pay him where he was. In fact as has been held in *Tika Ram* v. *Daulat Ram* (4) and *Firm of Vishinji Goverdhandass* v. *Firm of Jasraj Girdharilal* (3) referred to above the so called common law rule that a debtor must seek out his creditor has no application to a case between principal and agent.

For the above reasons I hold that this Court has no jurisdiction to try this suit. Under O. VII, r. 10, C. P. C., the plaint will be returned for presentation to the proper Court. The defendants are to have their costs from the plaintiffs. The plaintiffs shall bear their own costs.

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(4) 80 Ind. Cas. 661; 46 A. 465; 22 A. L. J. 591; A. I. R. 1924 All. 530; L. R. 6 A. 9 Civ.

(5) 76 Ind. Cas. 353; A. I. R. 1924 Sind 64.

(6) 76 Ind. Cas. 197; A. I. R. 1924 Sind 22.

(7) 79 Ind. Cas. 800; 46 M. L. J. 82; 19 L. W. 168; (1924) M. W. N. 178; 34 M. L. T. 7; 47 M. 403; A. I. R. 1924 Mad. 464.

(8) 84 Ind. Cas. 691; 46 M. L. J. 371; 19 L. W. 499; 34 M. L. T. 116; (1924) M. W. N. 336; A. I. R. 1924 Mad. 789.

(9) 79 Ind. Cas. 30; A. I. R. 1925 Sind 132.

(10) 30 B. 167; 6 Bom. L. R. 1038.

(11) 19 Ind. Cas. 433; 6 S. L. R. 181.]

P. B. A. *Plaint returned.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 593 OF 1925.
December 8, 1925.
Present :—Justice Sir George Claus Rankin, KT.
SASADHAR CHOUDHURY—AUCTION-PURCHASER—PETITIONER
versus
BISHNU NARAIN KUNDA—PLAINTIFF—OPPOSITE PARTIES.

Bengal Tenancy Act (VIII of 1885), s. 174 (3)—Civil Procedure Code (Act V of 1908), O. XXI, r. 91, applicability of—Auction-purchaser, if can apply to set aside sale and claim refund.

The *prima facie* meaning of s. 174 (3), Bengal Tenancy Act, is that the principle laid down in O. XXI, r. 91, C. P. C., does not apply to cases of sales held under Ch. XIV of the Bengal Tenancy Act. [p. 294, col. 1.]

Amrita Lal Bose v. *Nemai Chand Mukhopadhya*, 28 C. 382; 5 C. W. N. 474, followed.

Rule against an order of the Court of the District Judge, Burdwan.

Babu *Gopendra Nath Das*, for the Petitioner.

Babu *Panchanon Choudhury*, for the Opposite Party.

JUDGMENT.—The question arising on this Rule is a proper one to be decided on revision. One Mahendra was a *patnidar*, and he was sued for rent by three persons who added as *pro forma* defendants two others as being co-sharer landlords with the plaintiffs. Decree was obtained and this decree was put in execution by the procedure laid down in Ch. XIV of the Bengal Tenancy Act as distinct from the procedure of the Code. At the sale on 12th May 1924 the present applicant became the purchaser for a price of Rs. 1,375. He now says that a relation of his had purchased Mahendra's interest in 1922 at a sale under a mortgage-decree and that he has discovered that in the rent suit two other co-sharer landlords were not parties, with the result that the decree was not such a decree as is contemplated in Ch. XIV. Accordingly, he says the sale of 1924 passed to him only the right, title and interest of Mahendra and took effect only as a sale under a money decree. As the whole of Mahendra's interest was transferred by the mortgage sale of 1922 the applicant claims under O. XXI, r. 91 to have the sale set aside and his purchase-money refunded.

This contention has been negatived by the Munsif at Katwa and the District Judge of Burdwan on the ground that s. 174, sub-s. 3 of the Bengal Tenancy Act provides that "s. 313 of the C. P. C. shall not apply to any sale under this Chapter." The Courts below have accordingly refused to enter into the contest between the petitioner and the opposite parties as to whether Mahendra's landlords were five or seven in number whether his *patni* was held under an 8-annas share of the *zemindari* or under the 16-annas and so forth, and they have dismissed his application. They take the view that whether or not the decree was in strictness a rent decree so as to pass to an auction-purchaser the tenure itself or so as to give a charge to the landlords in terms of s. 65 of the Bengal Tenancy Act, the sale of 12th May 1924 was held under Ch. XIV. Thus notices were issued to co-sharer landlords under s. 158B, the proclamation of sale was under s. 163 issued simultaneously with the order of attachment and contained the particulars required by cl. (*a*) of sub-s. 2. This in their opinion ends the matter as s. 174 sub s. 3 applies.

The learned Vakil for the applicant contends that Ch. XIV of the Bengal Tenancy Act has no application except upon the basis of a rent decree and that the absence of this basis has the effect of giving to the auction-purchaser the ordinary rights of an auction-purchaser under the Code, and of rendering inapplicable the special restriction imposed by s. 174 sub s. 3. He cites as illustrating the principles to be applied *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (1) and *Sadagar Sircar* v. *Krishna Chandra Nath* (2). He also cites *Makar Ali* v. *Sarfaddin* (3) as showing that s. 313 of the Code of 1882 did not exclude an auction-purchaser from seeking the like remedy by suit and that under the present Code the remedy by suit has been taken away.

On behalf of the respondents I am referred to the decision of the Full Bench in *Amrita Lal Bose* v. *Nemai Chand Mukhopdhya* (4) which was a decision under s. 170

(1) 26 C. 727; 3 C. W. N. 586; 13 Ind. Dec. (N. S.) 1064.

(2) 26 C. 937; 3 C. W. N. 742; 13 Ind. Dec. (N. S.) 1199.

(3) 70 Ind. Cas. 606; 36 C. L. J. 132; 50 C. 115; 27 C. W. N. 183; A. I. R. 1923 Cal. 85

(4) 28 C. 382; 5 C. W. N. 474.

of the Bengal Tenancy Act but in which there are observations upon s. 174 (3). It is contended that before applying the general principles on which the applicant relies the Court must decide a prior question, *viz*, whether at the instance of an auction purchaser the Court is obliged to go behind the sale and the decree and enquire whether the decree was really in strictness a rent decree.

On the exact question as to s. 174 (3) there does not appear to be any direct authority. One has to consider primarily the exact form of words used by the Legislature in the sub-section. In my opinion "shall not apply to any sale under this Chapter" are words which in their ordinary meaning raise only the question of fact, *viz.*, was the sale held under the Chapter or was it not? The words seem to have the same effect as the phrase in s. 173 (1) where the right to bid without obtaining leave is given to the holder of a decree "in execution of which a tenure or holding is sold under this Chapter". It is tempting to say that "a sale under this Chapter" in s. 174 (3) means a sale in all respects rightfully held under the Chapter. It might mean that, certainly; but I think a little consideration shows that this is not the true construction and that it does not follow from the principles or the decisions upon which the applicant's Vakil relies that his client can at this stage and for this purpose contest the correctness of the procedure adopted in the execution of the decree.

The position is this. Agricultural landlords in Bengal are not allowed to evict their tenants for non-payment of rent; but if in substance all the landlords join or are joined and if they implead all the tenants of a single holding they may obtain a decree for the arrears of the entire rent. Having done so they may take the steps provided by Ch. XIV to bring the holding itself to sale and to do so in such manner as to give themselves a first charge upon it for the rent defeating thereby the rights of persons, *e. g.*, encumbrancers, who were no parties to the rent suit. Whether a decree for rent entitles the decree-holder to adopt these very special proceedings cannot always be finally determined on the mere face of the decree. Facts not appearing by the decree may have to be enquired into. The judgment-debtor has a right to contest the decree-holder's right to proceed under Ch. XIV but of course he must do so at the proper time. If he does not contest the order for sale at the proper time he is bound by the order unless he can show fraud or non-service of notice or some adequate reason. *Durga Charan Mandal* v. *Kali Prosanna Sarkar* (1). A third party whose interests are affected *e. g.* an incumbrancer can dispute the decree-holder's right to sell under Ch. XIV. For convenience he is in certain cases prevented from raising his objections in the execution itself (*cf.* s. 170) but he is never bound by the proceedings except there has been a strict rent decree and he can assert his rights by suit [*cf. Durga Charan Mandal* v. *Kali Prosanna Sarkar* (1)]. An auction-purchaser is in a different category. He has a right to claim to be relieved against fraud or misrepresentation and there may be other grounds which entitle him to have the sale set aside. But in a Court sale there is no warranty of title by the decree-holder or by the Court. Until he has been declared the purchaser the suit and the execution proceedings are matters with which he is in no way concerned. When he bids he does so upon the terms laid down by the Legislature, whatever they may be, and if he does not like them he need not bid. In the case of a sale which purports to be held under Ch. XIV what is put up for sale and what he purports to bid for is the holding itself and not the tenant's right and title. The case *Amrita Lal Bose* v. *Nemai Chand Mukhopadiya* (4) already, cited, shows that even if the decree is a true rent decree he may take nothing by his purcuase and yet cannot set aside the sale. This is clear enough on any view of s. 173 (4). If the decree is not a true rent decree under the Bengal Tenancy Act third parties are not bound by the sale, but the judgment-debtor is presumably bound by it since he has allowed orders for this form of sale to be made against him. Accordingly, if he has any interest in the holding it will pass to the auction-purchaser. But it is another matter altogether to say that if he has no interest the purchaser can set aside the sale. Order XXI, r. 91 applies in principle only to cases where the thing put up for sale is the tenant's interest. This was even clearer on the wording of s. 313 of the old Code. Even in such cases O XXI, r. 91 does not apply where there is any saleable interest left in the judgment-debtor however incommensurate its value may be to the price bid at the auction. No question arises under this Rule as regards fraud or mistake or irregularity. The basis of the Rule is that what has been sold turns out to have no real existence. Now the *prima facie* meaning of s. 174 (3) is that this principle is to have no application to the man who purports or attempts to buy a holding under Ch. XIV. The facts of the present case may or may not afford an illustration of a bid being made for a holding in the hope of excluding incumbrancers and with full knowledge that the tenant's interest by itself is nothing. But in sales held under Ch. XIV this is quite possible and quite legitimate and I have little doubt that it is extremely common. The Legislature may well have thought it highly inconvenient and even absurd to apply O. XXI, r. 91 to sales held under such conditions. I do not, therefore, consider that it is legitimate to interpret s. 174 (3) in any way which restricts its *prima facie* meaning. Rampini, J. in the Full Bench case in *Amrita Lal Bose* v. *Nemai Chand Mukhopahiya* (4) distinctly held that s. 174 prevented such an application being made on the ground that the judgment-debtor had no interest and that the purchaser would lose his money. This was *obiter* but I think it was correct. On this view it is in no sense an anomaly that the auction-purchaser in such a case as the present should have no right of suit analogous to the right given to purchasers under the Code by O. XXI, r. 91. I do not see how a change in the Code made in 1908 can assist one in interpreting an Act of 1885. If, however, the suggestion is that until 1908 a purchaser who had taken nothing by his purchase at a sale held under Ch. XIV could notwithstanding s. 174 (3) have brought a suit to set aside the sale either on Common Law principles or under s. 315 of the old Code, that is a proposition for which I should want very clear authority. The old law, however, need not be discussed here as in any view the argument is of no avail to the applicant.

In my judgment equally strong reasons exist for giving the same meaning to the words in sub-ss. 1 and 2 of s. 173 as I attribute to their counterpart in s. 174 (3). It is difficult to suppose that a purchaser accused of being the *benamdar* of a judgment-debtor could be heard to say "Never mind. It was not really a rent decree". Or that on the sale of a holding a competing bidder could object to the decree-holder's bid on the ground that he had not obtained leave and that the decree was not a true rent decree. The Statute endeavours to vary its language in the different sections of Ch. XIV, as it is dealing with different parties and with different stages of the proceedings. It is not perhaps very successful or very clear and in the light of subsequent experience it could probably be much improved; but, as it stands, general principles which apply to the rights of third parties *e. g.* incumbrancers cannot be assumed to be applicable to judgment-debtors or to auction-purchasers. The stage at which a judgment-debtor asserts an objection and the stage at which an auction purchaser comes upon the scene are most material considerations. In cases dealing with the rights of third parties wide language has at times been used by the Court in asserting the principle that their rights cannot be defeated save upon strict compliance with the requirements of the Statute. In such a case it has even been said broadly that where only one co-sharer has sued the tenant "a sale in execution of such a decree is not a sale under the Act"; *Sadagar Sircar* v. *Krishna Chandra Nath* (2). But the Act itself as well as the plain necessities of the case and other decisions of the Court [*Amrita Lal Bose* v. *Nenai Chand Mukhopadiya* (4)] show that there is no universal and overriding doctrine that in this very common type of case any person at any time and for any purpose may call upon the Court to decide as to the nature of the decree, and to treat proceedings taken under the Act as proceedings taken under the Code. A mixture of two proceedings may very well be materially different from either and the application of O. XXI, r. 91 to a sale held under the Bengal Tenancy Act is, I think, an instance of this.

The Rule is discharged with costs one gold *mohur*.

M. B. *Rule discharged.*

OUDH CHIEF COURT.

ORIGINAL CIVIL SUIT NO. 1 OF 1925.
December 19, 1925.
Present:—Mr. Justice Ashworth.
Tiwari BRIJ RAJ CHANDRA
AND OTHERS—PLAINTIFFS
versus
Rani SUBHADRA KUAR AND OTHERS
—DEFENDANTS.

Oudh Estates Act (I of 1869), ss. 22, 29, 29-A—Son, meaning of—Personal law, application of—Adoption *effect of—Brother, meaning of—Interpretation of Statutes, rule of—Testamentary devise, essentials of—Deed acknowledging former adoption—Interpretation.*

Son in s. 22 (1) of the Oudh Estates Act includes a son adopted by ceremony where the personal law of the deceased *taluqdar* allows such adoption. [p. 298, col. 1.]

Adoption whether by ceremony or deed must carry with it the consequences assigned to adoption by the personal law of the persons who are parties to the adoption, that is to say, among Hindus, the civil death of the adopted boy in the natural family and re-birth in the adoptive family. [p. 299, col. 2.]

Brother in s. 22 (6) of the Oudh Estates Act does not, in the case of Hindus, refer to a natural brother where there has been a valid adoption either by ceremony or by deed of adoption. [p. 399, col. 2]

When it is a question of succession s. 22 of the Oudh Estates Act is to be looked to but when it is a question of determining relationship it is the personal law that is to be resorted to. [p. 298, col. 2.]

Maharajah Pertab Narain Singh v. *Maharanee Subbao Kooer*, 3 C. 626; 1 C. L. R. 113; 4 I. A. 228; 3 Sar. P. C. J. 740; 3 Suth. P. C. J. 458; Rafique and Jackson's P. C. No. 46; 1 Ind. Jur. 679; 1 Ind. Dec. (N. s.) 983 (P. C.), referred and not applied.

It is a rule of interpretation of Statutes that new powers must be conferred by clear and unambiguous language. The more defective and open to objection the language of a Statute, the greater the necessity to apply the canons of construction. [p. 268, col. 1.]

A deed to be a testamentary devise must contain language from which can be inferred an intention to make a devise. [p. 297, col. 2.]

Nidhoomoni Debya Singh v. *Saroda Pershad Mookerjee*, 3 I. A. 253; 26 W. R. 91; 3 Sar. P. C. J. 653; 3 Suth. P. C. J. 338; Bold. 78 (P. C.), distinguished.

A document which acknowledges the fact of a previous adoption cannot itself be a deed of adoption. [p. 297, col. 1.]

In the matter of Ambai, 13 B. 280; 7 Ind. Dec. (N. s.) 186, referred to.

Bhaiya Rabidat Singh v. *Indar Kunwar*, 16 I. A. 53; 16 C. 556; 13 Jur. 98; 5 Sar. P. C. J. 505; Rafique and Jackson's P. C. No. 110; 8 Ind. Dec. (N. s.) 367 (P. C.), distinguished.

Obiter.—Section 22 (5) (8) of the Oudh Estates Act does not apply to any class but the Muhammadans and does not give Hindus an alternative mode of adoption. [p. 299, col. 1.]

Messrs. *O. Conner*, *L. S. Misra*. *H. Kidwai* and *Oudh Behari Lal*, for the Plaintiff.

Dr. Sir *Tej Bahadur Sapru*, Messrs. *B. N. Srivastava*, *Ali Zaheer*, *Mukund Behari*, and *M. Wasim*, for the Defendant.

JUDGMENT.—This is the first suit tried by this Court in exercise of its powers of original jurisdiction. One Chandra Shekhar succeeded in 1873 to the *taluqdari* property of Raja Kashi Prasad, an original *taluqdar*. It is a question in this suit whether he succeeded as heir by reason of his adoption under ordinary Hindu Law, or adoption under the special provisions of s. 22 of the Oudh Estates Act, I of 1869, or as legatee. The plaintiffs are the two surviving brothers, and four grandsons of a deceased brother, of Chandra Shekhar. They sue the latter's widow, Rani Subhadra Kaur, who got possession of the property upon her husband's death in 1923. There are also joined as plaintiffs three persons, plaintiffs Nos. 7, 8 and 9, to whom the first six plaintiffs have transferred half their interest in the property claimed, and there are joined as defendants, in addition to the widow, two sons of the brother of Raja Kashi Prasad, as persons claiming to be the nearest reversioners to Chandra Shekhar's estate after the widow. The claim is resisted on the broad ground that plaintiffs Nos. 1 to 6, as natural brothers and grandsons of a natural brother of Chandra Shekhar, have no right to the property of the latter, inasmuch as the latter, having been adopted by Raja Kashi Prasad, thereby ceased to belong to his natural family.

It is desirable to set forth a few facts for the proper understanding of this case. The pedigree given in para. 3 of the plaint is admitted. It is also admitted that the bulk, but not all of the property in suit, was *talukdari* property in the hands of Raja Kashi Prasad. There is a dispute as to whether some of the property should be regarded as an accretion to the estate (or estates) as left by Raja Kashi Prasad and as again left by Chandra Shekhar but in view of the preliminary finding that I propose to adopt in this suit, this matter need not be considered in this judgment. Raja Kashi Prasad was one of the five *taluqdars* who were actively loyal on the side of the Government in the Mutiny, and his property was exempted from confiscation (see s. 4 of the Act). Apparently, however, he surrendered the estates, which he held before the Mutiny, momentarily to Government for their re-grant under *sanads*. He was also given grants of other land, and again was decreed other lands at the first regular settlement. He, therefore, was a *taluqdar* as person in respect of whom some re-settlement had been made in 1868, as a person to whom lands had been granted under *sanad*, and also as a person to whom lands had been decreed in the First Regular Settlement. None of his property came to him as ancestral, as is stated in the only documentary piece of evidence, to which I shall refer in this judgment, namely, the document headed with the words "Translation of a Will executed by Raja Kashi Prasad, deceased *taluqdar* of Sissendi, dated the 5th April, 1873." (Exhibit 1). But the fact tha his property was all self-acquired does not appear to me to have any bearing on this case, beyond excluding the plea that his adoption before Act I of 1869 came into force invested him with any title to Raja Kashi Prasad's estate, see *Rambhat* v. *Lakshman Chintaman Mayalay* (1). Raja Kashi Prasad's name appears in List 1 as *taluqdar* of four estates. Sissendi, Bhyrampur, Dadlaha and Lalganj, the first being in the Lucknow District, the second in the Rae Bareli District, the third in Unao and the fourth again in Rae Bareli. As regards the first two estates, he was also entered in List III as a *taluqdar* whose *sanad* provided for the rule of primogeniture, and as regards the latter two estates, he was also entered in List V as a grantee whose *sanad* provided for the rule of primogeniture. In 1866 he adopted Ram Krishna, the great-grandson of his own grandfather, by the rights prescribed for adoption by Hindu Law, who thereafter was called by the name of Chandra Shekhar. The plaintiff's Counsel felt indisposed to admit that this was so, but he did not seriously deny the fact in view of the so-called will of the 5th April 1873, on which he himself relies, and which is evidence of the fact of this adoption under s. 32 of the Evidence Act. It will be observed that this adoption occurred before Act I of 1869 came into force. In 1871 Raja Kashi Prasad willed a few villages to his wife. In 1873 he executed in favour of Chandra Shekhar the so-called Will dated 5th April 1873, marked Ex. 1. The whole of this document is important, but specially notice may be drawn to the following facts recited in it. Chandra Shekhar was adopted when under five years of age, and was eleven and-a-half years old at the time of this deed. The date of the deed was 5th April 1873. Chandra Shekhar, must, therefore, have been adopted in 1866. Raja Kashi Prasad stated that his estate was not ancestral. The object in executing the deed is stated to be that the boy was adopted without any payment to his natural father, and that it was desirable to set forth the circumstances of the adoption in order that no claim might be raised in this respect. A desire is expressed that the Court of Wards should take the estate under its management until Chandra Shekhar's twentieth year. It was hoped that the management might be in fact made over to him in his seventeenth or eighteenth year, but, in any case, formal relinquishment should take place in his twentieth year. The actual words used being, "When he reaches twentieth year he should be made its owner and manager without any condition."

To meet the defence that the plaintiffs cannot succeed to their natural brother in the face of his adoption, the plaintiffs' Counsel has argued as follows: Chandra Shekhar may have been adopted by Hindu ceremony in 1866, but such an adoption is immaterial for determining succession to a *taluqdari* estate under the first ten clauses of s. 22 of the unamended Oudh Estates Act I of 1869, which govern succession to Raja Kashi Prasad. These clauses only recognise adoption by deed (see cls. 5, 8 and 9). "Son" in cl. (1) does not include an adopted son. Exhibit 1, a document entitled "Will executed by Raja Kashi Prasad, on 5th April 1873", should be construed as a deed of adoption executed in virtue of the power implied by cl. 5 of the section. Alternatively it should be construed as a devise. Even if it be construed as neither, Chandra Shekhar succeeded under cl. 11, which clause will let in a son adopted by ceremony, since such son would have been entitled to succeed under the ordinary law to which Kashi Prasad's family was subject. In any case Chandra Shekhar was either the heir or legatee of Raja Kashi Prasad within the meaning of the inducement to cl. 22. Succession to Chandra Shekhar will be governed by s. 22 of Act I of 1869, as amended by U. P. Act III of 1910. Just as "son" in cl. (1) will not include adopted son, so in cl. (6) "brother" will mean "natural brother". These arguments appear to mean that plaintiff No. 3 as grandson of Chandra Shekhar's eldest natural brother should succeed, but either to secure latitude in argument or for some other purpose of their own, the conclusion asked for in the plaint by the plaintiffs is that "In the presence of plaintiffs Nos. 1 to 6 no other person can be heir of Raja Chandra Shekhar."

On these arguments the following questions arise:

(1) How should the Will, Ex. 1, be construed?

(2) Does "son" in cl. (1) of s. 22 of Act I of 1869 include a son adopted by ceremony where the personal law of the deceased *taluqdar* allows such adoption?

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(1) 5 B. 630 at p. 635; 3 Ind. Dec. (N. S.) 415.

(3) Does "brother" in cl. (6) of Act I of 1869 as amended by U. P. Act III of 1910 refer only to a natural brother?

What construction should be placed on the Will Ex. 1?

My finding is that it is merely a declaration of an adoption made by ceremony in 1866, and not an adoption-deed of the kind referred to in cl. (5) of s. 22 of unamended Act I of 1869, or a devise within the meaning of ss. 11 and 13 of that Act. It is important to remember that it must be construed with reference to the provisions of Act I of 1869 as unamended by the U. P. Act III of 1910. It is the plaintiffs' contention that this document should be construed as a deed of adoption effected in virtue of the implied power conferred by s. 22 cl. (5). That section runs,

"Or in default of such son or descendants, then to such persons as the said *taluqdar* or grantee, heir or legatee, shall have adopted by a writing executed and attested in manner required in case of a Will and registered, subject as aforesaid."

It appears to me impossible to regard this document as intended to invest Chandra Shekhar with the status of a son. It is merely a document acknowledging the fact of the previous adoption under Hindu Law. In respect of a document of similar terms it was held by a Full Bench of the Bombay High Court in the case. *In the matter of Ambai* (2), that such a document acknowledging the fact of adoption was distinct from an adoption deed and would not be liable to stamp duty as such. The plaintiffs rely upon the Privy Council case, *Bhaiya Rabidat Singh* v. *Indar Kunwar* (3). In this case there was in question a deed of adoption executed by a widow by which the widow declared that in accordance with the written permission of her husband, she had adopted a boy, and that he would be the proprietor of the Maharajah's estate and property. This deed was held te comply with the language of cl. (8) of s. 22, and to be an adoption by a writing executed and attested in the manner required in the case of a Will. In the judgment which was delivered by Lord Macnaghten the following words occur:

"The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection."

The language, it is urged, shows that a document declaring a previous adoption to have taken place can be regarded as a deed of adoption. A study, however, of the judgment of Lord Macnaghten will show that no plea was ever taken that the deed was not a deed of adoption because the ceremonial part of adoption had already taken place. In that case again the ceremonies of adoption had taken place on the 8th November 1883, and the deed was executed on the 5th December 1883, that is within a month. So far as I can see, there is nothing to show that the deed was not executed at time of the ceremony, and the law allowed one month within which it could be registered. The case is, therefore, no support to the plaintiffs. More support could perhaps be found in the amendment of cls. (5) and (8) of s. 22 of Act I of 1869 by Act III of 1910. Those clauses in the amended Act appear as cls. (4) and (7). The provision as to attestation and registration is relegated to a new s. 29-A. This new section instead of requiring an adoption deed, requires a declaration of a previous adoption by the necessary deed. It does not seem to me possible to say whether, in making this alteration, the Legislature intended to make more clear what they considered the original sections to have meant, or whether they intended to alter the law. The preamble to Act III of 1910 suggests the former. But I am not in any way bound by the opinion of the Legislature in 1910 as to what the Legislature of 1869 intended. That opinion does not possess even the merits of *expositio contemporanea.* The plaintiffs' Counsel has also contended that this so-called Will, if not a deed of adoption, should be construed as a deed of devise by Will. He invokes the passage in the document expressing a desire that Chandra Shekhar should be the owner and manager when he reaches his twentieth year. It is clear, however, that this passage does not amount to a devise, but only to the expression of a desire that the Court of Wards should release the property when Chandra Shekhar arrived at the age of twenty. It does not appear to me necessary to refer to the many decisions in which it has been held, that for a deed to be a testamentary devise it must contain language from which can be inferred an intention to make a devise. Reliance by the plaintiffs

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(2) 13 B. 280; 7 Ind. Dec. (N. S.) 186.

(3) 16 I. A. 53; 16 C. 556; 13 Jur. 98; 5 Sar. P. C. J. 505; Rafique and Jackson's P. C. No. 110; 8 Ind. Dec. (N. S.) 367 (P. C.).

Counsel has been placed on the case of *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (4). In that case there was a deed stating that the testator was desirous of adopting a son, and declared that he had adopted a certain person. The deed went on to say that his wives should perform the ceremonies, and that when the boy came to maturity the executors should make over everything to him. The question was whether the deed should be construed as a devise or as a mere authority to adopt. The deed was construed by their Lordships of the Privy Council to be a gift of property by the testator to a designated person coupled with a mere expression of a desire that his wives should perform certain ceremonies. Now in that case no one suggested that there had been an adoption. The intention was obvious that the boy should have the property and the mention of executors made it clear that there had been a devise. In the case of Ex. 1, the intention of the deed is expressed by the executant himself, namely, the desire to set on record that the boy's father would not have any claim to consideration in view of his having allowed his son to be adopted. The declared fact of adoption six years previously is inconsistent with any intention to adopt by means of the deed.

Does "son" in cl. (1) of s. 22 of Act I of 1869 include a son adopted by ceremony where the personal law of the deceased *taluqdar* allows such adoption?

I hold that it does. Section 2 (19) of the General Clauses Act, 1868, passed a year before the Act of 1869 provides

"And in case of any one whose personal law permits adoption, 'son' shall include an adopted son and 'father' an adoptive father."

This enactment is subject to the condition "unless there be something repugnant in the subject or context". There is nothing repugnant in s. 22, if cl. (5) be construed as providing a special method of adoption, independant of adoption under Hindu ceremony. There is also nothing repugnant in s. 22, if cl. (5) be taken not to refer to Hindus, or any other class, whose personal law (this would include customary law) permits adoption. It is inconceivable that Act I of 1869 should have been intended to take away from Hindu *taluqdars* their power to regulate succession to their estates by adoption by religious ceremony. We have a reference in s. 29 to the Hindu Law of adoption as a law not affected by s. 22. I agree with the contention of the defendants that, when it is a question of the order of succession, you look to s. 22 of the Act, but that, when it is a question of determining relationship, you must go to personal law. It seems to me quite impossible to work Act I of 1869 without invocation of the personal law. Even the question of a person being a son by birth would depend upon the efficacy of the marriage ceremony of his parents, and this might only be determinable by personal law. I would refer on this question to the unreported case First Civil Appeal No. 118 of 1900 (*Thakur Sher Bahadur Singh* v. *Raja Rameshar Bakhsh Singh*), where Mr. Spankie held that the word "son" in cl. (1) did include an adopted son by Hindu ceremony. Later on in First Civil Appeal No. 70 of 1902 (*Thakur Sheo Singh* v. *Musammat Raghubans Kunwar*), Mr. Spankie resiled from his opinion, for an insufficient reason as I shall submit in the next paragraph of this judgment, but Mr. Ross Scott took Mr. Spankie's earlier view. This question has never been the subject of decision by the Privy Council. In the case of *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*, (3) already referred to, Mr. Arathoon for the appellant, before their Lordships of the Privy Council contended that the authority to adopt contained in a Will was invalid, as the ordinary Hindu Law upon the subject had been superseded by Act I of 1869. Their Lordships held in that case that the adoption was carried out by a valid deed of adoption under cl. (8) of s. 22 and so the question was not settled.

It may be that there are difficulties arising from the interpretation of cls. (5) and (8) of s. 22 of Act I of 1869, being regarded as investing Hindus with an alternative method of adoption to adoption by the method prescribed by Hindu Law. My own opinion is that cls. (5) and cl. (8) of s. 22 should not be held to apply to any class but Muhammadans. It is a rule of interpretation of Statutes that new powers must be conferred by clear and unambiguous language. The more defective and open to objection that the language of a Statute may be, the more necessary it appear to me to apply the canons of construction. Clause (5) of s. 22 should only be held to confer a power of adoption by implication if such a power must necessarily be implied in order that the clause should have any meaning. If the section can have sufficient meaning without finding implied in it the said power, then the implication should not be made. Now, s. 29 of the Act confers a power on Muhammadans to adopt by deed. It is expressed in the form of an enabling enactment and not in that of a restrictive one. Complete meaning can be given to cl. (5) of s. 22 by reference to the power given in s. 29 and this power is only given to cl. (5) of s. 22 by reference to the power given in s. 29 and this power is only given to Muhammadans. It will be noticed that the same remarks apply to cl. (8) of s. 22 since s. 29 also confers a power of adoption by deed upon a Muhammadan widow of a *taluqdar*. This view is supported by an unreported decision of the Judicial Commissioner's Court, First Civil Appeal No. 118 of 1900 (*Thakur Sher Bahadur Singh* v *Raja Rameshar Bakhsh Singh*) already referred to. In that case Mr. Spankie after deciding that the word "son" in cl. (1) of s. 22 would include a son adoped by ceremony uses the words:

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(4) 3 I. A. 253; 26 W. R. 91; 3 Sar. P. C. J. 653; 3 Suth. P. C. J. 338; Bald. 78 (P. C.).

"Supposing that cl. (5), s. 22 of Act I of 1869 is intended to apply to persons whose personal law permits them to adopt".

It is true that in a later unreported case of the Judicial Commissioner's Court, First Civil Appeal No. 70 of 1902 (*Thakur Sheo Singh* v. *Musammat Raghubans Kunwar*), Mr. Spankie resiled from this opinion, and came to the decision that the "son" referred to in cl. (1) meant a natural son only. He based this reversal of opinion upon the judgment of their Lordships of the Privy Council in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (5). In that case their Lordships observed, with reference to the fourth clause of s. 22 of Act I of 1869, that it, "like every other clause, in the section, applies to all the *taluqdars* whose names are included in 2nd or 3rd of the Lists prepared under the Act, whether they are Hindus or Muhammadans, or any other religion." Mr. Spankie held, that this amounted to holding that such a construction must be put on the clauses as would make them of general application. There can be no doubt that cl. (4) of s. 22 does give a power by implication, because there is no section to give it a meaning otherwise. It is quite a different matter with cls. (5) and (8) having regard to the existence of s. 29. In any case, I understand the remarks of their Lordships in this judgment as merely meaning, that *in form* every clause of s. 22 was of general application, and not as a decision that every such clause was necessarily so in effect. Any remarks as to clauses other than cl. (4) was an *obiter dictum*. Their attention had obviously not been drawn to the effect of s. 29 of the Act or cl. (5) of s. 22. The adoption of the view that cls. (5) and (8) only refer to Muhammadans, and do not give Hindus an alternative method of making adoption, is free from many of the complications that beset the latter view.

Does "brothers" in cl. (6) of Act I as amended by U. P. Act III of 1910 refer only to a natural brother?

My finding is that it never refers to a natural brother, where there has been a valid adoption either by ceremony or by deed of adoption. My reasons are those already stated when discussing whether "son" in cl. (1) of s. 22 includes an adopted son. The plaintiffs' Counsel, however, contends, that here we have no definition of "brother" in the General Clauses Act to appeal to. But if "father" includes an adoptive father, it follows that "brother" must include an adoptive brother. Adoption whether by ceremony or deed must carry with it the consequences assigned to adoption by the personal law of the persons who are parties to the adoption, that is to say the civil death of the adopted boy in the natural family and re-birth in the adoptive family. To hold otherwise would be to restrict the operation of a deed of adoption to that of a mere devise, whereas its operation is clearly intended to be wider and different.

The issues framed in this case were

(1) Did Chandra Shekhar succeed to Raja Kashi Prasad an original *taluqdar* under any and which of the clauses of s. 22 of the Oudh Estates Act I of 1869 ?

(2) Are the plaintiffs the heirs of Chandra Shekhar.

My findings are that Chandra Sekhar succeeded Raja Kashi Prasad under cl. (1) of s. 22. He succeeded as an heir, and on his death in 1923, he would be succeeded by his widow under cl. (7) and after the widow's death by the nearest reversioner under cl. 10 of s. 22 of Act I of 1869 as amended by U. P. Act III of 1910.

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(5) 3 C. 626; 1 C. L. R. 113; 4 I. A. 228; 3 Sar. P. C. J. 740; 3 Suth. P. C. J. 458; Rafique and Jackson's P. C. No. 46; 1 Ind. Jur. 679; 1 Ind. Dec. (N. S.) 983 P. C.).

The suit, therefore, fails on the preliminary issue:—

"Are the plaintiffs the heirs of Chandra Sekhar?"

It may be mentioned that this issue, in view of the admission by both parties of the so-called Will of Raja Kashi Prasad, was purely a legal issue.

It is accordingly ordered that the suit be dismissed as against all three defendants with costs.

R. L. *Suit dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1239 OF 1918.
February 25, 1926.
Present:—Mr. Justice Martineau and Mr. Justice Dalip Singh.
ATA-UR-RAHAMAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat MASHKUR-UN-NISA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9—Application for bringing legal representative on record, when may be treated as one for setting aside abatement—Joint decree—Death of party in appeal—Abatement in toto.

Where there has been no reasonable cause for delay in making the application, an application for bringing legal representatives of a deceased party on record cannot be treated as an application for setting aside abatement. [p. 301, col. 1.]

Arur Singh v. *Todar Mal*, 49 Ind. Cas. 501; 22 P. W. R. 1919, *Chuni Lal* v. *Kala Khan*, 67 Ind. Cas. 596; 4 L. L. J. 171; A. I. R. 1922 Lah. 61; 34 P. W. R. 1922, *Tirath Ram* v. *Muhammad Abdul Rahim Shah*, 73 Ind. Cas. 681; A. I. R. 1923 Lah. 546, *Allah Yar* v. *Thakar Das*, 44 Ind. Cas. 9; 46 P. W. R. 1918; 24 P. L. R. 1918, and *Badlu* v. *Narain*, 74 Ind. Cas. 17; A. I. R. 1924 Lah. 424, referred to.

Where a decree may be executed by any one of the plaintiffs, it is a joint decree. [p. 302, col. 2.]

A decree for a declaration that a certain lease has expired and that the plaintiffs are entitled to retain proprietary possession of certain shops and for an injunction to the defendants not to take steps to obtain possession or to interfere with the plaintiffs' ownership and possession is a joint decree as the injunction against the defendants might be enforced by any one of the plaintiffs. [*ibid.*]

If in an appeal from a joint decree a necessary party dies without his legal representatives being brought on the record the appeal abates *in toto*.

First appeal from a decree of the Subordinate Judge, First Class, Delhi, dated the 8th March 1918.

Bakhshi *Tek Chand* and Moulvi *Ghulam Mohy-ud-din*, for the Appellants.

Lala *Moti Sagar*, R. B., Lala *Sardha Ram*, R. S., and Lala *Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.—These three appeals, namely, Nos. 1239 of 1918, 844 of 1923 and 846 of 1923, together with Appeals Nos. 845 of 1923 and 847 of 1923, are all more or less connected with one other.

A preliminary objection has been raised as regards appeals Nos. 1239 of 1918 and 844 of 1923 and 846 of 1923, that these appeals have abated because one Siraj-ud-Din, who was a party to the first two of these appeals is dead and his legal representatives have not been brought on the record within the period of limitation, and one Baij Nath, who was also a respondent in Appeal No. 1239 of 1918 and in Appeal No. 846 of 1923, has died and his representatives have similarly not been brought on the record. As the point raised in both these instances is the same they will be disposed of by one decision.

It seems that Siraj-ud-Din died on the 31st January 1925 and an application to bring his representatives on the record was made on the 4th June 1925. The application was returned for the purpose of giving the date of the death, and on the 15th June 1925, the date of death was noted on the application as being the 31st January 1925. On the 23rd July 1925, a Judge of this Court admitted the application subject to just exceptions. Now, it is clear that at that time the appeals had abated because more than three months had elapsed from the date of the death of Siraj-ud-Din. It is also clear from the date of the attestation of the affidavit that the death was known to the appellants on the 4th of May, 1925.

The learned Counsel for the appellants has contended that the application should be treated as one under O. XXII, r. 9 and has cited various rulings of this Court in support of his contention. These rulings are *Arur Singh* v. *Todar Mal* (1), *Chuni Lal* v. *Kala Khan* (2), *Tirath Ram* v. *Muhammad Abdul Rahim Shah* (3), *Allah Yar* v. *Thakar Das* (4) and *Badlu* v. *Naraini* (5). The reason given now for not putting in the application in time is that the appellants were misled by the advice of their legal advisers at Delhi and thought that the time for making such an application was six months.

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(1) 49 Ind. Cas. 501; 22 P. W. R. 1919.

(2) 67 Ind. Cas. 596; 4 L. L. J. 171; A. I. R. 1922 Lah. 61; 34 P. W. R. 1922.

(3) 73 Ind. Cas. 616; A. I. R. 1923 Lah. 546.

(4) 44 Ind. Cas. 9; 46 P. W. R. 1918; 24 P. L. R. 1918.

(5) 74 Ind. Cas. 17; A. I. R. 1924 Lah. 424.

As regards Baij Nath the facts are that he died on the 5th August 1923 and an application was made to bring his representatives on the record on the 12th of November 1923. That application was by Sana-ul Haq, assignee of the lessees, the present appellants. The affidavit had been attested on the 5th October 1923, and the order of the learned Judge admitting the application subject to just exceptions was passed on the 20th of December 1923. The same reason for the delay is given in an affidavit by Abdul Gafur, Mukhtar of ObedulRahman one of the appellants.

Now as regards the contention that these applications should be treated as applications under O. XXII, r. 9, the rulings of this Court merely hold that an application which purports to be under O. XXII, r. 4, may in particular cases be treated as one in substance under O. XXII, r. 9. In all those cases except in *Badlu* v. *Naraini* (5), a ruling by a Single Judge, it is conceded by Counsel for the appellants, that the affidavit which accompanied the application asserted that there was reasonable cause for delay in making the application. In these circumstances it was open to the Court to hold that such an application was in substance under O. XXII, r. 9.

In the case before us not only was there no assertion that there had been a delay due to reasonable causes, but from the very nature of the ground now urged in the affidavit as a cause for excusing the delay there could not be any reason for the applicant to ask for an excuse of the delay because according to the applications he thought there had been no delay when the application was made. We, therefore, consider that it is not possible for us to treat these applications as being applications under O. XXII, r. 9 and we can only consider the oral application made before us on the 15th of February 1926 as being the first application under O. XXII, r. 9 to set aside the abatement that has admittedly taken place.

Now, without deciding the question as to how far delay was due to a mistake of the legal advisers of a party may be just cause or not, it is quite clear that, in the circumstances of this case, this delay cannot be excused. The Limitation Act of 1908, undoubtedly, gave a period of six months for such an application, but by Act XXVI of 1920, which came into force on the 1st January 1921, the period in the case of the sister Art. 176 was reduced to 90 days. For some time our Court held that the period under Art 177 had also been reduced to 90 days. On the 3rd July 1922, it was held by Mr. Justice Harrison in a case reported as *Rup Kishore* v. *Govind Das* (6), that the period under Art. 177 had not been reduced. This decision was upheld in Letters Patent Appeal reported as *Gobind Das* v. *Rupkishore* (7), on the 1st of May 1923. Before this decision, however, the Repealing and Amending Act XI of 1923 had been passed and had come into force sometime in March 1923. By that amending Act the doubt on the question was removed and the period under Art. 177 was reduced to 90 days. The question that we have to consider is whether any party, whether under the advice of his Counsel or not, can plead that the delay in applying under O. XXII, r. 9, can be excused when that delay extends from March 1923, when the amending Act came into force to February 1926 when as we have already held, the first application was made to set aside the abatement. We are not aware of any case where such a lengthy period has been allowed to any party on the ground of ignorance of a statutory provision of law. There is a clear distinction between a mistake of law and ignorance of law and without deciding whether ignorance of law can ever be an excuse for delay or not, it seems clear to us that a delay of nearly three years cannot, in the circumstances of this case, be excused. We, therefore, hold that these appeals abated so far Siraj-ud-Din and Baij Nath are concerned, and that no sufficient reason has been shown for setting aside the abatements.

The next question for decision is whether the appeals have abated *in toto* or not. Now, the rulings on this point are, so far as our own Court is concerned, admittedly conflicting to some extent and do not seem to lay down any clear principle of decision. The same difficulty seems also to appear in the rulings of the other High Courts. It is, therefore, necessary to examine each case with reference to its facts.

Now, in Appeal No. 1239 of 1918, the plaintiffs, of whom Siraj-ud-Din was one, sued for recovery of Rs. 12,324-3-6 on account of rent from various defendants. In para. 4 of the plaint the shares of the plaintiffs were specified, but no specification of shares was made in the amount claimed for rent. The decree directed defendants Nos. 1 to 4 to pay to the plaintiffs the sum of Rs. 6,568-3-6. No specification was made in the decree as to the shares of the plaintiffs. The decree was, therefore, in our opinion, a joint decree and any one of the plaintiffs might have executed it for the benefit of all. Now, in such a case it seems to us clear that Siraj-ud-Din and Baij Nath were both necessary parties to the appeal and it would be wholly infructuous to allow the appeal to proceed as it would lead to inconsistent decrees if the appeal of the lessees against the other lessors were to succeed. We hold, therefore, that in this case the appeal abates *in toto* and must be dismissed with costs.

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(6) 69 Ind. Cas. 748; A. I. R. 1922 Lah. 211.

(7) 77 Ind. Cas. 409; 4 L. 367; 6 L. L. J. 25; A. I. R. 1924 Lah. 65.

In Civil Appeal No. 844 of 1923 the suit by the lessees against the three contesting defendants, of whom Siraj-ud-Din was one, was a suit for possession of certain shops. No sharer of Siraj ud-Din and others were specified. No separate relief was asked against any of them. A joint relief was claimed against them all and that suit was dismissed. It has been contended by Counsel for the appellants that the case falls within the rulings *Raghbir Saran* v. *Sohan Devi* (8), *Zainab Bibi* v. *Rohila* (9) and *Nandoo Singh* v. *Baljit Singh* (10). In *Raghbir Saran* v. *Sohan Devi* (8), the question, however, was not whether the appeal had abated, but whether the suit against certain co-vendees whose shares were specified in the sale-deed had or had not abated. The question, therefore, of the effect of a joint decree was not discussed in that case. No doubt that ruling relies on *Zainab Bibi* v. *Rohila* (9), as authority for the proposition there laid down, and that was a case where the question was of the abatement of an appeal, but the specific point seems not to have been urged before their Lordships in *Raghbir Saran* v. *Sohan Devi* (8), *Zainab Bibi* v. *Rohila* (9) and *Nandoo Singh* v. *Baljit Singh* (10), were suits against collaterals, and, as the rights of collaterals are admittedly separate rights, it was held that the appeal only abated *qua* the particular collaterals whose representatives had not been brought on the record. The point is not free from doubt. The main question really seems to be whether in considering the question one should look at the nature of the decree or at the nature of the right of the deceased party. Without deciding this question it seems to us that in the circumstances of this case, whether we look at the nature of the decree in the suit or whether we look at the nature of the right of the party, it is clear that there is nothing to show that the right was separate. All the indications on the record are to the contrary. In the circumstances we must be guided, therefore, by the form of the decree which we hold was a joint decree and, therefore, it follows that we must hold that the appeal has abated *in toto*.

In Civil Appeal No. 846 of 1923 the suit was brought by Baij Nath and others for a declaration that a certain lease had expired and that the plaintiffs were entitled to retain proprietary possession of certain shops, and for an injunction to the defendants not to take steps to obtain possession of those shops or to interfere with the plaintiff's ownership and possession that suit was decreed in full and here again it is clear that the decree was a joint decree and that the injunction against the defendants might be enforced by any one of the plaintiffs. As, therefore, Baij Nath was a necessary partyto the appeal that appeal must also be held to abate *in toto*.

These three appeals are, therefore, dismissed with costs.

R. L. *Appeals dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 937 OF 1923.
December 9, 1925.
Present:—Mr. Justice Phillips.
MUTHUSAMI IYER, MINOR, BY HIS MOTHER AND GUARDIAN ANANTHALAKSHMI AMMAL—PLAINTIFF—APPELLANT
versus
DHARMA RAJA—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55 (2)—Covenant for actual possession, whether implied.

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(8) 86 Ind. Cas. 1; 6 L. 233; 26 P. L. R. 100; A. I. R. 1925 Lah. 281; 7 L. L. J. 149.

(9) 39 Ind. Cas. 277; 23 P. R. 1917.

(10) 69 Ind. Cas. 495; 5 L. L. J. 203; A. I. R. 1924 Lah. 93.

Where there is no express contract in terms in a sale-deed, a provision that the vendee shall be put into possession of the property sold cannot be said to be implied in it by virtue of s. 55, cl. (2), Transfer of Property Act. [p. 303, col. 2.]

Second appeal against a decree of the Court of the Subordinate Judge, Ramnad at Madura, in A. S. No. 124 of 1921, (A. S. No. 1312 of 1920, on the file of the District Court, Ramnad at Madura), preferred against that of the Court of the Principal District Munsif, Srivalliputtur, in O. S. No. 964 of 1918,

Mr. *K. V. Krishnasami Iyer*, for the Appellant.

Mr. *K. S. Champakesa Iyengar*, for the Respondent.

JUDGMENT.—The adoptive father of plaintiff-appellant in this case sold certain property to the defendant in 1912. One item of property was apparently in the possession of one Veerappa Naidu and, as a matter of fact, the defendant did not get possession of that item until after filing a suit against him and the plaintiff, possession being obtained shortly after the present suit was filed. One item of consideration for the sale-deed was a sum of Rs. 400 payable to plaintiff's creditor Muthayya Chetti and this amount was admittedly not paid by the defendant. Muthayya Chetti eventually filed a suit against the plaintiff and obtained a decree for Rs. 340 in 1917. The plaintiff now seeks to recover from the defendant damages which he has suffered owing to the defendant's non-payment of this portion of the sale price. The District Munsif gave a decree for the amount but the Subordinate Judge in appeal held that inasmuch as the father of the plaintiff had contracted to give possession to the defendant of all the items sold and had failed to give possession of one item, plaintiff was only entitled to a refund of the purchase money with interest from the date on which the defendant actually got into possession. From that amount he allowed the defendant to deduct Rs. 150 said to have been incurred by him for the expenses of his suit against Veerappa Nayudu.

In coming to this conclusion he has relied partly on an oral agreement pleaded by the defendant, namely, that Rs. 400 due under the sale-deed was not to be payable until the defendant got possession of the whole land. This oral agreement is inconsistent with the terms of the registered sale-deed and consequently under s. 92 of the Evidence Act, it cannot be proved in this case. On this ground alone it might be held that the Subordinate Judge's finding is not justifiable but he has also relied on the provision of s. 55, cl. (2) of the Transfer of Property Act. That runs as follows:—"The seller should be deemed to contract with the buyer that the interest which the seller professed to transfer to the buyer subsists." The Subordinate Judge has held that under this clause the sale-deed executed by the father of the plaintiff must be deemed to contain a contract to put the defendant in possession of the property. There is no such contract in terms in the document and the provision that the vendee shall be put into possession cannot be said to come under s. 55, cl. (2) which refers to the interest professed to be transferred. In this case the interest which the plaintiff's father professed to transfer, was the absolute right to the property. It has been found that that right was subsisting on the date of sale and that the plaintiff's father had power to transfer it. The discussion, therefore, in the Subordinate Judge's judgment with reference to this contract to put the defendant in possession is hardly relevant to the present suit.

It is probable that the defendant might have counter claimed for damages sustained by him by alleging that the plaintiff's father has committed breach of contract by not putting the defendant in possession of the land. It appears that the parties were aware that a third person was in possession of one item although there is no reference to this fact in the sale-deed. The defendant bought the properties without any covenant for actual possession and there is nothing in s. 55 to justify such a contract being implied. As a matter of fact, the defendant has not pleaded a set off in terms and has not proved breach of contract by the plaintiff. We have, therefore, only to consider the qustion whether the plaintiff is entitled to the damages claimed by him. The plaintiff has asked for the suit amount to be made a charge on the plaint property and from that it might be inferred that he was seeking to recover his unpaid purchase-money but on a perusal of the plaint it is clear that what he is asking for is damages sustained by him in consequence of the defendant's non-payment of the purchase-money and it is only through an erroneous view of his rights that he has asked for a charge.

A contention is raised as to the quantum of damages and it is suggested for the defendant that the plaintiff colluded with the creditor Muthayya Chetti and allowed a decree for an excess amount to be passed. The Subordinate Judge has found that the agreement to pay compound interest alleged by the plaintiff is untrue but no such allegation was made by the defendant and the finding is certainly vitiated by the fact that it is based on a wrong principle of law. The plaintiff's father admittedly paid a certain sum towards Muthayya Chetti's debt and then the arrangement to pay compound interest is said to have been arrived at because the plaintiff's father wanted further time to pay the balance. The Subordinate Judge referring to this says, "An ordinary prudent man would not, after having paid Rs. 162, have agreed to pay compound interest when he had three years' time to pay the amount. He seems to be under the impression that a debtor is not bound to pay his debts until the last day of limitation for filing a suit against him, which is, to say the least of it, a most extraordinary proposition. The agreement is spoken to by the witnesses and seems to be in accordance with probabilities and it is not the subject of any specific issue. There seems to be no reason for holding that this amount decreed against the plaintiff was due to collusion and consequently that is the amount of damages the plaintiff has sustained.

The appeal must, therefore, be allowed and the District Munsif's decree restored except that the amount will not be made a charge on the suit property. The plaintiff will get his costs both here and in the lower Appellate Court.

V. N. V.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 145 OF 1922.
March 17, 1926.
Present :—Mr. Justice Harrison and Mr. Justice Jai Lal.
THE FIRM KANWAR BHAN-SUKHA NAND THROUGH MR. D. R. CHAND—
PLAINTIFFS—APPELLANTS
versus
THE FIRM GANPAT RAI-RAM JIWAN
—DEFENDANTS—RESPONDENTS.

*Contract Act (IX of 1872), ss. 30, 51, 93—Contract for sale of goods—Presumption as to nature of transaction—*Badni *transaction, proof of—"Readiness and willingness" of promisee, meaning of—Purchaser's duty to demand delivery.*

The ordinary presumption is in favour of the legality of a contract and it is for those who assert that it was not intended to perform the contract in the manner recited therein to prove their assertion. [p. 305, col. 1.]

In order to prove that a transaction is wagering one it is necessary to prove that no delivery was originally intended and also that it was agreed between the parties at the time the contract was entered into, that neither party would be entitled to enforce the actual delivery of goods. [p. 305, col. 2.]

Kundan Lal v. *Qadir Ahmad Ali*, 78 Ind. Cas. 966; A. I. R. 1924 Nag. 270, referred to.

The mere fact that a transaction is a speculative one does not make it a wagering one. [*ibid.*]

Bhagwandas Parasram v. *Burjorji Ruttonji Bomanji*, 44 Ind. Cas. 284; 42 B. 373; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 20 Bom. L. R. 561; 7 L. W. 577; 11 Bur. L. T. 211; 45 I. A. 29 (P. C.), referred to.

The mere fact that neither of the parties deal in the commodity contracted to be sold and that in previous transactions the parties merely settled by payment of differences does not prove a transaction to be a *badni* one. [*ibid.*]

The expression "readiness and willingness" as used in s. 51, Contract Act, does not require a party to prove that on the due date he had the goods actually in his possession. It is quite sufficient if he is able to prove that he had control of the requisite goods or that he had the capacity to deliver them to the purchaser when called upon to do so. [p. 306, col. 1.]

Cohen v. *Cassim Nana*, 1 C. 264; 25 W. R. 273; 1 Ind. Dec. (N. S.) 167 and *Mulchand* v. *Kundanmull*, 57 Ind. Cas. 140; 47 C. 458, referred to.

Under s. 93, Contract Act, it is the duty of the purchaser to apply for delivery on tendering the agreed price. [p. 306, col. 2.]

Second appeal from a decree of the District Judge, Delhi, dated the 13th October 1921, reversing that of the Subordinate Judge, First Class, Delhi, dated the 9th May 1921.

Bakshi *Tek Chand* and Lala *Anant Ram*, for the Appellants.

Lala *Sardha Ram*, R. S., for the Respondents.

JUDGMENT.—On the 31st of January 1920 and the 12th of February 1920 the appellants agreed to sell 400 tolas of gold to the defendants to be delivered on the 13th of March 1920. On the last mentioned date they asked the defendants to take delivery of the gold on payment of the agreed price. The defendants not having taken delivery of the gold on the 19th of April 1920 the appellants instituted the suit out of which this second appeal arises for the recovery of Rs. 1,733-8-0 being damages alleged to be suffered by them owing to the breach by the defendants. The defendants' plea was that the contract was a wagering one and that, therefore, the plaintiffs were not entitled to recover any damages. The Trial Court held that the contract was not a wagering one and gave the plaintiffs a decree for Rs. 1,350-10-0 with proportionate costs against the defendants.

On appeal the District Judge held that the contract was a wagering one He also held that it had not been shown that "the plaintiffs were able and willing to deliver the gold on the due date."

Before us both these conclusions are attacked by the Counsel for the appellants. It appears from the judgment of the District Judge that he was of the opinion that the main issue in the case was "whether it was agreed that actual delivery would be given and that payment of the price would be given and that the second issue whether the transactions were *badni*" arose only if issue No. 1 had been decided in favour of the plaintiffs. With this view we do not agree. The ordinary presumption is in favour of the legality of a contract and it is for those who assert that it was not intended to perform the contract in the manner recited therein to prove their assertion. There is thus no force in the contention of the Counsel for the respondents that the finding of the District Judge is one of fact and therefore, binding on this Court.

We have examined the record and find that there is absolutely no evidence on the record to prove that the transaction was *badni*. The defendants themselves did not go into the witness-box and no other evidence was produced. The only facts from which the inference as to the illegal nature of the transaction is drawn by the District Judge are:

(*a*) that neither of the parties ordinarily deal in gold and

(*b*) that in previous transactions the parties merely settled by payment of differences.

We have no evidence as to the nature, extent, number or the period of those transactions. In our opinion these facts were wholly insufficient to prove that this transaction was *badni*. In order to prove that a transaction is a wagering one it was necessary for the defendants to prove that no delivery was originally intended and also that it was agreed between the parties, at the time when the contract was entered into, that neither party would be entitled to enforce the actual delivery of gold, *Kundan Lal* v. *Qadir Ahmad Ali* (1). The mere fact that the transaction was a speculative one does not make it a wagering one [*Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji* (2).]

We hold, therefore, that the respondents have failed to prove that the transactions, which were the subject of the suit in this case, were *badni*. This finding, however, does not conclude the case as the learned District Judge has further held that the plaintiffs had not shown that they were able and willing to deliver. In this connection we note that the defendants did not raise an express plea that the plaintiffs were not ready and willing to perform their part of the contract on the due date and no issue was framed by the Trial Court on this point, but the learned Counsel for the respondent contends that in order to make out a complete cause of action it was necessary for the plaintiffs to allege in their plaint that they were ready and willing to perform their part of the contract and that unless this allegation was made and proved by them the plaintiffs were not entitled to a decree for damages for breach of the contract. No objection was taken to the plaint being defective or incomplete in the absence of an allegation of readiness and willingness by the plaintiffs, but we are of opinion that it was not necessary for the plaintiffs to make an express allegation in the plaint as to their readiness and willingness.

The learned Counsel for the respondents relied upon certain authorities which support his contention, but O. VI, r. 6, of the present C. P. C. is a complete answer to his contention. It is now provided in that rule that any condition precedent, the performance or occurrence of which is intended to be contested shall be distinctly specified in his pleadings by the plaintiff or defendant, as the case may be, and subject thereto an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleadings. It is quite clear from this that in the pleadings of the plaintiffs as contained in the plaint an averment of the performance of the conditions precedent that is to say, readiness and willingness of the plaintiffs to perform their part of the contract, must be implied and it was for the defendants if they contested that fact to raise the matter expressly in their pleadings. It would then have been necessary for the plaintiffs to prove affirmatively that they were ready and willing to perform their part of the contract.

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(1) 78 Ind. Cas. 966; A. I. R. 1924 Nag. 270.

(2) 44 Ind. Cas. 284; 42 B. 373; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 20 Bom. L. R. 561; 7 L. W. 577; 11 Bur. L. T. 211; 45 I. A. 29 (P. C.).

The expression "readiness and willingness" as used in s. 51 of the Contract Act has been the subject of discussion in a large number of rulings. We will, however, mention only two of them here *Cohen* v. *Cossim Nana* (3) and *Mulchand* v. *Kundanmull* (4). It appears from these that it is not necessary for the plaintiff to prove that on the due date he had the goods actually in his possession. It is quite sufficient if he is able to prove that he had control of the requisite goods or that he had the capacity to deliver them to the purchaser when called upon to do so, in other words, that he was in a position to fulfil his part of the contract on the due date on a demand being made by the purchaser. Applying this test we hold that the plaintiffs in this case were ready and willing to perform their part of the contract. It appears from the evidence on the record that there was plenty of gold in the market of Dalhi on the due date and that delivery of large quantities was given by dealers in performance of other contracts to their purchasers. It also has been established that the market rate of gold on that day was lower than the contract rates between the plaintiffs and the defendants in this case. The District Judge has held that the plaintiffs "stood to make a profit by actually" buying gold at the market price on due date and selling "it at the contract rates to the defendants". On that finding of fact, in our opinion, the District Judge should have held that the plaintiffs were in a position to perform their part of the contract and taking this fact with another that the plaintiffs actually called upon the defendants to take delivery of the gold on the due date, the proper finding should have been that the plaintiffs were able and willing to deliver the gold. Under s. 93 of the Contract Act it was for the purchasers in this case to apply for delivery on tendering the agreed price. This they failed to do. They were, therefore, liable to pay damages to the plaintiffs owing to their breach of their part of the contract.

We accept this appeal, set aside the decree of the learned District Judge and restore that of the Subordinate Judge with costs throughout.

R. L. *Appeal accepted.*

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(3) 1 C. 264; 25 W. R 273; 1 Ind. Dec. (N. S.) 167.

(4) 57 Ind. Cas. 140; 47 C, 458.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 185 OF 1923.
August 25, 1925.
Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and
Mr. Justice Viswanatha Sastri.
UMAMKESWARA MUDALY AND OTHERS—
DEFENDANTS—APPELLANTS
versus
MUNISWAMI MUDALY AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Partnership, dissolution of—Taking of accounts—Interest on monies drawn by partner, whether allowable—Interest on advances, calculation of.

In taking accounts in a suit for dissolution of partnership, it is not the practice to allow interest on monies drawn by a partner from the partnership funds be it capital or interest unless it is so provided in the deed of partnership.

Meymott v. *Meymott*, (1862) 54 E. R. 1211; 31 Beav. 445; 32 L. J. Ch. 218; 9 Jur. (N. S.) 426; 135 R. R. 515, followed.

Interest is payable on advances by a partner only till the date of the preliminary decree when the partnership is dissolved, and not till the date of the final decree.

Barfield v. *Loughborough*, (1873) 8 Ch. 1; 42 L. J. Ch. 179; 27 L. T. 499; 21 W. R. 86, followed.

Appeal against a decree of the Court of the Subordinate Judge, Chingleput, in Original Suit No. 28 of 1919.

Mr. *T. R. Ramachandra Iyer*, for the Appellants.

Mr. *K. S. Krishnaswami Iyengar*, for the Respondents.

JUDGMENT.—In this case the learned Judge in making his final decree in a suit for dissolution of partnership has made two errors in taking the accounts. In the first place he has allowed interest on monies drawn by a partner from the partnership funds—be it capital or interest, it does not matter—a thing which it is not the practice to allow unless it is so provided in the deed. There is clear authority in the case of *Meymott* v. *Meymott* (1). The other thing he has allowed is interest on certain advances up to the date not of the dissolution which had been effected by the preliminary decree but right up to the date of final decree. For that again there is clear English authority, *Barfield* v. *Loughborough* (2) that such allowances cannot be made. The decree will be amended by disallowing those two items, interest at 9 per cent. being allowed up to the date of the preliminary decree. After that date the usual rate of 6 per cent. interest will be allowed.

V. N. V.

R. L. *Appeal allowed.*

(1) (1862) 54 E. R. 1211; 31 Beav. 445; 32 L. J. Ch 218; 9 Jur. (N. S.) 426; 135 R. R. 515.

(2) (1873) 8 Ch. 1; 42 L. J. Ch. 179; 27 L T. 499; 21 W. R. 86.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 24 OF 1925.

March 6, 1926.

Present:—Mr. Justice Raza.

DAWARKA—DEFENDANT—APPELLANT

versus

SANKATHA—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 115—Estoppel—Building house in absence of plaintiff—Silence—Pleadings——New plea in arguments.

A Court is justified in rejecting a plea in argument which was not raised by the defendant in his defence. [p. 308, col. 2.]

Where the defendant has built a house on plaintiff's land in the latter's absence, no question of estoppel by acquiescence can possibly arise. [*ibid.*]

Second appeal against a decree and judgment of the Additional Sub-Judge, Rai Bareli, dated the 20th October 1924, setting aside that of the Court of the Munsif, Rai Bareli, dated the 4th March 1924.

Mr. *Hargobind Dayal* for Mr. *Radha Krishna*, for the Appellant.

Mr. *Ghulam Hasan*, for the Respondent.

JUDGMENT.—This is an appeal from a decree of the Additional Subordinate Judge, Rai Bareli, dated the 20th October 1924, setting aside a decree of the Munsif of Rai Bareli, dated the 4th March 1924.

This appeal arises out of a suit brought by the plaintiff for possession of a house situated in village Shora, District Rai Bareli. The plaintiff alleged that the house in suit was his ancestral property, that he and his brothers were members of a joint family, but his brothers were living abroad and he was the *karta* (manager), that he also was mostly living in Hardoi, as he had got some property there and that the defendant took possession of the house in suit wrongfully in the beginning of March 1923 and took away some doors and beams in the plaintiff's absence. The plaintiff, therefore, sued for possession of the house and for Rs. 50 as damages.

The claim was resisted by the defendant. His defence was that the plaintiff's mother had sold the house to one Mahanand in 1898 during the minority of the plaintiff and his brothers and thus Mahanand had got possession of the house as a vendee. Mahanand was succeeded by his widow *Musammat* Sukhdei and she gave the defendant permission (oral) to build the house on the site of the old house which had fallen down. The defendant thus built the house a few months before the institution of the suit. The permission is said to have been given to the defendant in the beginning of 1923. The suit was instituted in September 1923.

The learned Munsif dismissed the suit holding that the sale-deed, Ex. A-1 was genuine and valid, and that the plaintiff had thus lost all right to the property and was never in possession thereof within limitation.

The learned Additional Subordinate Judge allowed the plaintiff's appeal holding that the sale-deed in question was a forgery and that the plaintiff was entitled to the property in suit which was his ancestral property.

The defendant has now come to this Court in second appeal. I have examined the record carefully. In my opinion there is no force in this appeal. The finding of the learned Additional Subordinate Judge that the sale-deed in question is not genuine, must be accepted in second appeal. There is no reliable evidence on record to show that the sale-deed in question was really executed by the plaintiff's mother. The fact that the plaintiff has been in possession of the property in suit within limitation is also satisfactorily proved, The appellant's learned Pleader has argued that on the plea of limitation the lower Appellate Court has found, that though the plaintiff has been out of possession for more than 12 years, but still it was not necessary for him to prove his possession within 12 years, having proved his title. So far as I see, the lower Appellate Court has not really found that the plaintiff has been out of possession of the house in suit for more than 12 years and that he was never in possession within limitation. I have read the judgment of the learned Subordinate Judge cerefully. So far as I see, the learned Subordinate Judge has found, as a fact, that the plaintiff has been in possession within limitation. He has rejected the evidence which was produced by the defendant to prove the possession of Mahanand and his successors. He has relied on Bhola's evidence which shows that the plaintiff was in possession of the property within limitation. The judgment of the learned Subordinate Judge shows that he was of opinion that, even if the plaintiff had been out of possession for more than 12 years, he would not have lost his right to the property in suit as the defendant had failed to prove adverse possession for more than 12 years. In that connection the learned Subordinate Judge had referred to the ruling in *Indarpal Singh* v. *Thakur Din Singh* (1).

In my opinion it is not necessary to consider that question in disposing of this appeal. The fact remains that it has been really found by the lower Appellate Court that the plaintiff has been in possession of the property in suit within limitation. I have gone through the whole evidence on record carefully. In my opinion, the plaintiff's possession within limitation is satisfactorily proved and when his title is admitted, his claim must be decreed. The plaintiff and other members of his family were living in the house before the last four or five years. They left the place about four years ago. However the plaintiff was visiting the place every now and then during the last four years. When the defendant took possession of the house wrongfully in March 1923 he misappropriated the doors and beams and built a new house there. Under these circumstances the plaintiff's claim was rightly and properly decreed by the learned Additional Subordinate Judge.

I should like to note that, though no plea of estoppel was raised by the defendant in this case, but the learned Munsif made the following observation at the end of his judgment.

"The defendant seems to have omitted the obvious plea ol estoppel by conduct as his whole house is now complete. At any rate because the plaintiff stood by when the defendant was building his house, it is safe to infer that the former knew that he had absolutely no rights in the land and so did not offer any resistance or remonstrance."

The learned Subordinate Judge did not consider the plea of estoppel in disposing of the appeal. I think he was perfectly right in leaving that plea out of consideration when it had not been raised by the defendant in his defence. I should like to note that it is in evidence that the house was built by the defendant in the plaintiff's absence. Under these circumstances no plea of estoppel can be taken in this case.

The result is that the appeal fails and must be dismissed. I dismiss the appeal with costs. The decree of the lower appellate Court is confirmed in all respects.

G. H. *Appeal dismissed.*

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(1) 78 Ind. Cas. 895; 27 O. C. 77; 10 O. L. J. 646; A. I. R. 1924 Oudh 266.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 886 OF 1923.
January 8, 1926.
Present:—Mr. Justice Odgers.
T. KUPPUSWAMI PILLAI—PLAINTIFF—APPELLANT
versus
S. MUHAMMAD KASIM SAHIB AND OTHERS—DEFENDANTS Nos. 3, 1 AND 2—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 116—Landlord and tenant—Sub-lessee from tenant, liability of, as lessee—Landlord's assent, what amounts to.

Where a sub-lessee from a lessee is sought by the landlord to be rendered liable as a tenant by virtue of s. 116, Transfer of Property Act, it is the lessor and not the lessee that must have done some act, recovered rent or otherwise given assent to the sub-lessee remaining in possession as a tenant. [p. 309 col. 2.]

Meghji Vallabhdas v. *Dayalji Lalji & Co.*, 80 Ind. Cas. 507; 48 B. 341; 26 Bom. L. R. 231; A. I. R. 1924 Bom. 322, relied on.

Where a landlord served the sub-lessee with a notice to vacate the premises or he would be charged Rs. 75 per month along with the costs of the case, it cannot be said that the landlord consented to the sub-lessee remaining in possession as his tenant in direct privity with him. [p. 310, col. 1.]

Second appeal against a decree of the District Court, Chingleput, in A. S. No. 208 of 1921, preferred against that of the Court of the Additional District Munsif, Chingleput, in O. S. No. 280 of 1919 (O. S. No. 60 of 1919 on the file of the Court of the District Munsif, Poonamallee).

Mr. *T. L. Venkatramier*, for the Appellant.

Mr. *P. G. Krishnier*, for the Respondents.

JUDGMENT.—This is a case in which it is important to look at the plaint. The plaintiff entered into a lease with defendants Nos. 1 and 2 in 1907. These two persons are said to have since become insolvents and are not represented in second appeal. In 1913 defendants Nos. 1 and 2 sub-leased to the 3rd defendant. The plaint sets out that defendants Nos. 1 and 2 were in enjoyment of the plaintiff's property as tenants and that the 3rd defendant is in enjoyment of the premises as a partner of defendants Nos. 1 and 2. It may at once be said that this case of partnership was given up in both the lower Courts and was not pressed before me here. The plaint then goes on to ask for "losses on account of rent from January 1916 to 15th December 1918" when the plaintiff sold the property to a stranger. Paragraph 7 of the plaint runs as follows :—

"The plaintiff claims relief in this suit for losses on account of rent and for damages for use and occupation at Rs. 50 per month."

The material issue settled in the case is,

"Is the plaintiff entitled to collect the rent of the suit building........... ..."

It is now contended before me that the plaintiff is entitled to succeed as against the 3rd defendant on any one of the several grounds, (1) as a tenant of the plaintiff under s. 116 of the Transfer of Property Act; (2) as a trespasser on the premises of the plaintiff and, therefore, liable for damages for use and occupation. I have set out the only paragraph in the plaint in which damages for use and occupation are referred to except the prayer and there are no introductory averments whatever showing how the plaintiff would be entitled to damages for use and occupation against one or more of the defendants. The plaintiff, no doubt, had a cause of action against the 3rd defendant; but the question is, whether on the plaint as framed he could be granted any relief. The District Munsif held that he could, on the ground that the 3rd defendant after the notice Ex. B (1) which will be referred to in detail in a moment, made himself directly responsible for the rent and continued in possession. The District Judge held that there was no contract express or implied by the 3rd defendant, to become the tenant of the plaintiff and to pay rent. As stated above the 3rd defendant is joined clearly in the plaint as a partner of defendants Nos. 1 and 2. The suit is not one in ejectment and he was nowhere treated as a trespasser. Therefore any damages for use and occupation against him as a trespasser were out of question. Can any damages for use and occupation or by way of rent be awarded against him as a tenant? That the plaintiff knew that the 3rd defendant was a sub-lessee is clear. No objection was raised to the sub-lease and the possession of the 3rd defendant is said to have been more than once admitted by the plaintiff. Now, the plaintiff terminated the lease to defendants Nos. 1 and 2 by a notice. He sent Ex. B (1) to the 3rd defendant specifically as sub-tenant enclosing the notice he had addressed to defendants Nos. 1 and 2 terminating their tenancy. Exhibit B (1) demands that the 3rd defendant should vacate the premises within a month of the receipt of the notice and concludes:—

"In default of so vacating I write this, with a pure mind, that Rs. 75 per month will be collected for the said tenancy, along with the costs of the Court."

To this the 3rd defendant gave no reply and continued in possession. Now it is said that these concluding words of Ex. B (1) bring the case within s. 116 of the Transfer of Property Act and that the lessor has by them "otherwise assented" to 3rd defendant's continuing in possession. It is clear from *Meghji Vallabh Das* v. *Dayalji Lalji & Co.* (1) that it is for the lessor to do some act, receive rent or otherwise to give consent and not for the lessee to do anything under the Transfer of Property Act. I have been referred to a case in

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(1) 80 Ind. Cas. 507; 48 B. 341; 26 Bom. L. R. 231; A. I. R. 1924 Bom. 322.

Dougal v. *McCarthy* (2) in the Court of Appeal which is said to resemble the present case in that there the tenants held over and when the landlord wrote demanding a quarter's rent in advance they did not answer the letter but remained in possession. The Master of the Rolls says :—

"The evidence appears to me clearly to show that the landlord consented to their so remaining in possession as tenants; and that he treated them as tenants from year to year on the terms of the previous tenancy."

The whole question here is whether from the terms of Ex. B (1) it can be said that the landlord consented to 3rd defendant remaining in possession as his tenant in direct privity with him. It seems to me it cannot. The terms are that he should go out or Rs. 75 will be collected together with the costs of the Court. That does not look like an amicable consent to either the tenant's holding over or to the recognition of a new tenancy on the part of a former sub-lessee. The 3rd defendant has paid no money upto this date and the landlord has taken no steps till 1919 when this suit was filed.

Another contention is that even though the 3rd defendant has been recognised as sub-tenant remaining in possession after the determination of the lease he must be liable for reasonable damages for so remaining in possession on the authority of old English cases like that of a man who takes a bun from a Railway refreshment room or of a man to whom wine is delivered without an order and who receives it and consumes it. That no doubt might be another good cause of action for the plaintiff had it been fore shadowed in his plaint, or had an issue been taken about it below. One must say with some sympathy for the plaintiff that there was no doubt he had a remedy against this 3rd defendant, but either he was badly advised or his remedy has been misconceived; and, in my opinion, on his plaint he is not entitled to succeed as against the 3rd defendant. It may be that when he first launched the case the 3rd defendant occupied a very minor place in his consideration and that the subsequent insolvency of defendants Nos. 1 and 2 caused him to turn to and try to recover from the 3rd defendant. But on the state of the pleadings and the issues and the shape in which the case was originally put, I am clearly of opinion that he cannot succeed in doing so.

The second appeal must, therefore, be dismissed with costs.

V. N. V.
R. L.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1964 OF 1923.

December 15, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

RAJMOHINI DASI—PLAINTIFF—APPELLANT

versus

NAGENDRA KUMAR TALPATRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 50 (2)—Presumption of fixity of rent—Occupancy raiyat, *if can be* raiyat *at fixed rate—Civil Procedure Code (Act V of 1908), s. 11, Exp. IV—Point not necessary in previous suit, omission to raise*—Res judicata.

In cases to which the presumption under s. 50 (2), Bengal Tenancy Act, is not applicable the Court is entitled to consider the facts in view of all the circumstances and determine whether the holding is held at a fixed rental. [p. 311, col. 2.]

Pran Krishna Saha v. *Mukta Sundari Dassya*, 21 Ind. Cas. 544; 18 C. L. J. 193, referred to.

Jagabandhu Saha v. *Magnamoyi Dassi*, 36 Ind. Cas. 884; 24 C. L. J. 363; 44 C. 555; 22 C. W. N. 89, distinguished.

The same person can combine in himself the status of an occupancy *raiyat* and a *raiyat* at fixed rate. [p. 412, col. 2.]

Sarbeswar Patra v. *Bijoy Chand Mahatap*, 63 Ind. Cas. 985; 49 C. 280; 34 C. L. J. 233; 26 C. W. N. 15; A. I. R. 1922 Cal. 287, followed.

Bhutnath Naskar v. *Monmotha Nath Mitra*, 2 Ind. Cas. 675; 13 C. W. N. 1025; 11 C. L. J. 98, distinguished.

A point which could have been raised in a previous suit but was not necessary for the decision of the case and as such was not raised cannot operate as *res judicata* in a subsequent suit. [*ibid.*]

Appeal against a decree of the Additional District Judge, Pabna and Bogra at Pabna, dated the 17th of April 1923, reversing that of the Munsif, Second Court at Pabna, dated the 13th of January 1923.

Mr. *Sarat Chandra Basu*, Dr. *Radhabinode Pal* and Babu *Bhupendra Kishore Bose*, for **the Appellan**

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(2) (1893) 1 Q. B. 736; 62 L. J. Q. B. 462; 4 R. 402; 68 L. T. 699; 41 W. R. 484; 57 J. P. 597.

Mr. *Atul Chandra Gupta*, Babu *Radhicaranjan Guha* and *Jatis Chandra Guha*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit instituted by the plaintiff for recovery of *khas* possession of certain lands. The plaintiff's case was that the lands comprised a non-transferable occupancy holding and the holding had been transferred by the previous tenants in favour of the defendants. The plaintiff, therefore, asks for *khas* possession. The suit was decreed in the Court of first instance. The lower Appellate Court has reversed that decision and dismissed the suit. The plaintiff has, therefore, preferred this appeal.

The first contention urged on behalf of the appellant is to the effect that the lower Appellate Court was in error in applying to the case the presumption contained in cl. (2) of s. 50, Bengal Tenancy Act. The suit being against a person who is said to be a purchaser of a non-transferable occupancy holding is not a suit under the Bengal Tenancy Act and it is urged that in a suit of this description the presumption to which I have referred is not applicable. That is no doubt so, but the question to be considered is as to whether the learned Judge of the Court below has relied upon the presumption as contained in cl. (2) of s. 50 or he has not taken the facts into consideration in order to find what inference may legitimately be drawn from them. What the learned Judge has stated in his judgment is this. He has observed that it is well-settled that apart from the provisions of s. 50 (2) it is open to the Court to draw an inference of a *jote* having been held at a fixed rent from the time of the Permanent Settlement from the fact of long payment of a uniform rent. He has found in his judgment that the origin of the tenancy is not known that the two suits which were instituted for enhancing the rent of the tenancy were unsuccessful that a third suit which was instituted for ejecting them had failed that in point of fact the rental remained unchanged for over 60 years, and that the tenancy has passed from generation to generation, and upon a consideration of these circumstances he has held that the reasonable inference to be drawn is that the holding was a *maurasi mokarrari raiyati*. The learned Judge, therefore, did not rely upon the presumption as a necessary presumption arising under s. 50 (2), Bengal Tenancy Act, but from the fact that rent has been uniform for a long series of years taken in conjunction with the other circumstances to which I have already referred and which have been found to exist in connection with this holding he has come to the conclusion that it was a *maurasi mokarrari raiyati*. It cannot, therefore, be said that the learned Judge has relied upon the presumption as contained in that section but has drawn an inference from the facts which to some extent are analogous to the presumption which arise under that section. That this is permissible has been laid down in series of cases of this Court amongst which reference may be made to the decision in the case of *Pran Krishna Saha* v. *Mukta Sundari Dassya* (1) where it has been laid down that in cases to which the presumption under s. 50 (2) is not applicable the Court is entitled to consider the facts in view of of all the circumstances and determine whether it was not a just inference that the holding bears a fixed rental, and that there is nothing objectionable in drawing such an inference so long as the Court as does not regard itself as legally bound to apply the presumption which arises under that section. Much reliance has been placed on behalf of the appellant upon the case of *Jagabandhu Saha* v. *Magnamoyi Dassi* (2). All that this Court did in that case was that it refused to interfere with a decision in which the lower Appellate Court had not drawn the inference of fixity of rent from facts somewhat similar. It cannot be said that the facts in that case were exactly the same as here. A final Court of fact is competent to draw the necessary inference, provided it does not feel bound to take the presumption into account.

That is exactly the way in which the learned Judge has dealt with the matter, and the appellant's contention that the learned Judge has relied upon the presumption is not well-founded.

It is next urged that the learned Judge has been in error in not using against the defendants the admission which has been made by their predecessors the (vendors) in a previous suit which had been instituted by the plaintiff against them for ejectment—the admission having been to the effect that they were occupancy *raiyats*. This admission, it is said, is to be found in the statement of the cases as recited in the judgment in that suit. The learned Judge, with reference to this matter, has remarked that in order to use the admission of the appellants-vendors the plaintiff-respondent should have proved the written statement filed by them and without this the recital as to the statements of the facts of the case could not be used as an admission. In the view that the learned Judge has taken of this matter, I think he is right far from the statement of the respective cases of the parties in the judgment, it cannot be gathered with certainty as to what the exact nature, scope and extent of that admission was, and if the plaintiff wanted to rely upon the admission of the defendants-vendors as a piece of the evidence binding upon them it was obligatory on their part to produce the written statement in which that admission was contained. This ground, therefore, also fails.

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(1) 21 Ind. Cas. 514; 18 C. L. J. 193.

(2) 33 Ind. Cas. 884; 24 C. L. J. 363; 44 C. 555; 29 C. W. N. 89.

The third ground urged on behalf of the appellant relates to the question of *res-judicata*. In the suit which the plaintiff had instituted against the vendors of the defendants for ejectment, the plaintiff alleged that he was a *raiyat* and that the defendants-vendors were under-*raiyats*, and the suit was instituted on the footing of them being under-*raiyats* under s. 49, Bengal Tenancy Act. In that suit it was decided that the defendants thence were not under-*raiyats* but occupancy *raiyats*. It is said that that decision operates as *res judicata* in the present suit on the question of the status of the defendants. The learned Judge has dealt with this matter in this way. He has observed that the finding in the judgment that the defendants were *raiyats* was sufficient for the determination of the suit and if the Court proceeded to determine the class of *raiyats* to which they belonged and held that they were occupancy rights it was unnecessary and the decision were not *res judicata* to the trial of the question as to the status of the defendants in the present suit. In dealing with this matter from this point of view I am not sure that the learned Judge was right, for it seems to me that if both the parties invited a decision of the Court on the question as to whether the defendants in that suit were occupancy *raiyats* or not the decision on the question of the status of the defendants would be *res judicata* in a subsequent suit as between the parties or persons claiming under them. But there is another aspect of the case which has been passed before us by the learned Advocate for the respondents. He has contended that in the previous suit it was not necessary for the defendants to urge that their status was something higher than that of occupancy *raiyats*. The suit was one in ejectment on the footing of the defendants thence being under-*raiyats* and it was enough for them to show that they were not under-*raiyats* but had a right of occupancy. The question as to whether they were *raiyats* holding at fixed rent was not necessary to be urged in that suit and if it was not necessary to put forward that defence in that suit, it cannot be said that the decision in that suit on the question as to whether the defendants were *raiyats* at fixed rent or not cannot now be treated in the present suit as *res judicata*. That one and the same person can combine in himself the status of an occupancy *raiyat* and a *raiyat* at a fixed rent cannot now be disputed in view of the decision of this Court in the case of *Sarbeswar Patra* v. *Bijoy Chand Mahatap* (3). The contrary view to be found in the *dictum* of Mookerjee, J., in the case of *Bhutnath Naskar* v. *Monmotha Nath Mitra* (4) was dissented from in that case. In the ejectment suit it was not necessary for the defendants to say anything more than that they were occupancy *raiyats* and the decision arrived at was to the effect that they were such *raiyats*. In the present suit they go further and say that not only are they occupancy *raiyats* but that they have been holding at fixed rent from this time of the Permanent Settlement and, therefore, they are *maurasi makarrari raiyats*. In this view the decision in the previous suit cannot be said to operate as *res judicata* in the present one. This ground, therefore, also fails. All the grounds urged in support of the appeal failing, the appeal must be and is accordingly dismissed with costs.

M. B.

R. L. *Appeal dismissed.*

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(3) 63 Ind. Cas. 986; 49 C. 280; 34 C. L. J. 233; C. W. N. 15; A. I. R 1922 Cal. 287.

(4) 2 Ind. Cas. 675; 13 C. W. N. 1025; 11 C. L. J. 98.

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 69 OF 1924.
February 17, 1926.
Present:—Sir Loius Stuart, KT., Chief Judge, and Mr. Justice Misra.
HAMID HUSAIN—PLAINTIFF—APPELLANT
versus
HADI RAZA AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Decision in same suit in previous proceedings—Binding force.*

A decision in previous proceedings in the same suit though not strictly speaking *res judicata* has still a binding force. [p. 315, col. 1.]

Appeal from a decree of the Additional Subordinate Judge, Lucknow, dated the 30th August 1924.

Mr. *M. Wasim* and *Zahur Ahmad*, for the Appellant.

Mr. *S. N. Roy* for Messrs. *Radha Krishna* and *Makund Bihari Lal*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was based on a deed of mortgage executed on the 4th November 1901 by a Muhammadan called Husain Raza in favour nominally of a man called Gulzari Shah. It is, however, admitted by Gulzari Shah himself that the deed of mortgage was not executed in his favour but was executed in his favour fictitiously. Gulzari Shah was the Muhammadan servant of a prostitute called Husaini Jan. Husaini Jan was the mistress of a Hindu Deputy Collector called Magghu Narain. This man was subsequently dismissed from Government service and eventually changed his religion, became a Muhammadan and married his mistress Husaini Jan. It would appear from the evidence of Gulzari Shah that the money was really advanced by Husaini Jan herself, although it was understood that the benefits of the mortgage were to be retained by her protector Magghu Narain. This mortgage carried simple interest at 18 per cent per annum with conditions as to the payment of compound interest in default of payment of simple interest and we have it established that on the 10th September 1908 certain houses belonging to Husain Raza were given into the possession of the mortgagee. The rights under the mortgage-deed formed the subject of various transfers by succession and otherwise and finally were purchased on the 15th of October 1922 for Rs. 2,000 by the present plaintiff-appellant. The plaintiff-appellant then instituted a suit on the 4th December 1922 upon the deed of mortgage. The evidence closed on the 21st of January 1924 and the Subordinate Judge dismissed the suit on the 29th of February 1924, on the ground that it was barred by limitation. The plaintiff-appellant's case on the subject of limitation was that inasmuch as the mortgagee had been in possession of certain mortgaged property from 1908 onwards and had received the rent of the property, limitation was saved under the provisions of section 20 of the Limitation Act. The learned Subordinate Judge repelled this suggestion upon the finding that the agreement under which the property had been delivered into the possession of the mortgagee could not be proved under the provisions of s. 92 of the Evidence Act as it varied the terms of the original contract of mortgage. An appeal was filed against the dismissal of the suit upon this point to the Court of the Judicial Commissioner which was decided on the 7th July 1924. It was decided by the Hon'ble Mr. Justice Hasan who was then the Officiating Judicial Commissioner. He decided that the suit was not barred by limitation holding that in 1908 the mortgagor had put the mortgagee in possession of a portion of the mortgaged property on the understanding that he would accept the income of the mortgaged property up till the date of redemption in full satisfaction of the whole of the interest which had accrued in the past and which would accrue in the future under the terms of the mortgage-deed. Upon this finding the plaintiff-appellant could not be entitled to more than Rs. 2,000 the amount of principal of the deed of mortgage. As a result of this decision the suit went back to the learned Subordinate Judge for re-hearing and as he found against the defendants upon the other points on which they contested their liability he decreed the plaintiff-appellant's claim for Rs. 2,000. In the course of the subsequent hearing he refused to permit the plaintiff-appellant to amend his plaint. The plaintiff appellant has again come to this Court in appeal arguing that even if he had not been allowed to amend the plaint it was open to him to ignore certain portions of the finding of the Judicial Commissioner's Court and that even if he were not allowed to ignore those findings he could avoid them by an amendment of the plaint which he should have been allowed to make. His learned Counsel has addressed us an ingenious argument in support of his position and it would have been difficult to have put the case for the appellant better than it was put. We have first of all to see what Mr. Justice Hasan said. He stated:

"The agreement upon which the plaintiff relies is stated in para. 11 of the plaint and was amplified or explained by the learned Counsel for the plaintiff at a subsequent stage of the hearing of the suit. The Court below is of opinion that this agreement has the effect of converting what was a simple mortgage into a usufructuary mortgage. If this opinion was correct it would be difficult to escape the conclusion at which the Court below has arrived but the learned Advocate for the appellant challenges the accuracy of that opinion. The conclusion at which I have reached is that the contention of the learned Counsel for the appellant is sound and must be accepted. The deed of mortgage of the 4th November 1904 was read at the hearing of this appeal more than once and I find nothing in the agreement as stated in para. 11 of the plaint and as explained later in the proceedings which in any manner contradicts, varies, adds to or subtracts from the terms of the original contract of mortgage. The general principle of s. 92 is not disputed. The question in the case as in all other cases must be the application of that principle to the circumstances of the particular case. It is agreed that if the agreement under consideration merely provided for a means of satisfying the term of the contract relating to the liability for interest s. 92 is no bar to proving it. On the other hand, it is also agreed that if the said agreement in any manner contradicts, varies, adds to or subtracts from the terms of the original contract it cannot be proved. I have to determine under which of these two conditions the present agreement falls and as I have said before I am of opinion that it falls under the former and not the latter. The mortgagor had made continuous default in payment of the interest from the date of the execution of the document right up to the date of the alleged agreement except that he had paid a paltry sum of Rs. 60 during the long interval. The only reasonable construction which I can place on para. 11 of the plaint is that in view of the inability of the mortgagor to pay any interest either accumulated or in the future the mortgagee approached the mortgagor to make such arrangements by means of which the latter's liability for the interest would be satisfied and the result was the arrangement under consideration. This amounts to nothing more or less than devising a method for the payment of the interest that had accrued till then and was to accrue in the future. This being my interpretation of para. 11 of the plaint it follows that the plaintiff is entitled to prove the agreement and the provisions of s. 92 of the Indian Evidence Act are no bar to his doing so.

"The learned Advocate for the appellants does not accept my construction of para. 11 of the plaint. His argument is that the agreement merely referred to the satisfaction of future interest and had no relation whatsoever to the interest that had accrued prior to the date of the agreement. He further contends that even as regards the future interest the agreement did not affect its running on the accumulated interest.

"I am not prepared to accept either of the two arguments. It seems to me that this agreement related to the satisfaction of the entire liability of the mortgagor both in respect of the past and the future interest on the principal amount. The plaintiff would thus be entitled to recover his principal amount only and his claim with regard to that is not barred by limitation. This of course assumes that the rest of the pleas raised by the respondents are overruled."

The learned Counsel for the appellant takes the position that Mr. Justice Hasan had no right to decide the nature of the agreement at all; that we should consider that Mr. Justice Hasan's remarks as to the interpretation of para. 11 are mere *obiter dicta*; that for the purposes of the further trial the legal effect of Mr. Justice Hasan's judgment was that the suit was not barred by limitation, and that it was open to the plaintiff-appellant to prove in his own way as he wished what the agreement actually was, and to calculate the amount of interest according to that proof. We cannot possibly accede to this argument. It is clear to us that the interpretation of para. 11 of the plaint made by Mr. Justice Hasan went to the whole root of his decision and that without that interpretation he could not have decided the appeal at all. The point before him was this. If there was no agreement the suit was barred by limitation. In order to save limitation it was not only necessary to prove an agreement but an agreement that was admissible in evidence under the provisions of s. 92 of the Evidence Act. It was impossible for the Court to permit the plaintiff-appellant to avoid limitation without interpreting the agreement which he set up. What the plaintiff-appellant wants now is to take advantage of Mr. Justice Hasan's decision, in order to save limitation, and to refuse to be bound by Mr. Justice Hasan's decision when it would deprive him of interest. We agree with the view taken by the learned Subordinate Judge on the point and consider that the matter of the disallowing of interest in the decree was finally settled by Mr. Justice Hasan's decision. This is not a question of *res judicata* in the proper sense of the term but of the binding nature of a decision in a previous proceeding in the same case.

The next point raised in the appeal can be disposed of very shortly, that is the refusal to permit the plaintiff-appellant to amend his plaint. The learned Subordinate Judge rightly refused to permit this amendment and would have been very wrong if he had permitted it, for the effect of the amendment would clearly have been to have changed the nature of the pleadings as interpreted by Mr. Justice Hasan. We, therefore, dismiss this appeal with costs.

There is no force in the cross-objections which fail and are accordingly dismissed with costs.

The appeal having been decided the matter of stay can be decided with it. According to our decision the amount due from the defendants is Rs. 2,408-8-0. That amount has been paid into Court. It will now be paid to the plaintiff-appellant Saiyed Hamid Husain. The property will then vest in the defendants-mortgagors and such compensation as is paid by Government, therefore, will be payable entirely to them.

R. L. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 1413 OF 1923.

February 22, 1926.

Present:—Mr. Justice Dalal.

DHARAM SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BAKHSHI—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Adoption of son in another family after father's death—Rights of adoptee in his natural family—Adoptee's sons, rights of, in natural family of their father—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appeal by one of plaintiffs—Reversal of dismissal in favour of all.

An adopted son's rights are extinguished in his natural family on his adoption whether he is adopted during the lifetime or after the death of his natural father. But the sons, if any, of the adopted in existence at the time of adoption retain their rights in the natural family of their father. [p. 316, cols. 1 & 2.]

Birbhadra Rath v. *Kalpataru Panda*, 1 C. L. J. 388 and *Kali Komal Mozumdar* v. *Uma Sunker Moitra*, 10 I. A. 138; 10 C. 232 13 C. L. R. 379; 7 Ind. Jur. 553; 4 Sar. P. C. J. 458; 5 Ind. Dec. (N. S.) 156 (P. C.), referred to.

Where only one of the several plaintiffs appeals from the dismissal of suit on a ground common to all, the dismissal may be set aside for the benefit of all the plaintiffs. [p. 316, col. 2.]

Second appeal against a decree of the Additional Subordinate Judge, Saharanpur, dated the 14th February 1923.

Mr. *A. Sanyal*, for the Appellants.

Mr. *Nehal Chand*, for the Respondent.

JUDGMENT.—The lower Appellate Court has written a very scrappy judgment in a very interesting case under the Hindu Law. The father of the three defendants-appellants one Sarnam by name was adopted by Kura. This is now a finding of fact and cannot be questioned in second appeal. I shall consider the facts of the case accepting the finding. There was disagreement between the Trial Court and the lower Appellate Court. It is another finding of fact which I accept because it has been so held by both the Subordinate Courts that plaintiff was adopted by Kura after the death of his natural father Mehru. On this ground the Trial Court held that Sarnam having inherited a share in his natural father's property cannot be divested of that property on adoption by Kura. The plaintiff who, as is usual, came to Court on false allegations alleged falsely that the defendants had never been in possession of the property and that their father ceased to be in possession on his adoption. This case was quite false. Even after the adoption Sarnam had continued to share in the profits of the family of his birth.

The Trial Court was of opinion that the property of Mehru once having been invested in the name of Sarnam, Sarnam could not be divested of such property on his adoption. The lower Appellate Court disagreed with this view and, in my opinion, correctly. There was no vesting of any property in Sarnam on Mehru's death. Sarnam at his birth got a vested interest in the family property being a Hindu son. It, therefore, makes no difference as to extinction of a person's rights in his natural family whether he be adopted during the lifetime of his natural father or after the death of his natural father. The lower Appellate Court has avoided the view of divesting the property unnecessarily. Every Hindu son at birth is vested with joint ancestral property and he is divested on adoption. With his usual lucidity, Mookerjee, J, has thus enunciated the law on the subject of adoption in the case of *Birbhadra Rath* v. *Kalpataru Panda* (1).

"This view (that is of their Lordships of the Privy Council in *Kali Komul Mozumdar* v. *Uma Shankar Moitra* (2) is founded on the proposition that the theory of adoption involves the principle of complete severance of the child adopted, from the family in which he is born, and his complete substitution into the adopter's family, as if he were born in it. To put the matter in another way, 'an absolute adoption appears to operate as birth of the boy in the family of adoption and as civil death in the family of birth, having regard to the legal consequences that are incidents of such adoption".

On Sarnam's adoption, therefore, the rights of the parties would be governed as if Sarnam had died at that moment with regard to the natural family and been born to his adoptive father. He will, therefore, be divested of his rights in the property of his natural family and vested with rights in the family of his adoptive father. So far I agree with the opinion of the lower Court though not in the reasons given.

I also agree with the concurrent findings of both the Subordinate Courts that no question of adverse possession can arise because the plaintiffs are admittedly in possession of the property which has not been partitioned. It appears that the plaintiffs' share between themselves have not been determined and even if Sarnam and after him his sons continued to derive benefit from the property in suit, this fact cannot start adverse possession from the date of Sarnam's adoption. Both the Subordinate Courts have also rightly held that a suit for declaration was sufficient, as the plaintiffs are at present in possession of the property in suit.

This disposes of grounds of appeal Nos. 2, 3 and 4. In ground of appeal No 2 it was alleged that Sarnam was separate from his brothers, but the entire trend of the proceedings in the two Subordinate Courts convinces me that there has been no partition and that Sarnam was not separate from his brothers when he was adopted. I hold accordingly.

As to ground of appeal No. 5, though only one plaintiff appealed against the dismissal of the suit, the lower Court had power to set aside the entire decree of the Trial Court and grant relief to all the plaintiffs.

One difficulty, however, remains. It has not yet been decided whether the defendants or any one of them were in existence or not when Sarnam was adopted. My view would be, though I do not record it as a definite finding, that if any of the defendants was in existence on the date of the adoption of Sarnam he would be vested with interest in the property and Sarnam's adoption which would involve Sarnam's civil death as regards the property in suit would not, as a matter of course, have the same effect on the rights of his son or sons. I think I would hold that if Sarnam's sons or even one of them were in existence when Sarnam was adopted, the plaintiff's suit would fail.

Such being my opinion at least at present, I refer the following issue for decision to the lower Appellate Court.

"Was any of the defendants born prior to the date of the adoption of Sarnam?

The parties shall be permitted to produce fresh evidence. Return shall be made within three months of to-day's date and the appeal shall be tied to me. Ten days' time shall be granted for filing objections on return of the findings.

R. L.

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(1) 1 C. L. J. 388.

(2) 10 I. A. 138; 10 C. 232; 13 C. L. R. 379; 7 Ind. Jur. 553; 4 Sar. P. C. J. 458; 5 Ind. Jur. (N. S.) 156 (P. C.).

OUDH CHIEF COURT.

EXECUTION OF DECREE APPEAL No. 29 OF 1925.

October 30, 1925.

Present:—Mr. Justice Ashworth and Mr. Justice Neave.

AHMAD MIRZA BEG AND OTHERS —JUDGMENT-DEBTORS—APPELLANTS

versus

THE ALLAHABAD BANK, LIMITED, LUCKNOW—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 11, O. XXIII, r. 3, O. XXXIV, r. 4—Compromise decree passed in mortgage suit, nature of—Preliminary decree, necessity of, in mortgage suit—Decree, adjustment of, by another decree.

Order XXIII, r. 3, C. P. C., does not contemplate the necessity of two decrees, a preliminary and a final but only one decree. Therefore, a compromise decree in a suit on an hypothecation must be regarded a final and an executable decree and not one under O. XXXIV, r. 4. [p. 318, col. 2.]

The necessity to pass a preliminary decree in a suit on the basis of a mortgage arises only when the plaintiff succeeds and not where the matter is compromised. [*ibid.*]

Durga Bharthi v. *Andesh Rai*, 11 Ind. Cas. 528; 14 O. C. 147, distinguished.

An agreement which puts an end to a liability under a decree by substituting a new liability under the agreement may be held to be an adjustment of the decree and may itself be embodied into a decree which decree would be one under O. XX, r. 11, C. P. C. [p. 319, col. 1]

Ladd Govindoss Krishna Doss v. *Ramdoss Vishnadoss*, 28 Ind. Cas. 376; 17 M. L. T. 222; (1915) M. W. N. 225, distinguished.

Fateh Muhammad v. *Gopal Das*, 7 A. 424; A. W. N. (1885) 76; 4 Ind. Dec. (N. S.) 593, *Thakoor Dyal Singh* v. *Sarju Pershad Missar*, 20 C. 22; 10 Ind. Dec. (N. S.) 16 and *Sadasiva Pillai* v. *Ramalinga Pillai*, 15 B. L. R. 383; 44 W. R. 193; 2 I. A. 219; 3 Sar. P. C. J. 519; 3 Suth. P. C. J. 190 (P. C.), referred to.

Appeal from an order of the Subordinate Judge, Sitapur, dated the 18th February 1925.

Messrs. *M. Wasim, Niamat Ullah* and *R. K. Bose*, for the Appellants.

Messrs. *Bisheshwar Nath Srivastava* and *Chhail Behari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of an application for execution of a decree, dated 16th February 1921. The history of this decree is as follows:—

In 1914 or 1915 the Allahabad Bank decree-holder in this case, sued the judgment-debtors on a hypothecation deed. The case was settled by a compromise that was given effect to in a decree, dated 30th March 1915, which provided that the money should be paid by instalments extending over seven or eight years. Default was made in payment of the instalments, and execution of this decree was applied for. It was refused as the Subordinate Judge held that the decree was not capable of execution. His ground for holding this appears to have been that the decree of the 30th March, 1915, was a preliminary decree for sale of the property, and was ineffectual without a further final decree, and that no application for final decree could be made, as the time for applying for such had passed. Against the order of the Subordinate Judge refusing execution an appeal was filed to this Court. That appeal was settled by a compromise. The judgment-debtors withdrew their objections that there was any necessity for a decree absolute and that execution was in any way barred by limitation. Interest was reduced from 7½ per cent. to 6 per cent, further time was allowed and smaller instalments fixed. This Court passed an order that the appeal should be allowed in terms of the compromise which was to be incorporated in the Court's decree. It also framed a decree which, it may be remarked, said nothing about the appeal before the Court being dismissed, but proceeded directly to decree the terms of the compromise. These terms provided for payment by instalments. After the payment of two instalments the judgment debtors made default, and accordingly the decree-holder has made the application out of which this appeal arises for realising the balance due to him by sale in accordance with the terms of the compromise as embodied in this Court's decree of 1921.

The Subordinate Judge held that the compromise as embodied in this Court's decree or order of the 16th February, 1921, was capable of execution and that he (the Subordinate Judge) could not question the validity of that order. He rejected the plea that the compromise of the 16th February, 1921, was a compromise, which might have been enforced by a regular suit, but could not be enforced (without some decree passed on it) in execution proceedings.

The following questions arise in this appeal.

1. Was the original decree of the 30th of March a preliminary decree passed under O. XXXIV, r. 4, or was it a final decree passed under O. XXIII, r. 3, that is to say a decree passed on a compromise of suit?

2. Was the decree of the latter character one that could be passed in a suit brought on a hypothecation bond?

3. Was this Court entitled in the execution appeal culminating in the order of the 16th February, 1921, to pass a decree modifying the terms of the original decree of the 30th March 1915?

4. Assuming that it was not so entitled, was the lower Court debarred from questioning its right to do so, and similarly is this Court debarred from questioning that right?

In respect of the first question it is urged by the appellants-judgment-debtors that the decree of the 30th March 1915 must be held to have been a decree under O. XXXIV, r. 4 of the C. P. C., (that is to say a decree in the form prescribed in a decree in a suit on a mortgage for sale) for two reasons. The first reason is that the Court specifically ordered that the decree should be prepared "under" O. XXXIV, r. 4, C. P. C. The second reason is that the Court had no power to pass a decree in any other form. Neither of these reasons commend themselves to us. The order of the Court was "The decree will be prepared in terms of the application Ex. 7 (*i. e.*, the compromise) and under O. XXXIV, r. 4, C P. C." These words are clearly contradictory. If the decree was to follow the compromise, then it would be a compromise decree, and not a decree under O. XXXIV, r. 4, which makes no provision for an instalment decree. The appellants' Counsel has endeavoured to reconcile this conflicting language by saying that the intention was to have a decree providing for instalments, but otherwise following the form required by O. XXXIV, r. 4, that is to say a preliminary decree of a character not prescribed by the Code. The answer to this argument is implied in our answer to the second contention that the Court had no power to vary the form of decree prescribed by O. XXXIV, r. 4. It will be observed that the opening words of the said rule are: "In a suit for sale if the plaintiff succeeds". Now this was not a case where the plaintiff succeeded, but it was a case where the matter was settled by a compromise. The provision of the Code applicable was not O. XXXIV, r. 4 but O. XXIII, r. 3, which provides that, "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement......the Court shall order such agreement, compromise or satisfaction to be recorded, *and shall pass a decree in accordance therewith so far as it relates* to the suit." It is clear that the paramount intention in the mind of the Court was to act under this section, and the Court's reference in its order to O. XXXIV, r. 4, which should have been a reference to O. XXIII, r. 3, may be disregarded. It is also clear that the compromise did not contemplate the necessity of a final decree being prepared, but meant that the debt should be realisable directly in execution proceedings without the intervention of any further decree, that is of a decree absolute. Order XXIII, r. 3, does not contemplate the necessity of two decrees, *i. e.*, a preliminary and a final, but only of one decree. We, therefore, hold that the original decree is a final decree.

As to question (2), it has been argued that O. XXXIV, r. 4 of the Code must mean that no other form of decree than that specified can be used in any case where the suit for sale is brought on a mortgage. We have already pointed out that this order only refers to a case where a plaintiff succeeds, and not to a case where the matter is compromised. Our attention has been drawn to *Durga Bharthi* v. *Andesh Rai* (1). That case is to be distinguished from the present one inasmuch as in that case a preliminary decree had been passed and the parties then came to an agreement to extend the statutory period of six months for payment of the mortgage-money. It was held that the parties could not by agreement obtain an extension of time and that the only remedy of the decree-holder was to apply for a decree absolute. In this case we have held that the decree of 1915, was a final decree and not a preliminary decree. In that ruling it was pointed out that if the decree-holder had got his decree made absolute for sale it would have been permissible to agree to an extension of time, but that it was not possible to extend the statutory limit of six months prescribed in the preliminary decree.

As to question (3) the argument of the appellant is that the compromise of the 16th February 1921, did not amount to an adjustment of the decree of 1915, within the meaning of O. XXI, r. 2, and that even if it was such an adjustment the only power of this Court was to record the adjustment, and the Court had no power to frame a new decree embodying the terms of the adjustment. In support of the first contention

(1) 11 Ind. Cas. 528; 14 O. C. 147.

reliance is placed on a ruling of the Madras High Court, *Lodd Govindoss Kishna Doss* v. *Ramdoss Vishnadoss* (2). It was held in that case that, "The adjustment referred to in O. XXI, r. 2 of the C. P. C. is a transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree. A transaction by which the parties agree to vary the mode by which the reliefs granted by the decree are to be realised in execution in that suit or the time when the decree becomes executable, is not an adjustment of the decree but it is a transaction which attempts to vary the terms of the decree, leading the altered terms to stand in the place of the terms of the decree so as to constitute a new executable decree." With all respect we are unable to give so narrow an interpretation to the word "adjustment". In a ruling of the Allahabad High Court, *Fateh Muhammad* v. *Gopal Das* (3), it was held that adjustment could take place by means of a new contract provided that the new contract put an end entirely to the liability under the decree. We hold that an agreement which puts an end to the liability under the decree by substituting a new liability under the agreement may properly be held to be an adjustment of the decree. It is, however, said that the power of the Court under O. XXI, r. 2 was merely to record the compromise and to proceed no further in execution of the decree that was adjusted. The decree-holder, should, it is, urged, have brought a fresh suit on the basis of the compromise agreement. Respondent's Counsel, however, on the other hand argues that an agreement which was recorded by a Court under O. XXI, r. 2 may be enforced directly in execution proceedings. Reliance is placed on *Thakoor Dyal Singh* v. *Sarju Pershad Misser* (4). As in the present case, the parties had agreed to the compromise being directly enforced in execution proceedings. The ruling professed to be based upon a Privy Council ruling, *Sadasiva Pillai* v. *Ramalinga Pillai* (5). In that ruling it was held that assuming a decree made no provision for mesne profits after a certain date but the parties in the course of execution proceedings agreed that mesne profits after that date should be realised then they could be realised in execution of the decree. Their Lordships held as follows:—"Where a Court has general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiæ*." It is doubtful whether the Privy Council ruling which was given in 1875 can be held applicable to the facts of the present case in view of the provision of O. XX, r. 11 of the present C. P. C. of 1908. Clause (2) of this rule specifically provides that "After the passing of any such decree (where and in so far as the decree is for the payment of money) the Court may, on the application of the judgment-debtor—order that payment of the amount decreed should be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit". It was argued in this case by the respondent that this provision would not apply to the money due and could not be invoked as justifying the Court's order of the 16th February 1921 for two reasons. The first reason was that this provision only applies to a simple money-decree. This objection fails to give effect to the words "In so far as the decree is for the payment of money". The second objection was that the rule did not apply to a preliminary decree for sale on a mortgage. This argument comes strangely from the respondent's Counsel, who, in his argument generally has taken up the position, which we have conceded to be correct, that the decree of 1915, was not a decree under O. XXXIV, r. 4. Accordingly we hold that strictly speaking the amendment of the decree of 1915, should have been effected under O. XX, r. 11 and by the Court that passed the decree. It is urged that the Court of first instance dealing with the application for execution in 1921, cannot be regarded as the Court that passed the decree. This we do not admit. Under general principles a Court exercising one capacity still remains capable of powers in another capacity. We may invoke the Privy Council ruling just considered to show that this is so. When their Lordships used the phrase "A Court having a general jurisdiction over the subject-matter of a claim" they referred to the case where an Execution Court was also the Court that passed the decree. Now this Court as an Appellate Court had the powers of the Court of first instance and it could amend the decree of 1915 because that Court of first instance had such powers. Indeed under s. 37 of the C. P. C., the decree of this Court has to be regarded as a decree of the Court of first instance. It was merely a matter of form whether this Court amended the original decree of 1915 or framed a new decree embodying the amendments settled by the compromise. Accordingly we hold that the decree framed by this Court in February 1921 was framed in exercise of powers under O. XX, r. 11 and was valid.

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(2) 28 Ind. Cas. 376; 17 M. L. T. 222; (1915) M. W. N. 225.

(3) 7 A. 424; A. W. N. (1885) 76; 4 Ind. Dec. (N. S.) 593.

(4) 20 C. 22; 10 Ind. Dec. (N. S.) 16.

(5) 15 B. L. R. 383; 24 W. R. 193; 2 I. A. 219; 3 Sar. P. C. J. 519; 3 Suth. P. C. J. 190 (P C.).

As to question (4), which in view of our decision on question (3) it is not really necessary to decide, we agree with the lower Court that that Court could not question the validity of the decree of this Court of February 1921, that decree being equivalent to a decree of the Court that passed the original decree. It is well-established law that the Executing Court has no power to question the jurisdiction of the Court that lawfully sends to it a decree for execution. Nor can a Court when executing its own decree question, *qua* Execution Court, its own power to have framed that decree. *A fortiori* it cannot question a decree framed by its own Appellate Court.

Accordingly we hold that the decree of 1915 was a final decree and not merely a preliminary decree and that it was a lawful and executable decree. We also hold that the decree of the 16th February 1921 framed by this Court in substitution of the decree of 1915 was a valid decree. Lastly the lower Court was not entitled to question its validity. We accordingly dismiss this appeal with costs.

R. L. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 223 OF 1926.
March 4, 1926.
Present:—Mr. Justice Sulaiman and
Mr. Justice Mukerji.
CHUNNI SINGH—DEFENDANT—
APPELLANT
versus
LAKSHPAT SINGH—PLAINTIFF AND
BHOREY KHAN AND OTHERS—DEFENDANTS
—RESPONDENTS.

Pre-emption—Sale of nine items of properties by one deed—Pre-emption as to one—Partial pre-emption.

Where nine items of property are sold to nine different persons for different considerations by one set of vendors by execution and registration of a single deed of sale, there are in effect nine different sales and a suit for pre-emption with regard to one of them cannot be resisted on the ground of partial pre-emption.

Lachhman v. *Tulsi Ram*, 2 A. L. J. 199, referred to.
Brij Narain Rai v. *Ram Dhari Rai*, 40 Ind. Cas. 40, distinguished.

Second appeal from a decree of the Additional Subordinate Judge, Bulandshahr, dated the 26th October 1925.

Messrs. *S. K. Dar* and *S. N. Gupta*, for the Appellant.

JUDGMENT.—This is a defendant's appeal arising out of a suit for pre-emption. By one document, dated the 29th January, 1924, nine items of properties were sold to nine different vendees for different amounts of considerations; but there was only one document executed and registered, as the entire properties belonged to one set of vendors. Among these vendees was one Kanchan Singh, who admittedly was a co-sharer in the property purchased by him. The plaintiff has brought a suit for pre-emption against the appellant Chunni Singh only in respect of the item of the property purchased by him under the sale-deed. This property was separately ear-marked as property having been purchased by Chunni Singh, a separate amount of the sale consideration was mentioned and the other vendees had no joint interest in this property at all. The first Court dismissed the claim on the ground that this was a case of partial pre-emption, which disqualified the pre-emptor from obtaining a decree. The lower Appellate Court, in view of the specification of the shares in the sale-deed, has come to a contrary conclusion.

Although it is true that there was only one document executed, there can also be no doubt that different items of properties were sold to different persons and, therefore, there were really nine different contracts, although they were all evidenced by one document. It cannot be doubted that, if a suit were brought by the plaintiff against Kanchan Singh, he could successfully resist the claim on the ground that he was a co-sharer in the property purchased by him. The mere fact that he has allowed the other vendees to be joined in the sale-deed would, in no way, have deprived him of his right. The contention before us is that it was the duty of the plaintiff to have brought the suit against all the other vendees, that is to say, all the vendees other than Kanchan Singh. This contention cannot be accepted. If this transaction is to be deemed to consist of nine different transactions with nine different persons, then it was certainly open to the plaintiff to object to one vendee and not the others. He would, therefore, have a right to claim pre-emption against Chunni Singh, even though he has chosen not to object to the coming in of other strangers. That this was the view before the new Pre-emption Act was passed cannot be doubted. We can only refer to the case of *Lachhman* v. *Tulsi Ram* (1) where, although one solitary amount was mentioned in the sale-deed for two items of properties, at the foot of the document details were separately given. It was held by a learned Judge of this Court that it was open to the plaintiff to maintain a claim for pre-emption of either of the two properties, although both had been purchased by the same vendee. The case of *Brij Narain Rai* v. *Ram Dhari Rai* (2) is distinguishable, because there properties in two *mahals* were sold for one consideration and there was apparently no specification of the different prices for the two *mahals*.

Lastly, it is contended that the enactment of s. 16 of the new Act has altered the position. We cannot accept this contention. The law has in no way been altered. As against defendants-vendees the plaintiff could not have claimed pre-emption in respect of any property which he has not included in this suit. The provisions of s. 22 also go to suggest that, where a purchaser has a defined interest in the sale-deed, he cannot be said to have acquired the property jointly with others. The appeal accordingly fails and is dismissed under O. XLI, r. 11, C. P. C.

R. L. *Appeal dismissed.*

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(1) 2 A. L. J. 199.

(2) 40 Ind. Cas. 40.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2301 OF 1923.

December 3, 1925.

Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

RAJENDRA NATH (KUMAR) DAS—
PLAINTIFF—APPELLANT
versus
PEYARI MOHAN DAS AND OTHERS—
Pro forma DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Permanent lease by widow in consideration of alienee looking after her—Legal necessity.

A permanent lease granted by a Hindu widow in consideration of the alienee looking after her and her property is for good legal necessity and is valid.

Appeal against a decree of the District Judge, Jessore, dated the 25th May 1923, modifying that of the Munsif, First Court, Narail, dated the 30th March 1922.

Babu *Hemendra Chandra Sen*, for the Appellant.

Babu *Profulla Kamal Das*, for the Respondents.

JUDGMENT.

Ghose, J.—This appeal arises out of a suit for recovery of *khas* possession of a certain land on the ground that the plaintiff is the reversioner of one Rup Chand Das who died many years ago. Rup Chand left a widow Haramani and a daughter. The daughter was married to one Mahima Chandra who lived in the house as *ghar jawai*. Mahima had a daughter born and brought up in the house of Haramani. She was married to defendant No. 1. It is said that the land in possession of defendant No 1 was granted under a permanent lease to him by Haramani. The finding is that defendant No. 1 was given a lease of these properties in consideration of his looking after Haramani who had no male relation to look after her or her property. For that consideration defendant No. 1 married her grand-daughter and lived in the house as *ghar jawai*. The learned Judge held that that was good legal necessity. I see no reason to differ from him.

On that ground the appeal with regard to the properties in the possession of defendant No. 1 must be dismissed with costs.

The plaintiff got a decree as against defendant No. 3 in both the Courts below which was not challanged.

Cuming, J.—I agree.

R. L. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.
January 21, 1926.
Present:—Lord Dunedin, Lord Shaw,
Lord Blanesburgh and Sir John Edge.
Raja RAJESWARA SETUPATI
AVERGAL, RAJA OF RAMNAD—
APPELLANT
versus
KAMID ROWTHEN AND OTHERS—
RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 12, scope of—Trees on land under lease, rights in.

Where trees are growing in land which is held by a *ryot*, though no mention of trees be made in any lease, s. 12 of the Madras Estates Land Act applies and the landholder has no claim. But where the trees are let to a person on whose land they do not grow the landholder has a claim for full value of the trees cut by the *ryot*. [p. 325, col. 2.]

Murugappa Chettiar v. *Ramanathan Chettiar*, 26 Ind. Cas. 60; 1 L. W. 881, approved.

Appeal from the judgment and decree of the Madras High Court (Sadasiva Aiyar and Spencer, JJ.), in C. R. P. Nos. 164 to 178, 180 to 183 of 1918, dated the 24th February 1920, and printed as 60 Ind. Cas. 90, preferred against the decree of the Munsif, Manamadura.

Messrs. *L. DeGruyther* and *Kenworthy Brown*, for the Appellant.

Messrs. *K. V. L. Narasimham* and *P. Subba Rao*, for the Respondents.

JUDGMENT.

Lord Dunedin.—The plaintiff in the present set of cases is the *Zemindar* of Ramnad, an estate situated in the Presidency of Madras. The defendants are *ryots* who are tenants of the plaintiff in virtue of certain *pattahs*. The plaintiff complained that the defendants had cut down trees belonging to him The trees were palmyra trees, which yield a juice which is tapped from the trees, and, as it makes an intoxicating liquor, has a commercial value. The plaintiff raised separate actions against each alleged wrongdoer in the Court of the District Munsif of Manamadura. The pleading in the case was in the highest degree unsatisfactory and was, as will appear hereafter, the real cause of the unsatisfactory condition of the case on the appeal before this Board. It may be here parenthetically explaind that the ordinary position of a *ryot* is that he is in possession of the land for agricultural uses, but that he is not entitled to cut down trees. But in Madras there is special legislation dealing with the subject, namely, the Madras Estates Land Act, being Act I of 1908. Section 12 of that Act is in the following terms:—

"Subject to any rights which by custom or by contract in writing executed by the *ryot* before the passing of this Act are reserved to the landholder, every occupancy *ryot* shall have the right to use, enjoy and cut down all trees now in his holding and in the case of trees which after the passing of this Act may be planted by the *ryot* or which may naturally grow upon the holding he shall have the right to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary."

In the definition clause, s. 3, sub-s. 6 "occupancy *ryot*" is defined:—

" 'Occupancy *ryot*' means a *ryot* having a permanent right of occupancy in his holding."

Then sub-s. 15 defines "*ryot*":—

" 'Ryot' means a person who holds for the purpose of agriculture *ryoti* land in an estate on condition of paying to the landholder the rent which is legally due upon it."

Sub-section 3 defines "holding":—

"'Holding' means a parcel, or parcels of land held under a single *pattah* or engagement in a single village."

Now, what the plaintiff ought to have said in each case was in plain terms that the defendants were not persons to whom s. 12 applied, because they were lessees of the trees in terms which made them usufructuaries of the trees, but did not give them the trees as a mere appanage of land let to them, and then to have averred that they had wrongfully cut down the trees. Instead of this, what he did was this (the averments in one case may be taken as a sample of the whole as they are all in terms practically identical). After averring the cutting down of the trees, he said:—

"The defendant, who is bound according to the custom of the village and *zamin* and according to law to pay compensation to the plaintiff for the said trees, has not done so."

To this the defendant (again taking one case as a sample) replied first, by denying that the trees had been cut and, second, by denying the custom alleged. It is thus evident that, so far, the real question as to whether the Act of 1908 applied had not been properly raised. It is true that it had been alleged that the *pottah* was a tree *pottah*. But that allegation had not been pressed home by the appropriate plea, that the result was that the Act did not apply. On the contrary a custom of payment had been set up which exactly fits the exception mentioned in the opening words of s. 12. The parties then went to trial in the Court of the District Munsif of Manamadura. He delivered a judgment. In this judgment he found as a fact that the trees had been cut. He then found in law that, as a *tirva* or rent, was paid for the trees, the trees belonged to the *zemindar* and that, therefore, at Common Law, apart from custom, if the tenants cut the trees, they must pay damages. He then went on to deal with the averment of custom as if it had been an averment of custom, not as to right of payment, which it obviously was, but as to scale of payment, which it obviously was not. He then found that there was no universal custom proved as to scale, and thus it being left to himself to determine the figure of damages, he determined them as 25 years' purchase of the annual rent value of a tree. He did not in his judgment make any mention of the Act of 1903. He granted decrees in all cases for a sum representing the 25 years' purchase of the rental value of the trees cut.

From this judgment an appeal in the form appropriate to such a case from the Munsif's Court, *i. e.*, civil revision petition, was preferred to the High Court of Madras. This was disposed of by Moor, J. He, in his judgment, after stating the claim says this:—

"These civil revision petitions arise out of a number of small cause suits which were brought by the petitioner, the Raja of Ramnad, to recover from his tenants the value of palmyra trees on their holdings which had been wrongfully cut and appropriated by the tenants. The value of the trees was claimed at the rate of Rs. 3 per tree in one village and Rs. 6 per tree in the other two villages. In Civil Revision Petition No. 1252 of 1918 the petitioner is the defendant in one of the small cause suits. It was alleged in the plaint that the defendants, who were bound according to the custom of the village and *zamin* and according to law to pay compensation to the plaintiff for the trees cut, had not done so. The defendants denied having cut the trees and the custom alleged in the plaint and claimed the ownership of the trees. They further contended that the value claimed was excessive. The District Munsif found that the alleged cutting was true and that the value claimed was proper for the trees, *viz.*, Rs. 3 and Rs. 6 and that the holding consisted of trees which were assessed to *tirva*. On the third point, *viz.*, 'Whether the alleged usage was true and what relief was plaintiff entitled to', the District Munsif held that the proper amount of compensation would 'ordinarily' be the capitalised value of the annual *tirva*, or twenty-five times the annual *tirva*. The findings on the first two points being in plaintiff's favour, the only question for decision in these petitions is whether the method of calculating compensation adopted by the lower Court is correct."

He then mentions the contention of the defendants under s. 12 of the Act, but he says no more about it. In other words he seems to stick to his view that the only question left was the valuation question. He criticises unfavourably the Munsif's view of the 25 years' purchase of the rental value of the trees as the proper measure of damages, a result which, he says, he cannot extract from the proof as to custom, and he then remits the case to the inferior Court for findings on the following points:—

"1. Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the defendant without the permission of the landholder?

2. If so, what is the compensation payable by the defendants?"

The case then went back to the lower Court. This time there was a different Munsif. He pronounced a very clear judgment. He said:—

"I have to give findings on the following two issues:—

(1). Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the defendants without the permission of the landholder?

II. If so, what is the compensation payable to defendants?

2. Issue No 1:—

"I have heard Mr. T. C. Srinivasa Ayyangar, Pleader for plaintiff, the Raja, at great length. I have approached the question in the light of the observations contained in the judgment of High Court. I would find the issue in the negative.

"Issue No. II requires no finding in view of my finding on issue No. 1."

He also takes no notice of the Act, but assumes that he had been told that the *zemindar*'s only right to compensation rests on a custom to receive it.

On the return to the High Court of the findings, the *zemindar* presented a note of objections. In these objections he, for the first time, raised definitely the true case as to the application of the Act:—

"4. The District Munsif erred in throwing the onus of proof on the plaintiff.

"5. The District Munsif erred in assuming that the Estates Land Act had any application to the present case."

The case was then resumed by the High Court with the returned findings and the objection thereto. They, in all the cases, set aside the decree of the lower Court and dismissed the suits. They granted the respondents their costs in the High Court; in one case they directed that there should be no costs in the lower Court, but in all the other cases they were silent as to the costs in the lower Court. The opinion of the learned Judge who delivered the leading judgment begins with the statement that "the counter-petitioners are the tenants of land on which trees were and are standing." He then goes on to say:—

"The remaining questions for consideration are:—

(1) Whether the District Munsif was right in allowing as damages not the value of the trees cut, but only 25 times the *tirva* payable, and

(2) Whether plaintiff (petitioner) is legally entitled to claim damages at all, in other words whether the tenants have got absolute right to deal with the trees in any manner without being liable for any damages for so dealing. So far as the first question is concerned, I might at once say that if the tenants are legally liable for damages, they ought to have been made to pay the market value of the trees and not 25 times the *tirva*. But, on the second point, I am of opinion that the defendants are not liable for any damages at all".

After dealing with an argument which seems to have been presented that the right to cut down trees does not include the right to appropriate them, which he negatives, he then comes to the true question of the case. This portion of his judgment must be quoted in full and is as follows:—

"Lastly it was argued that the defendants are not *ryots* holding lands for agricultural purposes but that they are merely persons who have been allowed to enjoy the produce of the trees on payment of some remuneration to the landholder which remuneration does not fall within the definition of rent in the Estates Land Act, and that, therefore, s. 12 has no application at all. The *muchilikas*, Ex. E series, executed by the tenants do not, in my opinion, support this contention. They are all ordinary *muchilikas* of the kind usually executed by *ryots* holding land under the *zemindar*. The only special feature of these *muchilikas* is that the fixed rent payable by the *ryot* who holds the land, calculated on the area of the land, which is described as *Regai punja*, is increased by an amount varying with the number and size of the trees in the holding. Under the definition in cl. 1 of s. 3 of the Act, agriculture includes horticulture, and the fact that the rent for the land varies with the number of trees standing thereon does not make the *ryot* a mere licensee enjoying the produce of the trees under the landlord. He is the occupancy *ryot* of the land itself with the trees thereon, though paying varying rents according to the number of trees existing on the land. (We were told in the course of the argument that the assessment was varied once in six years, according to the number of trees at the time of the periodical settlement). Reliance was, however placed on the decision in *Murugappa Chettiar* v. *Ramanathan Chettiar* (1) for the contention that these were not *muchilikas* for the land held by an occupancy *ryot*, but that these are agreements for payment of vari or tax payable in respect of the trees held on tree *pattas*. We have not before us the *muchilika* executed in that case and if, on a consideration of the terms of that *muchilika*, it was held that it was an agreement by a licensee to pay *tirva* for enjoying the produce of trees without any *kudiwaram* right in him in the land on which the trees stood, I accept (if I may say so with respect) the correctness of that decision. But, as I said, I am satisfied in this case that the land itself on which the trees stand is held on *patta*, though the rent payable for that land varied with the number of trees standing on it, owing to a certain amount (varying according to the number of trees) being added to the invariable rent based on the extent of the land. Therefore the Estates Land Act does apply to the relationship of landlord and tenants in this case."

Spencer, J., concurs and says as follows:—

"The suggestion that s. 12 of the Madras Estates Land Act does not apply in this case was put forward on the assumption that the *pattas* in the suits were purely tree *pattas* and *pattas* for land. But a reference to the *muchilikas* on the record shows that this is not the case. I agree with my learned brother both on the general question as to the effect of s. 12 of the Madras Estates Land Act, and as to the order to be passed in particular cases."

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(1) 26 Ind. Cas. 60; 1 L. W. 881.

It is, therefore, quite clear that the case has been decided upon the ground that the *ryots* were holders of land on which trees stood, that they had cut trees standing on their own holdings, and that they had the right so to cut them in respect of s. 12 of the Madras Act. It is clear also that, had the tenants' right to the trees not depended on the fact that the trees stood on their holdings, but had depended on a separate lease of the trees as trees, whether trees stood on their holdings or on the holdings of other persons, the learned Judges would have come to the opposite conclusion and would have held that the damages for illegal cutting were to be measured by the value of the trees so cut and, lastly, it is clear that the reason that they held that the trees in question were held as part of the land holdings and not in respect of separate title was not in respect of any local knowledge as evidenced by proof led, but because they determined the fact as a matter of construction of the leases in question of which the *muchilikas* or tenants' counter-part were produced. Their Lordships are in entire concurrance with the learned Judges as to the result in law if trees are held on what may be called separate title. In such a case s. 12 of the Madras Act does not apply, and they think that the case cited of *Murugappa Chettiar* v. *Ramanathan Chettiar* (1) was rightly decided. They think also that the result that follows was rightly affirmed by the learned Judges, *i.e.*, that the full value of the trees which had been illegally cut must be paid for.

But their Lordships are quite unable to concur with the reasons of judgment on the further point. From the reference made to the Ex. E series of the *muchilikas* it would seem as if the learned Judges had exclusively directed their attention to a case where there is both land and trees which are included in the lease. In one case at least, by a comparison and reference, perhaps it is possible to infer that some at least of the trees are on the land let, but that is not the case with all. Moreover there are a large number of *muchilikas* which deal with trees and trees alone. How can it be possible to deduce from this, as a matter of construction, that these trees are on a land holding of the person to whom the tree right is granted? How can it be told that he holds any land at all? It is matter of common knowledge—and the case already mentioned is an instance—that, in view of the known use of the palmyra trees, leases of what are only the usufruct of the trees as such are granted. Many of the *muchilikas* produced point to such a lease. But in the judgment they have all been compelled to suffer the fate of the *muchilika*, which is above mentioned. If the judgment stands it would be very far reaching and, in granting leave to appeal to the King in Council, the learned Judges seem fully to appreciate that fact. In their Lordships' view, the facts on which the case depends have not been properly found one way or other.

There are just three situations in which palmyra trees may be held :—

1. They may simply be growing on land which is held by a *ryot* though no mention of trees be made in any lease.
2. They may be growing on land held by a *ryot*, but they may be let as a separate entity in his lease.
3. They may be let to a person on whose land they do not grow.

Assuming trees to be cut without the leave of the landholder the position in law as regards 1 and 3 seems simple.

As regards 1. Section 12 of the Act of 1908 applies and the landholder has no claim.

As regards 3, s. 12 of the Act of 1908 does not apply and the landholder has a claim for the full value of the trees so cut.

As regards 2, their Lordships will not express an opinion because, as yet, there is no determination of the question so far as they know, by the Courts in India, and they would wish such a determination before coming themselves to a conclusion.

But as regards the cases in this appeal, there are no materials for ascertaining positively in regard to the 30 separate cases in which of the three categories each case falls. They cannot be taken in a block. Each case stands on its own facts. Their Lordships have, therefore, come to the conclusion that these cases must go back to the Courts in India to determine on evidence of fact in each particular case into which category it falls, and, in accordance with that determination, to pronounce or refuse decrees in each particular case. As regards costs, for the reasons stated in this judgment, their Lordships consider that the confusion into which the cases have fallen is largely due to the inadequate pleading of the plaintiff. At the same time the defendants ought not to have denied the cutting—a fact which has been determined against them. Their Lordships, therefore, think that the case should be remitted as aforesaid, that the respondents should have the costs of the appeal before this Board, and in each of the Courts below, except the costs of the original inquiry before the first Munsif; that, in that inquiry in the case of all defendants who denied cutting of trees, there should be no costs to either party and that the costs of the future progress of the case should be determined by the Courts in India. They will humbly advise His Majesty to issue an order in accordance with these views.

R. L. *Case remitted.*

Solicitors for the Appellant:—Messrs. *Chapman, Walker* and *Shephard.*

Solicitors for the Respondents:—Mr. *H. S. L. Polak.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 41 OF 1925.

January 29, 1926.

Present:—Mr. Prideaux, A. J. C.

RAMU—APPELLANT

versus

PUNA—RESPONDENT.

Trust—Scheme settled by Court, alteration of—Scheme, direction in—Mode of enforcement:

A scheme once settled by a Court cannot be altered except by the Court and this would preclude suits between parties to establish a private right, which, if established, would interfere with the charitable scheme settled by the Court. A direction in a scheme of this nature may be enforced in execution application by persons interested. [p. 329, col. 1.]

Runganatha v. *Krishnaswami*, 75 Ind. Cas. 189; 47 M. 139; 18 L. W. 237; (1923) M. W. N. 664; A. I. R. 1924 Mad. 369 and *Lachman Prasad* v. *Munia*, 89 Ind. Cas. 639; 47 A. 867; L. R. 6 A. 405 Civ.; 23 A. L. J. 795; A. I. R. 1925 All. 759, not followed.

Sakharam Daji Ganpule v. *Ganu Raghu Gurao*, 60 Ind. Cas. 924; 45 B. 683; 23 Bom. L. R. 125, *Damodarbhat* v. *Bhogilal*, 24 B. 45; 1 Bom. L. R. 509; 12 Ind. Dec. (N. S.) 567, *Rama Das* v. *Hanumuntha Row*, 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 952; 10 M.L.T. 356; (1911) 2 M. W. N. 387 and *Pruyag Dossji Varu Mahant* v. *Tirumala Srirangacharlavaru*, 28 M. 319; 15 M. L. J. 133, followed.

First appeal against a decree of the District Judge, Nimar, dated the 30th March 1924.

Dr. *H. S. Gour* and Mr. *W. R. Puranik*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondent.

JUDGMENT.—In Civil Suit No. 1 of 1919 in the Court of the District Judge, Nimar, the plaintiffs sued in respect of a field No. 79 of *Mauza* Dapora which they stated was held in trust for the villagers in connection with the supply of water at a certain well to which cisterns or tanks are attached. The field was recorded as *sir*, and the defendants were the sons of Dattu *malguzar*. The plaintiffs' case was that a very old custom amounting to a constructive trust that the field should be leased to the person who undertakes to keep the cisterns filled with water, and that the person should take the income of the field, rent-free, as his remuneration, a contribution being assessed on and collected from the villagers for paying the proportional assessment of the field, existed. The suit was brought by members of the public with permission obtained under s. 92 of the C. P. C., and the reliefs claimed were as follows:—

"(*a*) A declaration that field No. 79 is trust of the nature described in the plaint.

(*b*) The defendants be removed from position as trustees of the field and be restrained from interfering with the management of it.

(*c*) The Court should appoint the trustees from among the members of the proprietary body.

(*d*) A direction that the field vests in the trustees so appointed.

(*e*) The Court will settle a scheme for carrying out the object of the trust to the best advantage of the village.

(*f*) The Court will grant other reliefs as the case may require."

The case went to trial on the following issues:—

1. Was the land in suit subject to a trust as described by the plaintiffs?

2. Has the trust been managed from time immemorial by a Committee consisting of the *malguzars* of the village?

3. Has the land been let out by such Committee on condition that in lieu of rent the tenant was to keep the cisterns filled?

4. Has the tenant for the time being always filled the cisterns?

5. Did the defendant appoint the per-

son from year to year for filling the cisterns on pay that was variable and subsequently levied by assessment on the *malguzars* and tenants of the village?

6. Or was the proportionate *sir* assessment contributed by the villagers and co-sharers in order that the tenants should hold rent-free and fill the cisterns?

7. Was the grants if any made before the Land Revenue Act came into force? If so, what effect has that?

8. To what reliefs are the plaintiffs entitled."

The case resulted in the following decree:—

".................it is ordered and declared that field No. 79 is held in trust by the whole proprietary body of the *malguzars* of Dapora to be let out year by year, rent-free to the person who undertakes to maintain the water supply in the public well with the cisterns attached as heretofore, the field remaining recorded as the *sir* of *lambardar* and collection being made on a basis of acreage of the holdings of those villagers who hold land for cultivations as was done before the defendant took possession of the land, the amount collected being paid to the *lambardar*. It is further declared that the field vests in the whole proprietary body and it is directed that on *Sheoratri* of each year the *malguzars* be called for the purpose of letting the field for the coming agricultural year, the person for the work of filling the cisterns and cultivating the field, being chosen by majority of those who attend the meeting of the co-sharers and that the sum of Rs. 640 15-0 be paid by the defendant to the plaintiff for costs of the suit. Defendants shall bear their own costs Rs. 329."

That case reached this Court as First Appeal No. 9 of 1923, being heard by Kinkhede, A. J. C. In this Court's judgment the Judge writes *inter alia:*—

"The attitude taken up by the defendants as disclosed in the evidence cannot be anything but hostile to the interests of the public, and to the very object of the trust, and will doubtless frustrate the intention of the founders of the trust. The evidence on record as to probabilities of the case justify the inference that in face of such attitude the defendants could not be safely relied upon to hold and manage the property in the best interests of the public and for the benefit of the community or in a matter which will serve in every way the purpose for which the trust was created or the property dedicated. It is beyond doubt that the right of management vests and ought to vest in the whole body of proprietors and not in any single individual proprietor, although one single proprietor may, by the express or tacit consent of the whole body, act for, and on behalf of, all of them, and for the common benefit of all the co-sharers and villagers. A trust once lawfully created for either a charitable or religious or public purpose is irrevocable, and similarly once a person accepts the trust he cannot be allowed to repudiate it. But the hostile attitude of the defendants in the past few years has given rise to this litigation and I do not think that the interests of the public will be properly safeguarded if the right of management is allowed to remain solely in the hands of the defendants. It is always expected that the conduct and procedure of persons who are entrusted with the management of a trust property must be *bona fide* and straight and such as would inspire confidence and not create suspicion. Here the defendant's intention to appropriate the income or a portion thereof at any rate, to themselves exclusively, has been clearly manifested by them. Their future management cannot be, in these circumstances, safely presumed to be, or likely to be in the interests of the public, nor is it likely that the beneficiaries can be pursuaded just now to believe that they (defendants) will fulfil the obligations of the trust, quite disinterestedly. I have no doubt that the management, if allowed to remain in their hands, will necessarily be highly prejudicial to the interests of the general public. I cannot, therefore, accede to the request and accept the conditional offer, made by the appellants' Counsel to allow his clients to act as trustees, in case it be found by me that the defendant hold the property as trust property, subject to the obligations of letting it out to the person who agrees to maintain the water supply of the cisterns. The object of the trust will be frustrated by giving effect to this request because, I am afraid, repeated efforts or injunctions to restrain the defendants from doing any acts likely to prejudice the interests of the trust would, perhaps, become necessary under certain contingencies. This will necessarily interfere with the due and smooth working and administration of the trust and the management of the trust property, which must be the chief aim and endeavour of the Court to achieve in matters such as these. By the by I must make it clear that this does not, in any way disentitle the defendants from exercising their right of voting or of having a voice, in the matter of the management of the trust property as members of the committee of management in virtue of their position as the co-sharer *malguzars* of the village. They will, by virtue of their position as such co-sharer *malguzars* of the village, be on the committee of management and can certainly have voice in the matter, in that capacity and influence the proceedings of the committee. In short, whatever part the defendants or any of them might take will be as trustees and in virtue of their position as such in the matter of the administration of the trust. Whatever collection, therefore, may come, on account of the management of this land, to the hands of the person who may be the *lambardar* for the time being, will be held by him in this capacity of a trustee and he will be accountable for them to the committee of management, consisting of the members of the proprietary body, who may be in office for the time being or from time to time, as the case may be."

The Judge further wrote.—

"I am not asked by either party to alter the form of the decree granted by the First Court in any respect. Apparently they were satisfied with its form. What I have said above is only to make the meaning clear. The main question on which they fought was whether the property was trust property or not and whether it was to be managed by them as such trust property or not. I hold that the plaintiffs have established the fact that the field in suit is trust property and is liable to be held and managed as trust property even in the future for the benefit of the village community and of the cattle in Dapora."

The decision of the lower Court was confirmed, and the appeal was dismissed.

The decree-holders then applied to the first Court stating as follows:—

"That in pursuance of the terms of the decree a meeting of the co-sharers of the *mouza* was convened and was duly attended by the defendants judgment-debtors on 21st February 1925 (the *Shivratri* day) fixed by the decree. At that meeting the person selected to be placed in charge of the trust work of filling the cisterns is one Onkar son of Dattu, a tenant of the *mouza* and he was duly selected by a majority of the co-sharers assembled there. The petitioners herewith attach a *kabuliyat* obtained from the person so selected and showing the terms of his appointment for the ensuing year."

And the decree-holders asked "that the Court be pleased to place the said Onkar son of Dattu in possession of the trust property field No. 79 of *Mauza* Dapora to which he is entitled under the terms of the decree as a necessary consequence of his appointment to discharge the duties of the trust or as such other suitable order be passed as the Court thinks fit for the due administration of the trust and the carrying out of the scheme settled therefor by this Court and confirmed on appeal." The Judge in his order of the 30th March last held that the directions as to delivery of possession of the field in suit can be enforced in execution proceedings, and that no separate suit was necessary. Against that order the present appeal has been filed.

It is clear that if, in execution the tenant appointed by the Committee is not given possession of the land, a separate suit would have to be brought. It is argued here that the decree-holders in the suit would again sue for possession, and that the decree of the District Court is merely a declaratory one of their rights, and that the scheme cannot be executed under the decree. It is true that Mr. Parry, District Judge, refused to give the relief of possession, and from that decision an appeal was filed in this Court which I disposed of on 4th December 1924. There I wrote:—(F. A. No. 80 of 1924).

"This appeal can be disposed of by a few words. In the lower Court when the plaintiffs sought to execute their decree they asked that the field be put in possession of Khushal, the person whom the whole proprietary body or a majority of them had decided to let out the field to. Here, however, the prayer is perfectly different. They ask that the plaintiffs be put in joint possession of the field No. 79 of *Mouza* Dapora This question had never been before the lower Court, and I decline to adjudicate upon it until it had been put to the lower Court and decided by that Court."

I do not think that these proceedings are any bar to the present appeal by the decree-holders.

It is argued that the scheme cannot be executed and I am referred to *Runganatha* v. *Krishanswami* (1), and *Lachman Prasad* v. *Munia* (2). It seems to me that in the present case the decree can be executed in the manner asked for by the decree-holders and that the Court, in granting their request, is but carrying out the scheme provided for in the decree. In *Sakharam Daji Ganpule* v. *Ganu Raghu Gurao* (3), it was held that a scheme once settled by a Court cannot be altered except by the Court, and that this would preclude suits between parties to establish a private right, which if established would interfere with a charitable scheme settled by the Court: see also *Damodarbhat* v. *Bhogilal* (4) and *Rama Das* v. *Hanumuntha Row* (5). The scheme has been settled by the Court, and it is absurd to suppose that yearly suits must be brought to carry out that scheme. And it seems that the direction in the scheme of this nature may be enforced in execution application by persons interested: see *Prayag Dossji Varu Mahant* v. *Tirumala Srirangacharlavaru* (6) I think that under the circumstances of the case the delivery of possession of the field in suit can be enforced by execution proceedings and that a separate suit is unnecessary. I, therefore, dismiss this appeal with costs, and the appellants will pay the respondents' costs. I fix Pleader's fees at 25 rupees.

Miscellaneous Petition No. 7 of 1926 has been filed by the plaintiffs asking that the scheme be amended by the insertion of the following:—

(1) That after the meeting of the co-sharers at about the *Shivratri* time is held, they should make a report of the same to the District Court (presided in by the District Judge) through the Chairman of the meeting and inform the Judge of the person selected by it then at that meeting.

(2) That the said Judge after hearing the parties (if this is thought necessary) confirm the selection of the person or pass such other orders as the said Judge thinks fit.

(3) That after the confirmation of the selection of the person to hold possession of the field held in trust he be put in possession of the same.

(4) That all other matters pertaining to the administration of the trust be dealt with by the Judge on the executive side of the case.

As I have held that possession of the field can be given in execution of the decree, it seems to me unnecessary to amend in any way that decree, and I, therefore, do not do so. The miscellaneous petition was heard with the present First Appeal, and I, therefore, make no separate order as to costs with regard to it.

R. L. *Appeal dismissed.*

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(1) 75 Ind. Cas. 189; 47 M. 139; 18 L. W. 237; (1923) M. W. N. 664; A. I. R. 1924 Mad. 369.

(2) 89 Ind. Cas. 639; 47 A. 867; L. R. 6 A. 405 Civ.; 23 A. L. J. 795; A. I. R. 1925 All. 759.

(3) 60 Ind. Cas. 924; 45 B. 683; 23 Bom. L. R. 125.

(4) 24 B. 45; 1 Bom. L. R. 509; 12 Ind. Dec. (N. S.) 567.

(5) 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W. N. 387.

(6) 28 M. 319; 15 M. L. J. 133.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 46 OF 1925.

March 19, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

PREM SUKH—APPELLANT

versus

Musammat PARBATI—RESPONDENT.

Probate and Administration Act (V of 1881), s. 50, scope of—Withdrawl of letters—Courts, inherent powers of.

Section 50 of the Probate and Administration Act is exhaustive and not merely illustrative. But apart from that section, when the condition on the fulfilment of which alone the grant of letters can be made is not fulfilled, the Court has inherent power to withdraw the order for grant so as to prevent an abuse of its process. [p. 330, col. 1.]

Surendra Nath Pramanik v. *Amrita Lal Pal Chaudhuri*, 51 Ind. Cas. 936; 47 C. 115 at p. 124; 29 C. L. J. 496; 23 C. W. N. 763, referred to.

Letters Patent Appeal against the judgment of Mr. Justice Martineau, in Civil Appeal No. 1683 of 1924, dated the 20th January 1925, and printed as 86 Ind. Cas. 563, reversing that of the District Judge, Ambala, dated the 17th April 1924.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Parkash Chandra*, for the Respondent.

JUDGMENT.—On the 29th of March, 1923, the District Judge of Ambala made an order for the grant of Letters of Administration *cum testamento annexo* to *Musam-*

mat Parbati in respect of the estate of her deceased husband and at the same time directed her to give a bond with one surety engaging for the collection, getting in and administering of the estate. It appears that no time was fixed within which the security was to be furnished, and though *Musammat* Parbati produced in March, 1924, a security bond, it was not accepted because she failed to appear on the date fixed for enquiry in regard to the surety. Consequently, the District Judge passed an order revoking the grant of Letters of Administration.

On appeal, the order of the District Judge has been set aside by Mr. Justice Martineau, who holds that the grant can be revoked only under s. 50 of the Probate and Administration Act, and that failure to furnish security does not constitute a "just cause" within the meaning of the section. Now, while we agree with the learned Judge that s. 50 of the Act is exhaustive, and is not merely illustrative, we are of opinion that the Court has inherent power to enforce obedience to its direction. It is quite clear that the Letters of Administration cannot be granted unless the administrator furnishes a security bond in compliance with the direction of the Court; and indeed, in this case the Letters of Administration were never committed to *Musammat* Parbati and could not be committed without her furnishing security as directed by the Court. There can, therefore, be no question of the revocation of the Letters of Administration and we consider that when the condition, on the fulfilment of which alone the grant can be made, is not satisfied, the Court has inherent power to withdraw the order for grant so as to prevent an abuse of its process, *vide*, *Surendra Nath Pramanik* v. *Amrita Lal Pal Chaudhuri* (1).

While we hold that the District Judge was competent to withdraw the order for the grant of letters, we consider that as *Musammat* Parbati is the sole legatee under the Will of her husband, she should be given another opportunity to furnish security. We accordingly direct her to furnish, within six months, a security bond with one surety for the due administration of the estate. In the event of her failure to comply with this order, the District Judge is authorised to withdraw the order for the grant of Letters of Administration to her. The appeal is accepted *pro tanto*, and the parties are directed to bear their own costs throughout.

R. L. *Appeal accepted.*

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(1) 51 Ind. Cas. 936; 47 C. 115 at p. 124; 29 C. L. J. 496; 23 C. W. N. 763.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 202 OF 1924.

November 20, 1925.

Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

Hazi ROSHAN BEPARI AND ANOTHER—PETITIONERS—APPELLANTS

versus

THE COLLECTOR OF DACCA—OPPOSITE PARTY—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. IX, r. 13—*Ex parte *decree in reference under Land Acquisition Act—Refusal to set aside—Appeal.*

No appeal lies against an order refusing to set aside an *exparte* decree made in a reference under the Land Acquisition Act.

Hasun Molla v. *Tasiruddin*, 15 Ind. Cas. 925; 39 C. 393, followed.

Appeal against an order of the District Judge, Dacca, dated the 11th March 1924.

Babu *Kali Kinkar Chakravarti*, for the Appellant.

Babu *Surendra Nath Guha*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the learned District Judge of Dacca refusing to set aside an *ex parte* order dismissing a reference made to him under the Land Acquisition Act for default.

Mr. Guha, who has appeared for the respondent, contends that in this case no appeal lies and in support of his contention, he has referred us to the case of *Hasun Molla* v. *Tasiruddin* (1). The decision is undoubtedly on all fours with the present case. The learned Judges pointed out that an order refusing to set aside an *ex parte* decree made in a reference under the Land Acquisition Act is not an award and, therefore, no appeal lies against that order.

The appeal must, therefore, fail as being incompetent and is dismissed with costs. Hearing fee three gold *mohurs*.

R. L. *Appeal dismissed.*

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(1) 15 Ind. Cas. 925; 39 C. 393.

PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE RESIDENT IN MYSORE.

January 26, 1926.

Present:—Viscount Dunedin, Mr. Ameer Ali and Sir Arthur Channell.

THOMAS CHARLES WILLIAM SKIPP—
APPELLANT
versus
LILIAN MILDRED KELLY—
RESPONDENT.

Contract Act (IX of 1872), ss. 23, 25—Marriage, promise of—Promise to marry married lady—Legality—Fixing day for marriage after her divorce—Promise to marry inferred—Damages for breach of promise to marry—Interference by Privy Council.

A promise to marry a lady who is already married is void even though made in contemplation of a divorce which is subsequently effected. But where after the divorce is effected the parties fix a day for their marriage, a promise of marriage may be inferred and one is not bound to take it as a ratification of a contract which in itself is void.

Ditcham v. *Worrall*, (1880) 5 C. P. D. 410; 49 L. J. C. P. 688; 43 L. T. 286; 29 W. R. 59; 44 J. P. 799 and *DeThoren* v. *Attorney-General*, (1876) 1 A. C. 686, referred to.

Their Lordships of the Privy Council will not interfere with a measure of damages unless there is something very clearly wrong with the figure.

A promise to marry is a sufficient consideration in itself on either side.

Consolidated appeal and cross-appeal from a decree of the Resident, Bangalore, dated the 20th March 1923, modifying that of the District Judge, Bangalore, dated the 11th September 1922.

Mr. *E. Labouchere Thornton*, for the Appellant.

Mr. *R. A. Yule*, for the Respondent.

JUDGMENT.

Viscount Dunedin.—This is an action by a lady for breach of promise of marriage against the defendant. The case was tried by the District Judge of the Civil and Military Station, Bangalore. He formulated the following issue: "Was there a valid contract of marriage?" Their Lordships think perhaps the expression there used ought rather to have been whether there was a definite promise of marriage, because the expression "contract of marriage" is usually used in another sense, but it is quite plain what he actually meant. He found that issue in favour of the plaintiff. He then went on with another issue: "If there was such a valid contract, did the defendant or the plaintiff break it either expressly or impliedly?" He found that issue also in favour of the plaintiff. When the case went to appeal the learned Resident in Mysore found that the engagement did subsist up to the time of the defendant's marriage with anothar lady, and, therefore, a breaking of the contract was necessarily inferred.

The point was taken by the plaintiff, the respondent in the main appeal, that these two findings, being concurrent findings of fact, cannot be interfered with, and, to a certain extent their Lordships think that is true, but at the same time the defendant put forward what he considered a legal plea, because he said that upon a proper consideration of the promise which had been held proved, that promise was not a promise which could be recognised in law, because it was merely a ratification of a void promise which had been made before.

That plea arises upon these facts. It is undoubtedly the case that the defendant first promised to marry the plaintiff when, as a matter of fact, she was a married woman. It was understood between them that a divorce was going to take place, and a divorce afterwards did take place; but it has been quite well settled, and no one can doubt the law upon the subject, that a promise made in such circumstances is a void promise. Nevertheless, the parties considered themselves as engaged persons; behaved as engaged persons, and, though their Lordships need not go through the various circumstances of the case, it is certain that after the divorce proceedings had gone through, and consequently the plaintiff became a free woman, the defendant bought her a ring and actually arranged the date on which they were to be married.

The legal point is whether, from circumstances like that, it is possible to infer what really is in law a new promise to marry. There is no difficulty as to consideration because the promise to marry is sufficient consideration. It seems to their Lordships that the case is in precisely the same position as the case of *Ditcham* v. *Worrall* (1), and their Lordships cannot do better than read a few words from the judgment of Lindley, J. (as he then was) in that case. He says at page 414*:—

"Unless, therefore, the Statute (he is speaking of the Infants Relief Act) forbids such an inference from their conduct, it appears to me that the Jury might have found, and ought to have found, that there was a promise by the defendant after he came of age to marry the plaintiff on the day ultimately fixed for the marriage, and not a mere ratification of a promise made previously to marry at a day to be thereafter, fixed," and then he gives reasons for saying that that opinion is warranted by the decision of the House of Lords in the case of *De Thoren* v. *Attorney-General* (2). Their Lordships entirely agree with that reasoning. It seems to them that when persons fix a day for their marriage it may be inferred from this that there is a promise of marriage, and one is not bound to take it as a ratification of a contract which in itself is void, and which, therefore, in law cannot be rectified by anything that can be subsequently done.

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(1) (1880) 5 C P. D. 410; 49 L. J. C. P. 688; 43 L. T. 286; 29 W. R. 59; 44 J. P. 799.

*Page of (1880) 5 C. P. D.—[*Ed.*]

Accordingly their Lordships think that the learned Judges here on the facts, which cannot be controverted because they are concurrent findings, came to a conclusion which they were perfectly warranted in law in coming to.

Although their Lordships did not stop the appellant from reading the evidence, they really think that the examination of the evidence as to how the parties behaved afterwards was scarcely relevant in view of these two findings, but, as it has been gone into, their Lordships would wish to say that they think that the learned Resident has taken a perfectly correct view of what happened between these two parties. They had lover's quarrels, each was unwilling to take the first step of reconciliation, and so they drifted on with periods of separation, but after a time came together in India, when this renewed promise was made.

Now the learned District Judge held that the matter was made worse by what he considered was a proof of seduction. That proof of seduction was rejected, and rejected, their Lordships think upon perfectly right grounds, by the learned Resident on appeal. The result was that the learned Resident, on appeal, reduced the damages from Rs. 50,000 to Rs. 15,000.

Their Lordships, whatever their own views would have been if they had been trying the case, would never think of interfering with a measure of damages which had been fixed by a learned Judge unless they saw that there was something very clearly wrong with the figure which he had fixed upon, and, therefore, as regards this part of the judgment also they do not consider it right that it should be altered.

Their Lordships will therefore, humbly advise His Majesty that the main appeal should be dismissed, and that the respondent should have such costs as a pauper can obtain, because she has been allowed to defend *in forma pauperis*, and, as her cross-appeal has not been insisted upon, it should also be dismissed, and that there should be no costs to either party in that cross-appeal.

R. L. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Josselyn & Elwes.*

Solicitor for the Respondent:—Mr. *H. S. L. Polak.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO 81 OF 1924.
December 1, 1925.
Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Panton.

GOBINDA CHANDRA MAJUMDAR AND OTHERS—APPELLANTS
versus
HARI CHARAN MARWARI AND OTHERS—CREDITORS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 75 (4)—Receiver's report, confirmation of—Consent of parties—Jurisdiction.

The District Judge has no jurisdiction to confirm the Receiver's report except by consent of parties until 21 days have elapsed within which the aggrieved creditors can apply to the Court for the reversal or modification of the act or decision by which they are aggrieved. [p. 333, col. 2.]

Appeal against an order of the District Judge, Birbhum, dated the 19th September and the 13th December 1923.

Babus *Panchanon Ghose* and *Mohendra Kumar Ghose*, for the Appellant.

Mr. *Sarat Chandra Bose* (with him Babus *Charu Chandra Ganguli* and *Kanai Dhone Dutta*), for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by certain creditors named Majumdars against two orders of the District Judge of Birbhum, dated the 19th September, 1923 and 13th December of the same year.

A preliminary objection has been taken that the appeal is out of time having regard to the provisions of sub-s. (4) of s. 75 of the Provincial Insolvency Act. It is necessary to state a few facts before I deal with that objection. The creditors of the insolvent put in their proofs under the provisions of s. 33 of the Provincial Insolvency Act, and when the proofs had been put in they were referred to the Receiver who had been appointed to the insolvent's estate to be dealt with by him and for a report to the District Judge. The Receiver dealt with the various proofs and made his report to the District Judge on the 12th of September, 1923. That report is to be found in the paper-book and it bears this date. The Receiver in his report rejected the proofs of the Majumdars for reasons which it is not necessary for me now to state. It appears from the order-sheet dated the 12th September, 1923 that the report was submitted to the Court on that date and the order concludes with these words 'Put up the report for further orders.' Then comes the next order No. 53 dated the 19th September 1923. On that date the District Judge confirmed the Receiver's report dated the 12th September, 1923 and two further reports of the 17th and 19th of September. We asked and asked in vain as to the procedure which is adopted when a report of this nature is confirmed and we have been unable to ascertain whether notice is given to the creditors or at any rate to those creditors whose proofs have been rejected by the Receiver. Under s. 68 of the Provincial Insolvency Act the creditor who is aggrieved by an act of the Receiver is entitled to apply to the Court who has power to confirm, reverse or modify the act or decision complained of and there is a proviso to the section providing that no application is to be entertained after the expiry of 21 days from the date of the act or decision complained of, that is to say, the Statute clearly gives to every creditor aggrieved by the action of the Receiver, as these creditors were aggrieved by reason of the rejection of their proofs, 21 days in which to bring the matter before the Court (in this case before the District Judge). Within 21 days, namely, on the 1st October, 1923 the Majumdars filed a petition of objection against the Receiver's report. On the 24th of May, the notice was served on the judgment-debtor and on certain creditors and apparently a question was raised on behalf of creditor No. 3 that no appeal lay. Eventually on the 13th December 1923, the District Judge rejected the application holding that as the report that had already been confirmed by him no appeal lay against that decision and that the proper remedy was by way of appeal to this Court. Now what is urged on behalf of the creditors who are opposing the appeal is that the appeal is out of time as it was not preferred within 90 days from the confirmation of the report, namely, the 19th September, 1923, and it is said that this is really the order by which the Majumdars are aggrieved and that inasmuch as the appeal was not preferred within 90 days from that date this appeal should be rejected or dismissed as out of time. Now the Majumdars had put in their objection within 21 days allowed by s. 68 ...and they were quite entitled to assume that the District Judge would consider their objection and, would not reject it on the ground on which it was rejected on the 13th December, and in my opinion, the District Judge had no jurisdiction to confirm the Receiver's report except by consent of parties until 21 days had elapsed within which the creditors who were aggrieved could apply to the Court for the reversal or modification of the act or decision by which they were aggrieved. The result is, therefore, that the preliminary objection fails and that the appeal was preferred in time because it was preferred within 90 days from the date of the order by which for the first time the Majumdars found that the District Judge had refused to hear their application of the 1st October which had been filed within time. Suppose the Majumdars had appealed from the order of the 19th September, 1923 without making the application which they did to the District Judge they would then have been told that their appeal was premature because the District Judge had not dealt with their application and had neither re-considered the Receiver's report or dismissed the application.

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(2) (1876) 1 A. C. 686.

For these reasons, therefore, we think that the preliminary objection fails and this really disposes of any argument that can be urged against the appeal because clearly for the reasons which we have indicated the Majumdars were entitled to have their objections to the Receiver's report which were made within time considered and dealt with by the District Judge. It is suggested that in any case the appeal will be infructuous as all the assets of the insolvent's estate have been distributed. Whether that is so or not we do not know. We think for the reasons we have indicated, that this appeal is entitled to succeed and it is accordingly decreed and we accordingly set aside the order of the District Judge of the 13th December, 1923 and direct him to consider the Majumdars' objections to the Receiver's report on their merits.

The appellants will be entitled to their costs in this appeal—hearing fee, three gold *mohurs*.

Panton, J.—I agree.

M. B. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 46 AND 99 OF 1924.

September 21, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Viswanatha Sastri.

APPEAL NO. 46 OF 1924.

S. R. MUTHUSWAMI IYER AND SONS, FIRM BY ONE OF THEIR PARTNERS S. R. MUTHUSWAMI IYER—PLAINTIFFS—APPELLANTS IN A. S. No. 46 OF 1924 AND RESPONDENTS IN A. S. No. 99 OF 1924

versus

V. V. C. RAMALINGA MUDALIAR (DEAD) AND OTHERS—DEFENDANTS—RESPONDENTS IN A. S. No. 46 OF 1924 AND APPELLANTS IN A. S. No. 99 OF 1924.

Contract—Sale of goods—Breach by vendor in delivery—Series of sellers and buyers—Ultimate buyer himself vendor higher up in chain—Breach of contract with third persons—Suit by buyer for return of advance, whether maintainable.

The *M* Mills sold certain bales of yarn to *V* and sons, who sold them to the plaintiffs, who sold to *H* who sold to *M* and sons, who sold to *A* and sons, who again sold to the defendants, who in their turn sold to the plaintiffs who paid an advance of about Rs. 7,000 towards the contract. At the time of these transactions the market was in a highly speculative state and each one of these sales was made at a profit. But at the end the market price had fallen and the goods were not worth what the various buyers had paid for them. In a suit by the plaintiffs for return of the advance with interest the defendants pleaded that the plaintiffs could not sue them because they themselves were in default higher up in the chain of buyers and sellers:

Held, that since the defendants had contracted to deliver the bales to the plaintiffs, they could not be heard to say that the plaintiffs were out of Court because they had been in default at an earlier stage of the series and broken a contract not with the defendants but with somebody else. [p. 335, col. 2.

Appeals against the decrees of the Court of the Second Additional Subordinate Judge, Madura, in O. S. No. 21 of 1922, (O. S. No. 10 of 1922 on the file of Sub-Court, Madura.)

Messrs. *A. Krishnaswami Iyer* and *K. V. Sesha Iyengar*, for the Appellants.

Messrs. *S. Varadachariar* and *N. Chandrasekhara Iyer*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—This appeal has given rise to a very interesting argument nonetheless so that both Mr. Alladi Krishnaswami Iyer and Mr. S. Varadachari who argued the appeal with great ability agreed in saying that whatever the result of the case was to be, the judgment of the learned Judge, which was a sort of compromise between the case of the plaintiffs and the defendants could not possibly stand.

The facts are very short. The contract relates to a batch of bales of yarn and the contract in question in the suit is one of 28th August 1918 for the sale of 86 bales by the defendants as sellers and the plaintiffs as buyers. The plaintiffs paid on the contract an advance of Rs. 6,966 and their claim is for that money with interest.

The point that arises in the appeal is best shown by an account of the history of these bales. There was a sale in the first instance by the Madura Mills to Venkatachalapathy Iyer and sons, who sold them to the plaintiffs, who sold to Hanumantha Iyer, who sold to P. S. N. Muruganathan Chettiar and Sons who sold to Arumugha Mudaliar and Sons, who again sold to the defendants, who sold in their turn to the plaintiffs so that the plaintiffs occur twice in the chain. What happened, of course, was that the market was in a highly speculative state and that each one of these sales was made at a profit. But at the end the market price had fallen and the goods were not worth what the various buyers had paid for them. In these circumstances the plaintiffs brought the action in which they did not claim damages based on the difference between the contract and the market price but agreed to treat the contract as a nullity on the return of the advance they had paid together with interest. The answer of the defendants is that the plaintiffs cannot sue them because they themselves were in default higher up in the chain of buyers and sellers. Plaintiffs did not take delivery from Venkatachalapathy Iyer or give delivery to Hanumantha Iyer and all the contracts down to the goods reaching the defendants were settled in one way or another, the ultimate result being that the bales were never delivered to any body because the ultimate buyer Venkatachalapathy Iyer obtained a cancellation of his contract with the Madura Mills and the defendants themselves settled with Arumuga Mudaliar who got some money out of them. The short point put for the defendants is that as the plaintiffs themselves were in default higher up in the chain of buyers and sellers they cannot have any remedy against the defendants.

The first thing that emerges is that this was in effect a contract for specific goods. The bales are described and their whole history is given. On that it would be possible for Mr. Varadachari to argue that the contract on its true construction was a contract for specific goods conditional on their reaching the hands of the defendants. But that argument is of no assistance to him, because the position would then be that its impossibility of performance having arisen, though through no fault of the defendants, they could not under Indian Law retain the monies they had received from the plaintiffs by way of advance. I am putting it in favour of the defendants because it is quite obvious that it would be equally arguable to say that as the defendants had agreed to deliver certain bales of yarn they had put themselves in the position of warranting that the sellers in all the preceding links in the chain would fulfil their contract. In order to succeed in this suit, which I have already pointed out is not one for damages, the defendants have to go further and say that by reason of the plaintiffs' default to deliver to Hanumantha Iyer, the plaintiffs are disentitled to take the attitude that this contract must be looked at by itself, as they were indirectly responsible by their failure to fulfil the contract with a third person for the default—the inevitable default—of the defendants.

The point is not covered by any direct authority but it appears to me that the law on the subject is clear. The defendants undertook to deliver bales to the plaintiffs and ran the risk of a breach of any one of the links of the chain which preceded their contract. In my opinion, it is a mere accident that one of those links—it may be the defaulting link—is the plaintiffs themselves. If I am right in my view that the defendants took the risk of all previous contracts being duly executed, they took the risk of the breach of the plaintiffs' contracts either with Venkatachalapathy Iyer as buyer or with Hanumantha Iyer as seller, as well as any other of the links. I may further point out that if the defendants were right in their contention, it would be difficult for them to justify the fact that having brought a suit against Arumuga Mudaliar and sons they settled it on terms whereby they put money into their pockets for this breach. In my opinion, the defendants having contracted to deliver these bales to the plaintiffs they cannot be heard to say that the plaintiffs are out of Court because they had been in default at an earlier stage of the series and broken a contract not with the defendants but with somebody else.

Although we listened to a very able and interesting argument from both the learned Vakils, I do not myself think that it is really a matter of very great difficulty and it seems to me for the purpose of this case that it may be treated as an accident that the plaintiffs' name recurs twice in the series of buyers and sellers because I think that for the purpose of adjusting the rights of parties each contract must be considered solely by itself.

The result is that the appeal will be allowed with costs throughout; defendants ordered to return the deposit.

I see no justification for the plaintiffs claiming interest at the rate of 12 per cent. and I think the justice of this case will be met if the defendants, who have had the plaintiffs' money in their pockets all these years, be ordered to pay interest at the rate of 6 per cent. from the date of default which is the 2nd September 1921 till to day and further interest at the rate of 6 per cent. till payment.

The other Appeal No. 99 will in consequence be dismissed without costs.

Viswanatha Sastri, J.—I agree with my Lord.

Appeal No. 46 allowed.
V. N. V. *Appeal No. 99 dismissed.*
R. L.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1410 OF 1923.
February 23, 1926.
Present:—Mr. Justice Walsh.
Rai Sahib Sahu Lala JAGDISH PRASAD —PLAINTIFF—APPELLANT
versus
RAGHUBIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 49, scope of—Suit for compensation for trees cut by occupancy tenants—Limitation.

A suit by the landlord against his occupancy tenant for compensation for the trees cut is a suit for compensation for the breach of an implied contract not specifically provided in the Limitation Act and is governed by 3 years' limitation under Art. 49, Sch. I, Limitation Act. [p. 336, col. 2; p. 337, col. 1.]

Article 49 of Sch. I to the Limitation Act covers all other cases of specific moveable property wrongfully taken or wrongfully detained which do not arise out of theft or dishonest conversion as provided by Art. 48. [p. 337, col. 1.]

Mangun Jha v. *Dolhin Golab Koer*, 25 C. 692; 2 C. W. N. 265; 13 Ind. Dec. (N. S.) 454, referred to.

Second appeal against a decree of the Subordinate Judge, Muzaffarnagar, dated the 7th August 1923.

Mr. *S. D. Sinha*, for the Appellant.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—I cannot interfere in this appeal. The plaintiff sues, as *zemindar*, some occupancy tenants who cut down some trees and sold them. The case is not without its humorous aspect. The plaintiff alleged that the trees were cut down in April, 1922. He did not say that there was theft or concealment, so as to make Art. 48 applicable, or that the matter came to his knowledge at a later date. What he said was that inspite of repeated demands for the money, not for the trees, the defendants refused to pay, and he claimed damages to the extent of Rs. 500. It reads like a claim for trespsss upon immoveable property in cutting down the trees and for conversion of moveable property by turning them into money after they have been cut down. This would be *prima facie* a theft; but inasmuch as the defendants are occupancy tenants of the *zemindar*, there is a contract between them, and to cut down trees in breach of the landlord's right is clearly a breach of contract. So the action might be said to relate to compensation for breach of contract. All this would be unimportant in the ordinary way, because the plaintiff can always waive the contract; but the humorous part of the case is that, according to the finding of the lower Court the plaintiff, having thought that he had a perfectly good claim for Rs. 500 deliberately waited until the Statute of Limitation became a serious difficulty in his way, and then commenced this suit, fraudulently alleging that the act complained of occurred years after it really did, when every body knew that it was a lie. This sounds like the conduct of a lunatic; but I am bound by the findings of the lower Court in the matter. The plaintiff, having selected this curious line to adopt, did not bother himself about the Statute of Limitation, but the defendants did, and admitted that they had sold the trees in the exercise of their lawful right about four years before the suit and that the plaintiff's claim was barred by three years' limitation. They were very careful not to say by which article. It would have been much better if the Courts below had discussed the case on the merits because if the defendants had done it under a right, no puzzle would have arisen about the statutory limitation. But the lower Appellate Court has found that the trees were cut more than four years ago and that the claim is time-barred. It obviously meant to hold that a period of three years barred the suit; but it obviously followed the example of the defendants and refrained from deciding which article was applicable, so that the plaintiff was in this position that the findings of the Courts below had entirely altered the aspect of his case and he found himself with a time-barred claim, although no body concerned had ventured to say why it was time-barred. So he hit upon the ingenious idea—this is another humorous aspect of this case—of selecting Art. 120, for which six years were provided. Now Art. 120 says that six years is applicable to a suit for which no period of limitation is provided elsewhere; and one cannot blame him (the plaintiff); if neither his opponents nor two Courts of Justice had discovered any article, which was applicable in this case, he should ask this Court to hold that this is a suit for which no article can be found elsewhere. That would be an extremely easy solution of this case. I am afraid that several articles can be found elsewhere, and the only difficulty that I have is to decide which is the right one. As this is an act done by an occupancy tenant in excess of his right, it clearly arises out of contract, and it seems to me impossible to hold that it is not a suit for compensation for the breach of an implied contract not specifically provided for in the Limitation Act—the implied contract being not to cut down trees. It seems to me also that Art. 49 must apply. Articles 48 and 49 may be read together. Article 48 distinctly deals with specific moveable property acquired by theft or dishonest misappropriation and for compensation for wrongfully detaining the same. No body could say that there is anything of this kind here. It has not been found, but the defendants by their written statement claim, that they had a right to cut down the trees. It would be, therefore, wrong, and I do not know why the learned Vakil asks this Court to hold that they were guilty of theft in cutting down the trees. Article 49 to my mind covers all other cases of specific moveable property wrongfully taken, or wrongfully detained, which do not arise out of theft or dishonest conversion as provided by Art. 48; and, although to cut down trees in breach of an occupancy tenancy agreement is not only a breach of the agreement but also a trespass to immoveable property, yet when the trees have been cut down, they certainly become specific moveable property, and if they are taken away and sold, the suit is one for compensation as defined by Art. 49. This is the view that has been taken in the Full Bench reference in Calcutta in 1898, to which Mr. Nehal Chand drew my attention, reported in *Mangun Jha* v. *Dolhin Golab Koer* (1). I agree with that. There are other Articles, which it seems to me might be made applicable; but it is not necessary to discuss them. There is ample ground for holding, as the lower Court did, that a period of three years at the most is the period within which the plaintiff ought to have sued, and that on the finding his claim is barred.

The appeal must be dismissed with costs, including in this Court fees on the higher scale.

R. L   *Appeal dismissed.*

(1) 25 C. 692; 2 C. W. N. 265; 12 Ind. Dec. (N. S.) 454.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1353 OF 1925.

August 12, 1925.

Present:—Mr. Justice Jackson.

In re POKALA MAHALAKSHMI AMMAL —PLAINTIFF—PETITIONER.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 1—Petition to appeal in forma pauperis*—Subsequent deposit of money to petitioner's credit under decree of lower Court, whether amounts to, "sufficient means"—Subject-matter of suit, exclusion of, in considering means of person.*

The expression "The subject-matter of the suit" in O. XXXIII, r. 1, C. P. C., does not qualify "sufficient means" and in considering the means of a person to sue *in forma pauperis*, the subject-matter of the suit ought to be excluded as being out of the pauper's reach.

But where a plaintiff who has obtained a decree for maintenance applies for leave to appeal *in forma pauperis* claiming a larger amount and the petition is sent to the Court of first instance for inquiry into pauperism and the judgment-debtor meanwhile deposits into Court the amount of the decree, which amount is in excess of the Court-fees payable on the appeal, the petitioner must be said to be possessed of sufficient means to enable him to pay the stamp fee in appeal and is not entitled for leave to appeal *in forma pauperis*.

Dwarkanath Narayan v. *Madhavrav Vishvanath*, 10 B. 207; 5 Ind. Dec. (N. S.) 524, followed.

Krishnabai v. *Mandhar*, 30 B. 593; 6 Bom. L. R. 671, referred to.

Bai Balagavri v. *Motilal Ghelabhai*, 72 Ind. Cas. 224; 47 B. 523, 25 Bom. L. R. 199; A. I. R. 1923 Bom. 247, distinguished.

Application under O. XLIV, r. 1 of Act V of 1908 to be allowed to appeal *in forma pauperis* against a decree of the District Court, Chingleput, in O. S. No. 23 of 1923, (O. P. No. 2 of 1923).

Messrs. *T. R. Ramachandra Iyer* and *S. Srinivasa Iyer*, for the Petitioner.

ORDER.—The petitioner applied for leave to prefer an appeal in this Court from the decree of the District Court, Chingleput, *in forma pauperis*. Her petition was sent to the District Judge for enquiry whereupon the judgment-debtor (she herself has obtained a decree for maintenance and is appealing for a larger amount) paid Rs. 571 into Court to her credit. The District Judge passed an order allowing her to draw out the money, and reported that she had means to pay the stamp duty of Rs. 200 on her appeal. To this report she objects. Of course Rs. 571, is the subject-matter of the suit, though not of the appeal but this causes no difficulty because it has been ruled in *Krishnabai* v. *Mandhar* (1) that "the subject-matter of the suit" in O. XXXIII, r. 1, C. P. C., does not qualify "sufficient means" and the subject matter of the suit is excluded as being presumably out of the pauper's reach which is not so in the present case [*Dwarkanath Narayan* v. *Madhavrav Vishvanath* (2).] But another Bombay Bench in *Bai Balagavri* v. *Motilal*

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(1) 30 B. 593; 6 Bom. L. R. 671.

(2) 10 B. 207; 5 Ind. Dec. (N. S.) 524.

Ghelabhai (3) besides holding that the subject-matter of the suit cannot be taken into consideration in calculating the plaintiff's means, apparently overlooking *Krishnabai* v. *Mandhar* (1) has also held that the pauper applicant is not obliged to take out of Court what is deposited or paid in, and cannot, therefore, if he choose to allow the deposit or payment made in Court to remain there, be said to be possessed of sufficient means as if the deposit were actually in his possession. This differs from a previous ruling of the same Court in *Dwarkanath Narayan* v. *Madhavrav Vishvanath* (2) and with all respect I think it a most genuine definition of "possessed" to confine the phrase to actual possession on one's own person. I see no distinction between money deposited in Court and ordered to be delivered to a person and moneys lying at a person's credit in a Bank. I should hold that a person with Rs. 571 at her disposal in the Court is possessed of sufficient means to enable her to pay a stamp-fee of Rs. 200. Nor do I think it necessary to contemplate that possibly the Rs. 571 might have been attached; it was not attached when the District Judge passed his order. I also think it unnecessary to go into the question whether supposing the petitioner's estate went into liquidation she would have sufficient balance to pay the stamp-fee. It is enough to find that at the time of hearing her application she has "sufficient means."

I have been asked to refer the matter to a Bench because of *Bai Balagavri* v. *Motilal Ghelabhai* (3) but the Bombay rulings are so contradictory that I do not consider it to be in the face of clear authority that I am deciding that petitioner is possessed in the circumstances of sufficient means and not entitled to sue as a pauper.

The petition to be allowed to appeal as a pauper is dismissed. The petitioner can pay the requisite fee within one month from the date of this order,

V. N. V.

Petition dismissed.

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(3) 72 Ind. Cas. 224; 47 B 523; 25 Bom. L. R. 199; A. I. R. 1923 Bom. 247.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2272 OF 1923.

December 3, 1925.

Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

BAHADUR AHMED MOULVI—DEFENDANT No.1—APPELLANT

versus

HEMANTA KUMAR ROY—PLAINTIFF AND OTHERS—DEFENDANTS AND *Pro forma* DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 178—Holding—Undivided parcel of land, if holding—Sale of undivided portion—Abandonment—Re-entry, clause as to—Legality.

Undivided portions of land included within a leasehold do not constitute a holding as defined in the Bengal Tenancy Act. [p. 339, col. 2.]

Hari Charan Bose v. *Runjit Singh*, 25 C. 917n; 1 C. W. N. 521; 13 Ind. Dec. (N. S.) 598, followed.

Sale of undivided portions of lands not comprising a holding does not amount to abandonment and the landlord is not entitled to re-enter on that ground. [*ibid.*]

A clause in a lease covenanting that the landlord shall be entitled to re-enter on transfer by the tenant does not offend against the provisions of s. 178, Bengal Tenancy Act. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Jessore, dated the 1st May 1923, reversing that of the Munsif, Third Court at Narain, dated the 19th November 1921.

Mr. *Harendra Kumar Sarbadhikari* and Babu *Nripendra Chandra Das*, for the Appellant.

Babus *Hemendra Chandra Sen* and *Surendra Nath Basu* (Sr.), for the Respondents.

JUDGMENT.

Ghose, J.—This appeal arises out of a suit for recovery of *khas* possession of certain land. The Trial Court dismissed the suit which was decreed on appeal by the Subordinate Judge.

Defendant No. 1 has appealed to this Court. The facts found by the Subordinate Judge are that certain lands belonged jointly to two persons Baidya Nath and Golok in equal shares. There was a partition between the two co-sharers and the lands belonging to Golok's share were inherited by one Nityamoyi. She died sometime in 1916. Before her death she executed a *kabuliyat* in favour of the plaintiff dated the 11th of April 1907. It was stated in that *kabuliyat* that the lands of which she had been in possession was found on measurement to be in excess of the original *jama* and, therefore, the rent was altered and certain terms were arranged between the landlord and the Nityamoyi with regard to her leasehold property. The defendants came into possession by right of purchase from one Pitambari who was the widow of the daughter's son of Golok.

The plaintiff claimed possession of these lands on two grounds. First, that the transfer to the defendants was made in contravention of the terms of the *kabuliyat* executed by Nityamoyi and secondly, that the tenancy being that of an occupancy *raiyat* the purchasers had acquired no title as against the landlord as the occupancy right was not transferable by custom.

The Trial Court found that the leasehold was a permanent tenure that the sale was of a portion of the tenancy which was saleable and that, therefore, the plaintiff was not entitled to succeed in ejectment. On appeal by the plaintiff the Subordinate Judge held that if the leasehold interest of Nityamoyi be held to be a permanent tenancy then the sale having been effected in breach of the covenant contained in the *kabuliyat* executed by her the landlord was entitled to re-enter. He, however, held that the interest of Nityamoyi in the lands was that of a *raiyat*. He found that the leasehold did not form a holding as defined by the Bengal Tenancy Act, because it did not consist entirely of parcels of land but some undivided shares of land under the occupancy of tenants were included within the leasehold. He came to the conclusion that the Bengal Tenancy Act made no provisions for a tenancy of this character and the incidents of such a tenancy were rather uncertain, but that, at any rate, such a tenancy would not be transferable. In that view he made a decree in favour of the plaintiff.

Defendant No. 1 by his appeal contends that the leasehold having been found not to consist of a holding as defined by the Bengal Tenancy Act the sale to the defendants cannot be considered to be an abandonment of the holding by an occupancy *raiyat* which would entitle the landlord to take *khas* possession as on an abandonment under the Bengal Tenancy Act. It is contended by the learned Vakil on behalf of the plaintiff-respondent that the leasehold really consisted of a holding and he placed the *kabuliyat* before us. On reading the descriptions of the lands in the schedule there cannot be any doubt that undivided portions of lands have been included within the leasehold and, therefore, according to the decision in the case of *Hari Charan Bose* v. *Runjit Singh* (1) the tenancy cannot be said to comprise a holding as defined in the Bengal Tenancy Act. The sale, therefore, cannot be construed into an abandonment of a holding by an occupancy *raiyat* and the landlord is not, therefore, entitled to recover possession on that ground. But it is contended on behalf of the respondent that the plaintiff is entitled to take advantage of the provision with regard to the restriction as to alienation contained in the *kabuliyat* of Nityamoyi and that he is entitled to re-enter on account of the breach of that covenant. Clause 9 of the *kabuliyat* runs thus: "With respect to this *jama* or any portion thereof, I shall not be entitled to make a gift or sell or give settlement of or create any lien or incumbrance in favour of anybody or otherwise transfer the same in any way. In case I do so, you shall be entitled to take *khas* possession of the entire *mehal* either of your own motion or through the Court and I shall not be able to object to the same." This is a clear provision restricting alienation and reserving the right of re entry by the landlord in case of breach of the covenant. According to the plaintiff's case there has been a transfer which is a breach of the covenant. It is, however, argued on behalf of the appellant that this covenant is not valid under the Bengal Tenancy Act. I cannot find any provision in s. 178 of the Bengal Tenancy Act which prevents any such agreement being entered into. An attempt was made on behalf of the appellant to bring this covenant within the provisions of cl. (*d*), sub-s. (3) of s. 178 of the Bengal Tenancy Act which enacts that nothing in any contract made between a landlord and a tenant shall take away the right of a *raiyat* to transfer or bequeath his holding in accordance with local usage. But the answer is that this leasehold is not a holding and the defendants have not been able to prove that there was any local usage authorising them to transfer their tenancy. There is no provision in the Act which the clause in the *kabuliyat* mentioned above offends against. In my opinion, therefore, the plaintiff is entitled to re-enter for the breach of the covenant above referred to.

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(1) 25 C. 917n; 1 C. W. N. 521; 13 Ind. Dec. (N. S.) 598.

The appeal must, therefore, be dismissed with costs.

Cuming, J.—I agree.

M. B. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 378 OF 1922.
March 3, 1926.
Present:—Mr. Justice Sulaiman and
Mr. Justice Banerji.
Kunwar NARENDER SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
Bohra CHATRAPAL SINGH AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 11—Retirement of guardian ad litem—*Courts, discretion of.*

It is not open to a guardian *ad litem* to retire at his own sweet will without the permission of the Court. It is a matter of discretion for the Court which having regard to all the circumstances of the case may permit the guardian to retire and may pass such orders as to costs as it thinks fit. [p. 341, col. 1.]

Jangi v. *Sundar*, 70 Ind. Cas. 589; L. R. 3 A. 458; A. I. R. 1922 All. 416, distinguished.

First appeal from a decree of the Subordinate Judge, Muttra, dated the 17th August 1922.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *G. Agarwala*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for declaration that a decree obtained by the respondents against the plaintiffs under the guardianship of their mother, *Musammat* Mahindra Kunwar, is not binding on them. It appears that the plaintiffs' father, Niranjan Singh, executed a mortgage-deed on the 12th of October, 1912, hypothecating certain properties. A suit was brought on the 15th March, 1921, on the basis of this mortgage-deed against the father and his sons, the present plaintiffs. The interest of the father, who had transferred the property, being adverse to the minors, the plaintiffs very properly applied that the minor's mother should be appointed their guardian. Notice was issued to her and she did not object. She appeared through a Vakil on the 2nd June 1921 and accepted the appointment of herself as guardian. Subsequently, on the 11th July, 1921, she filed a written statement, in which she denied the existence of any legal necessity and put the mortgagees to proof of the same. Issues were settled and the next date for hearing was the 24th August, 1921, which was on the 25th July, 1921, altered to the 16th November, 1921. Till the 10th November, 1921, *Musammat* Mahindra Kunwar took no steps, whatsoever, to summon any witness on behalf of the minors. On that date an application was put in on her behalf, not through the Pleader who had appeared first for her, but through a new Pleader, stating that she had been ill for nearly two months and should be relieved of her duties as guardian. No affidavit was filed in support of this application to satisfy the Court that she was really ill, nor was any medical certificate produced. The learned Judge was not satisfied that this was a *bona fide* application; he considered the circumstances of the case and came to the conclusion that the application had been made merely to cause delay in the case, five months after she had been appointed as guardian of her own sons. The learned Judge, therefore, disallowed the application. No further application was made on behalf of the guardian for adjournment of the case in order to enable her to summon witnesses, or for giving any particular instruction to the Vakil. The case was disposed of on the date fixed. The mortgagees led evidence, both oral and documentary, to prove the existence of legal necessity. The learned Judge accepted that evidence and decreed the claim. *Musammat* Mahindra Kunwar took no steps to apply for a review of the judgment, nor did she take any steps to prefer an appeal against the decree which had been passed against the minors. A declaratory suit has now been instituted on behalf of the minors through Kundan Singh, their paternal uncle. *Musammat* Mahindra Kunwar has been examined in this case, and her statement shows that over and above the assistance and help which she might have got from her own husband, who was just as much interested in protecting the minors' interests out of Court as any body else, she had the assistance of two general attorneys; Jagat Narain and Ram Charan, who used to look after her own cases as *mukhtar-i-khas* in Court. These *mukhtars* are even now looking after the case on her behalf and Jagat Narain has been filing applications and affidavits in this case. She appears to belong to a respectable family and had several maid-servants as well as 5 or 7 other servants to attend on her. Having regard to all these circumstances, it is impossible to believe, that as she was a *pardanashin* lady, that she could not have the help of qualified persons who could defend her minor sons' interests as *pairokars.* The fact that no attempt had been made to summon witnesses for a very long time suggests that the Court was right in thinking that the application was a mere dodge to gain further time and cause delay. Her statement that she was ill is also difficult to believe. Her story is that she had an attack of rheumatism some 15 years ago and has been suffering off and on from this disease and that she had a severe attack 2½ months before her application. She, however, did not put forward any such excuse when she was appointed guardian.

The learned Advocate for the appellants contends that when *Musammat* Mahindra Kunwar expressed her desire to retire from the guardianship, it was the duty of the Court to allow her to retire, and inasmuch as the Court refused to do so, it committed an irregularity. We are unable to accept this contention. Under O XXXII, r. 11, C. P. C., "where the guardian for the suit desires to retire. . . . . . the Court may permit such guardian to retire, or may remove him, and may make such order as to costs as it thinks fit." That rule makes it quite clear that it is not open to the guardian to retire at his own sweet will without the permission of the Court. It is a matter of discretion for the Court, which having regard to all the circumstances of the case may permit the guardian to retire and may pass such order as to costs as it thinks fit. The matter was, therefore, discretionary. The Court did go into the circumstances of the case and refused to grant the permission. Under the circumstances it is difficult to hold that it committed an irregularity. The learned Advocate relied on sub-cl. (2), r. 11. But that subclause has no application, because it directs the Court to appoint a new guardian when a former guardian has retired, died or has been removed. The sub-cl. (2) does not give any substantial right to guardians to retire at their own will. Reliance has been placed on the case of *Jangi* v. *Sundar* (1). That case on its facts was a very special one. A suit had been brought for restitution of conjugal rights against a young woman, who was first alleged by the plaintiff himself to be a major. He then changed his mind and treated her as a minor and proposed to appoint a relation of her as her guardian *ad litem.* A notice was issued to the proposed guardian but was never served on him personally. His views on the subject were never definitely ascertained. An order appointing him as guardian was passed on the 9th March, 1920, and, as soon as the guardian came to know of it, he appeared in Court on the 13th March and protested and stated that he did not wish to act as guardian. Inspite of the fact that the notice was not served on him personally and inspite of the fact that his views had not been definitely ascertained and he came to the Court to express his refusal, the learned Munsif refused to permit him to withdraw from the guardianship. The result was that he refused to act, and an *ex parte* decree for restitution of conjugal rights against the young woman was passed in favour of the plaintiff. It was on these circumstances that a learned Judge of this Court thought that the order passed by the Munsif refusing to grant permission to the guardian *ad litem* to withdraw was not justified. The language employed in the judgment must be understood in relation to the facts of that case.

In the present case we are satisfied that there was no good ground for *Musammat* Mahindra Kunwar to withdraw from the guardianship of her own sons.

We also cannot believe that the minors have been really prejudiced. In the previous case, although proceedings were *ex parte,* both oral and documentary evidence was led to prove legal necessity, which satisfied the Court. If the evidence was insufficient, the mother would have certainly taken steps to prefer an appeal from that decree. It is also difficult to believe that the father of the minors, who would be interested in their welfare, would also not have taken some steps. Having regard to these circumstances, we find it difficult to differ from the view taken by the learned Subordinate Judge, and we dismiss this appeal with costs, including fees in this Court on the higher scale.

R. L. *Appeal dismissed.*

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(1) 70 Ind. Cas. 589; L. R. 3 A. 458; A. I. R. 1922 All. 416.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1711 OF 1923

December 3, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

KESHAB LAL GOSWAMI—PLAINTIFF —APPELLANT

versus

BHOLANATH GANGOPADHYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Possession of mortgagee after satisfaction, when adverse.

A suit which in essence is one for declaration of title and recovery of possession is governed by Art. 144 and not Art. 148 of Sch. I to the Limitation Act. [p. 342, col. 2.]

The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage-money has been satisfied. [p. 343, col. 2.]

The question whether the possession of the mortgagee after the mortgage-debt has been satisfied is adverse to the mortgagor or not is always a question of intention of the parties concerned. [*ibid.*]

Habeebullah v. *Abdul Hamid,* 13 Ind. Cas. 963; 34 A. 261; 9 A. L. J. 131, followed.

Appeal against a decree of the Subordinate Judge, Asansole, dated the 19th of February 1923, affirming that of the Munsif, Asansole, dated the 4th of January 1922.

Mr. *Bankim Chandra Mukerjee* and Babu *Nalini Kumar Mukerjee,* for the Appellant.

Babus *Baranashibasi Mukerjee* and *Gopendra Krishna Banerjee,* for the Respondents.

JUDGMENT.

Mukerji, J.—The plaintiff who was unsuccessful in the Courts below has preferred this appeal with respect to 5 *bighas* of land. The Courts below have dismissed the plaintiff's suit holding that it was barred by limitation. The first ground urged on behalf of the appellant is to the effect that Art. 148 of the First Schedule to the Limitation Act applies to the case and, therefore, it should have been held that the suit was well within time. In order to deal with this ground it is necessary to consider the allegations upon which the plaintiff came to Court. Shortly stated the plaintiff's case was that about 13 *bighas* of land belonged to one Jafer Sheik and after his death it passed by inheritance to his son Kinu and daughter Umeda, that in 1887 Kinu mortgaged the land by way of usufructuary mortgage to two persons, Sheik Jamait, Sheik Chhakuri, that in 1888 the said mortgagees or one of them it is not very clear whether both or one of them were parties to the transaction—sub-mortgaged the property to Anantaram and Dayal Mandal who were put in possession thereof. The plaintiff's case was that after the death of Kinu, Umeda Kinu's sister became entitled to the property and that on the 7th July 1920 the plaintiff purchased the same from Umeda, paid off the debt due on the mortgage and got back the mortgage-deed. He wanted to take possession of the property after his purchase but that the defendants acting in collusion with each other forcibly resisted and prevented him from taking possession. The defence, shortly stated was that of these 13 *bighas* of land, Kinu in 1893 sold 8 *bighas* to Ananta and Dayal and thus paid off the mortgage in their favour that thereafter there was an oral sale by Kinu in favour of Ananta and Dayal in respect of the remainder of the land and that the defendants had purchased the land in execution of a decree against Ananta and Dayal. The suit, therefore, in essence was a suit for declaration of title and recovery of possession. There was no relief claimed in the plaint as against the defendants on the footing of their being mortgagees or persons who represented the mortgagees. To such a suit Art. 148 of the First Schedule to the Limitation Act cannot possibly apply and the Courts below were, in my opinion, right in applying Art. 144 to the case.

The second ground taken on behalf of the appellant relates to the sufficiency of findings of the lower Appellate Court upon which the suit has been disposed of. The learned Subordinate Judge first of all set out the pleadings of the parties. He then stated in his judgment that the defence had adduced evidence to prove the oral sale in respect of the rest of the land in favour of Ananta and Dayal. He observed that that evidence was accepted by the learned Munsif but it was urged before him that the story of the verbal sale was not to be found in the written statement. He then gave an explanation as to why this story may not have found a place in the written statement. Then he observed thus: "When a part of the mortgaged property was sold and according to the recital in the *kobala* the mortgage debt was satisfied and only the balance of the consideration money was taken by Kinu, the mortgagee could not retain the remaining land. In the ordinary course the rest of the land would be returned to the mortgagor so that if the remaining land returned to the possession of Ananta and Dayal there must be a legal origin for the possession or if the possession was unlawful, then it was apparently adverse to the mortgagor. In the lattercase the plaintiff's claim would be obviously time-barred." The learned Subordinate Judge, in my opinion, was not right in disposing of the question of limitation in this way. He did not arrive at any finding on the question as to whether there was a transfer of possession in respect of the 5 *bighas* of land on the mortgage being satisfied from Ananta and Dayal to Kinu or whether the land came back to the possession of Ananta and Dayal afterwards. He says that in ordinary course after the mortgage was satisfied the land would come back to the mortgagor and if Ananta and Dayal came to be in possession afterwards the possession of Ananta and Dayal must be taken to have been based either on legal origin or it amounted to unlawful possession. The learned Vakil on behalf of the respondents has urged that this judgment be read as embodying the findings with regard to all these points. I am unable to accede to his contention in this respect. It seems to methat in order to dispose of the question as to whether the suit is barred by Art. 144 the learned Subordinate Judge will have to come to the following necessary findings. In the first place he will have to find whether in point of fact after the satisfaction of the mortgage debt the 5 *bighas* of land which was not included in the *kobala* of 1893 came back to the possession of Kinu and thereafter Ananta and Dayal could not claim to be in possession of it. If this question is found in the affirmative then it will not be necessary to go into other matters; and on a finding in the affirmative with regard to this point the learned Judge will be right in holding that in that case the possession of Ananta and Dayal must have been either under the verbal sale or it was possessive which was adverse to the mortgagor. If, however, the point is not decided in the affirmative then the learned Judge will have to find as a fact whether there was an oral sale in respect of the 5 *bighas.* If the question cannot be determined in the affirmative then the question will arise as to whether the possession of Ananta and Dayal became adverse to that of Kinu and if so, at what point of time. It is not the law that simply because a mortgage debt has been satisfied and the mortgagee continues in possession became adverse from the point of time of satisfaction of the mortgage debt. If any authority is needed for this proposition reference may be made to the case of *Habeebullah* v. *Abdul Hamid* (1). At page 265 the learned Judges observe as follows: "The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage money has been satisfied out of the usufruct or has been otherwise paid off. Much more is required to set time running against the mortgagor." The question whether the possession of the mortgagee after the mortgage debt has been satisfied is adverse to the mortgagor or not is always a question of *animus* or intention of the parties concerned. The whole of the circumstances will have to be considered in order to find out whether the mortgagees in the present case continued in possession as mortgagees or as owners in respect of the property. I am therefore of opinion that the findings of the Subordinate Judge are not sufficient to dispose of the question of limitation which arises in the present case.

In this view of the matter I would set aside the decree passed by the learned Subordinate Judge and remand the appeal to his Court so that the questions to which I have referred may be considered afresh and the appeal disposed of in the light of the observation I have made. Costs will abide the result.

Suhrawardy, J.—I agree.

M. B. *Appeal allowed:*
R. L. *Case remanded.*

(1) 13 Ind. Cas. 963; 34 A. 261; 9 A. L. J. 131.

OUDH CHIEF COURT.

FIRST CIVIL APPEAL NO. 14 OF 1925.
February 26, 1926.
Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.
Rana UMANATH BAKHSH SINGH—
PLAINTIFF—APPELLANT
versus
B. RAM BAKHSH SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 107-H—Under-proprietary rights, assertion of—Potential and not actual rights—Civil Courts, jurisdiction of.

In Oudh the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds, and the Civil

Courts have the exclusive jurisdiction to decide whether or not a person in possession of the land holds a proprietary or under-proprietary right in the lands. [p. 346, col. 1.]

Mohammad Abul Husan Khan v. *Prag*, 38 Ind. Cas. 814; 20 O. C. 8; 15 A. L. J. 113; 21 M. L. T. 102; 19 Bom. L. R. 202; (1917) M. W. N. 232 & 456; 32 M. L. J. 388; 21 C. W. N. 582; 26 C. L. J. 165; 5 O. L. J. 34 (P. C.), referred to.

Where, however, the plaintiff comes into a Civil Court asking for a declaration that the defendants are neither proprietors nor under-proprietors, the defendants' reply to the effect that they never asserted that they were proprietors and that they only asserted such under-proprietary rights as could be created under s. 107-H, Oudh Rent Act, in other words potential rights in the future and not actual rights in the present, takes the case out of the jurisdiction of the Civil Court, the under-proprietary rights claimed by the defendants being not such as could be determined by a Civil Court. [p. 346, col. 2.]

Mohammad Abdul Husan Khan v. *Prag*, 38 Ind. Cas. 814; 20 O. C. 8; 15 A. L. J. 113; 21 M. L. J. 102; 19 Bom. L. R. 202; (1917) M. W. N. 232 & 456; 32 M. L. J. 388; 21 C. W. N. 582; 26 C. L. J. 165; 5 O. L. J. 34 (P. C.), construed.

First appeal against a decree of the Additional Subordinate Judge, Rae Bareli, dated the 30th October 1924, in Regular Suit No. 19 of 1924.

Messrs. *Ali Zaheer*, *Radha Krishna* and *Naim Ullah*, for the Appellant.

Messrs. *A. P. Sen* and *H. K. Ghose*, for the Respondents.

JUDGMENT.—Rana Sir Sheoraj Singh, father of the plaintiff-appellant Rana Uma Nath Bakhsh Singh, put a certain Ram Bakhsh Singh in possession of an area of 50 *bighas* 5 *biswas* 16 *biswansis* in the village of Seora on the 20th August, 1910, on a rent of Rs. 75 a year. Ram Bakhsh Singh, who is defendant-respondent in this case, and his wife have been in possession of this area from then till now. They have never been ejected, although an attempt was made to eject them. They are paying the rent fixed. This is common ground. Sir Sheoraj Singh died in 1920 and was succeeded by the present plaintiff-appellant. Very shortly after the death of Sir Sheoraj Singh the plaintiff-appellant issued a notice of ejectment upon the defendant-respondent No 1 under the provisions of s 55 of Act XXII of 1886, as it was before the recent amendments of 1922. This notice of ejectment is not on the record, but it is admitted by the appellant's learned Counsel that in order to issue such a notice effectively, it was necessary to assert that the defendants-respondents were tenants not having a right of occupancy and not holding under special agreement or decree of Court. Defendant-respondent No. 1 thereupon filed a suit under s. 56 of the Act (as it was then) contesting the notice. The plaintiff-appellant, who was defendant in that suit, maintained that he had a right to eject him, but at a certain period in the hearing of the suit he withdrew the notice of ejectment thereby consenting for the time being to the retention by the defendants of the land in question. The Assistant Collector did not decree the suit in favour of the defendant-respondent No. 1, who was then plaintiff, in very clear terms but he did decree the suit in his favour. The words he used were these:—

"Notice issued by defendant, as prayed by the defendant, is cancelled. Case to be struck off from the registers and consigned to the record. The plaintiff shall remain in possession of the land as usual."

This order is dated 27th October 1921. The plaintiff-appellant then filed a suit in the Civil Court on the 16th September, 1922 asking for a declaration that the two defendants-respondents had neither superior nor under-proprietary right in the land in question under a certain *sanad* of the 20th August, 1910, and further for a declaration that the *sanad* was legally ineffectual and unfit to be admitted in evidence as against the plaintiff and that the defendants-respondents could have no right under the aforesaid *sanad*. The learned Subordinate Judge has dismissed the plaintiff-appellant's suit on the 30th October 1924 on the ground that no cause of action had arisen to him; and against the dismissal on that ground the present appeal is preferred.

The first point which we propose to consider is the question of valuation for the purpose of jurisdiction. This point is important. The suit being brought for a declaratory relief the Court-fee paid was at fixed rates, but for the purpose of jurisdiction the plaintiff appellant valued the relief at Rs. 10,000. The defendants respondents asserted that the relief should not be valued at more than Rs. 4 500 The learned Subordinate Judge arrived at the conclusion that Rs 4,500 was a reasonable valuation and accepted it. The plaintiff-appellant, however, has preferred an appeal to this Court on the assertion that the valuation is Rs. 10,000. The point is important because upon its decision must be determined the question of jurisdiction. If the valuation is correctly Rs. 4,500 the appeal lay to the

District Judge and this Court has no jurisdiction. We consider, however, that although the valuation of Rs. 10,000 is excessive, the valuation of Rs, 4,500 is too little. We have examined the evidence upon this point and we consider that there is force in the appellant's contention that as the Rs. 75 rent which has been paid is a favourable rent the market rent must be greater. We do not wish to determine finally the market rent upon the land. It may be necessary for that point to be considered in subsequent matters, but this much we can say with confidence that Rs. 75 is clearly a very favourable rent and that the market rent must be at least Rs. 200. At 30 years' purchase this would come to Rs. 6,000 and we should accordingly put the correct valuation at Rs. 6,000 which is more than Rs. 5,000 and less than Rs. 10,000. We, therefore, have jurisdiction to decide this appeal.

We now come to the only point to be decided at present. Had the plaintiff-appellant a cause of action when he brought this suit? In order to decide this point it is necessary to examine with some care the positions asserted by the two parties. The plaintiff-appellant has not in his plaint definitely stated the position which he assigns to the defendants-respondents, but in the course of argument it was admitted to us that he considered them to be agricultural tenants with no special rights and considered himself to be landlord. The defendants-respondents did not either put their position very clearly but in the course of argument their learned Counsel has informed us that they set themselves up as persons holding land at a favourable rate of rent under a grant and that they acquired the land in perpetuity by a written instrument for valuable consideration.

As the plaintiff-appellant is asserting that the defendants-respondents are his tenants, and the land is agricultural land in Oudh, his only method of recovering possession of the land would be under the provisions of the Oudh Rent Act by ejectment, and he thus has clearly no title to recover this possession through a Civil Court. So in considering what the cause of action is, it must be carefully borne in mind what his remedy can be against the defendants-respondents. It can only be by the issue of a notice of ejectment under the Rent Act the validity of which can be contested in a Rent Court. It is to be observed that that is the remedy that he took. His case is that the cause of action arose owing to certain statements made by defendant-respondent No. 1 in the suit which he brought to contest that notice, and by the fact that he supported those statements by producing the *sanad*. We shall first see what these statements are. They are contained in the second paragraph of the defendants-respondents' plaint. We give their translation :—

"Paragraph 2. The notice is liable to be cancelled for the following grounds :

"(*a*) The plaintiff is not a mere tenant but he is an under-proprietor of the land in dispute along with other land.

"(*b*) The plaintiff holds the land on favourable rent and is not liable to be ejected by notice.

"(*c*) In lieu of the distinguished services of the plaintiff and his family the defendant and his father Sir Rana Sheoraj Singh having taken a large sum as *nazrana*, Sir Rana Sheoraj Singh, *Taluqdar* of Khajurgaon gave a grant of 50 *bighas* 6 *biswansis* land situate in village Seora, *Pargana* and Tahsil Dalmau, District Rae Bareli, to the plaintiff in perpetuity and put him in possession thereof. Sir Rana Sheoraj Singh has also given a written *sanad* to the plaintiff with respect to the same. This grant has been maintained and kept subsisting even by the defendant in his writings and made it binding upon himself; rather this grant was made to the plaintiff by the efforts and on the recommendation of the defendant."

The plaintiff's case is that by making the first statement and producing a *sanad* which is on the record of this case as Ex. A-22, the defendant-respondent No. 1 made an assertion of under-proprietary title which gave him a cause of action to apply for a declaration in the Civil Court that the defendants-respondents have neither proprietary nor under-proprietary rights. In the 8th paragraph of his plaint in the present suit he says : "That the cause of action in respect of this suit accrued within the jurisdiction of the Court of the Subordinate Judge of Rae Bareli on the 17th July 1921, when the defendant produced evidence to prove the *sanad* and the Revenue Court did not pay any heed to the objection of the plaintiff at village Seora, *Pargana* Dalmau." The passage might have been drafted better but we are ready to accept the position taken by the learned Counsel for the plaintiff-appellant on this point. It is undoubtedly the case, as was laid down by their Lordships of the Privy Council in *Mohammad Abul Husan Khan* v. *Prag* (1) that in Oudh the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds, and that the Civil Courts have the exclusive jurisdiction to decide whether or not a person in possession of the land holds a proprietary or under-proprietary right in the lands. But in the use of the word "under-proprietary" their Lordships were referring to the ordinary under-proprietary rights as known to law, and there is a peculiar form of under-proprietary right not coming under such rights which can come into existence when a tenant, holding rent-free land or land at a favourable rent, which is not liable to resumption and which has been acquired in perpetuity by a written instrument and for a valuable consideration, as sued for resumption under the provisions of Ch. VII of Act XXII of 1886 as amended at present (There has not, as a matter of fact, been any important change in this provision of the Act since 1901). The provision is contained in s. 107-H. It is to be remarked that here a person, such as is described in the section who may be called for convenience a *muafidar*—can be called upon by the superior proprietor, when his land is not liable to resumption, to take upon himself the responsibilities of an under-proprietor in the matter of payment of revenue and to have a rent assessed upon him as an under-proprietor. But it is to be noted that such under-proprietary right is created by the Revenue Court when the question of the resumption of such land is brought before it. We are of opinion that the decision of their Lordships of the Privy Council was not intended to have reference to under-proprietary titles created under s. 107-H, for it is obvious that the creation of such under-proprietary titles being in the exclusive jurisdiction of the Revenue Courts, a Civil Court would have no jurisdiction to issue a declaration in respect of such a title. We read para. 2 of the defendants-respondents' plaint in the rent case merely to mean that the defendant-respondent No. 1 having received a notice of ejectment, which treated him as a tenant not having a right of occupancy and not holding under a special agreement or decree of Court, put forward the following position. He said in effect: "We are not tenants having no right of occupancy and not holding under special agreement or decree of Court. We are tenants holding the land on a favourable rent under a grant in writing for consideration. We cannot be ejected as ordinary tenants. At the most the *taluqdar* can apply under s. 107-H to have us declared as under-proprietors holding the under-proprietary right created by s. 107-H and assessed to liability to pay land revenue and rent." That is what we understand the plaint to mean when it asserts that the defendant-respondent No. 1 was an under-proprietor. The production of the *sanad* in respect of this plea was essential towards proving the plea and the interpretation of the *sanad* in respect of this plea was an interpretation which the Revenue Court alone had jurisdiction to make. In order to decide whether the defendant-respondent No. 1 was or was not liable to ejectment the Revenue Court had to construe the *sanad*. What the construction would be is another matter. Thus clearly when the plaintiff-appellant comes into this Court asking for a declaration that the defendants-respondents are neither proprietors nor under-proprietors the reply given to him to the effect that they never asserted that they were proprietors and that they only asserted such under-proprietary rights as could be created under s. 107-H, in other words potential rights in the future and not actual rights in the present, is an unanswerable reply, and shows clearly that the plaintiff-appellant has no cause of action in respect of the statement, however, that statement might have been proved. Further in respect of the *sanad* he has no cause of action either, for the *sanad* has so far only been produced in order to resist the ejectment, and there has been and could have been no constructions by the Revenue Court other than for that purpose. There was nothing to cloud the plaintiff-appellant's title to full proprietary rights and no improper assertion of under-proprietary rights, for the defendants-respondents have never claimed at any time proprietary rights and did not claim such under-proprietary rights as could be determined by a Civil Court. We, therefore, uphold the decision of the learned Subordinate Judge and dismiss this appeal with costs.

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(1) 38 Ind. Cas. 814; 20 O. C 8; 15 A. L. J. 113; 21 M. L. T. 102; 19 Bom. L. R. 202; (1917) M. W. N. 23 & 456; 32 M. L. J. 388; 21 C. W. N. 582; 26 O. L. J. 165; 5 O. L. J. 34 (P. C.).

G. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 222 OF 1925.

March 8, 1926.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth.

MOHSHAM ALI KHAN *alias* ALI KHAN —PLAINTIFF—APPELLANT

versus

MULOO—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appeal by one defendant—Defence common—Reversal of entire decree.

It is open to an Appellate Court to vary the decree appealed against where there is a common defence even in favour of persons who have not appealed but were parties to the suit. [p. 347, col. 2.]

Puran Mal v. *Krant Singh*, 20 A. 8; A. W. N. (1897) 154; 9 Ind. Dec. (N. S.) 365 and *Niaz-ud-din* v. *Abdul Aziz*, 2 Ind. Cas. 552; 31 A. 521; 6 A. L. J. 643, distinguished.

Execution second appeal from a decree of the District Judge, Budaun, dated the 4th December 1924.

Mr. *M. A. Aziz*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—The only question for consideration in this appeal is, whether there is a decree capable of execution as against Mulu. It appears that there was an attempt at house-breaking committed at the house of Mulu in 1919. Two persons were named in the first report made by Mulu at the Police Station, one of whom was Mohsham Ali Khan, the present appellant. Bhawani had accompanied Mulu when he had gone to the Police Station to make that report. Both the persons named in the report were originally convicted, but on appeal Mohsham Ali Khan was acquitted.

The suit which has given rise to this appeal was then brought by Mohsham Ali Khan for damages for malicious prosecution. It was decreed by the Trial Court both against Mulu and Bhawani. Mulu did not appeal. Bhawani filed an appeal making Mohsham Ali Khan alone a party to it. Mulu subsequently appeared before the Appellate Court and asked that his name should be added as a co-appellant, alleging that he had paid Rs. 16 to Bhawani of a joint appeal and that Bhawani had fraudulently kept his name out. Bhawani, however, denied that he had been paid any money. The application was, therefore, rejected.

The Appellate Court then proceeded to hear the appeal and the conclusion at which it arrived was that there was no satisfactory evidence that Mhosham Ali Khan had failed to establish that he had been falsely named through enmity. It allowed the appeal accordingly, and dismissed the suit of Mohsham Ali Khan, and what is more significant, it set aside the judgment and the decree of the Trial Court.

An attempt is now being made by Mohsham Ali Khan to execute the decree which had been given to him by the Trial Court against Mulu. Both the Courts below have refused to entertain his application because they found that there was no subsisting decree capable of execution against him. Order XLI, r. 33 provides that an Appellate Court shall have power to make or pass such decree or order as the case may require, and this power may be exercised by it, notwithstanding that the appeal is as to a part only of the decree and it may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not file any appeal or objections. Mulu was not a party to the appeal but he was a party to the original suit which had given rise to that appeal. Both he and Bhawani filed a joint and common defence. The ground upon which the Appellate Court proceeded to dismiss the suit was a ground common to Bhawani and Mulu, namely, that no sufficient case for damages had been made out. Although Mulu was not a party to the appeal, the Appellate Court passed a decree which had the result of dismissing the suit in its entirety and setting aside the judgment and decree which the Trial Court had passed in the case. It is open to an Appellate Court to vary the decree appealed against, where there is a common defence even in favour of persons who have not appealed but were parties to the suit and that is what the Appellate Court seems to have done when it dismissed the suit and set aside the judgment and decree which the Trial Court had passed and from which one of the defendants, namely, Bhawani alone had appealed.

The learned Counsel for the plaintiff has referred to the decision in *Puran Mul* v. *Krant Singh* (1). That was a case decided under the old C. P. C., and all that was held therein was that, unless the Appellate Court proceeded upon a ground common to all the defendants, a defendant who did not appeal was not entitled to the benefit of a decree framed in favour of the others. Even that case is not an authority for the proposition that where the Appellate Court proceeds upon a ground common to all the defendants and dismisses the suit as against all, the decree passed by the Trial Court against any of the non-appealing defendants can be enforced. A reference has also been made to the decision in *Niaz-ud-din* v. *Abdul Aziz* (2). But in that case the suit had been decreed against one of the defendants and dismissed against the other. An appeal was filed by the defendant against whom the claim was decreed and it was held that since the plaintiff had not appealed, the Appellate Court could not convert the decree of dismissal in favour of the successful defendant into a decree imposing a liability upon him in an appeal filed by the unsuccessful defendant.

The question is really one of interpretation to be placed on the decree passed on appeal. The decree in question here specifically directed that the suit shall stand dismissed and that the decree and judgment of the Trial Court should be set aside. In the face of that direction, the view taken by the Courts below ought to be upheld.

We dismiss the appeal with costs including fees on the higher scale.

R. L *Appeal dismissed.*

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(1) 20 A. 8; A. W. N. (1897) 154; 9 Ind. Dec. (N. S.) 365.

(2) 2 Ind. Cas. 552; 31 A. 521; 6 A. L. J. 643.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2392 OF 1925.
February 8, 1926.
Present:—Mr. Justice Jai Lal.
THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY THROUGH THE AGENT AT BOMBAY—DEFENDANT —APPELLANT
versus
THE FIRM MUL CHAND-SANWAL DAS THROUGH SHEO KARN DAS— PLAINTIFF AND ANOTHER—DEFENDANT — RESPONDENTS.

Punjab Courts Act (VI of 1918), s. 41—Second appeal—Neglect—Finding of fact.

The finding of the lower Appellate Court that there was wilful neglect on the part of the appellant is a finding of fact and cannot be disturbed in second appeal.

Secretary of State for India v. *Charanjit Lal*, 79 Ind. Cas. 428; A. I. R. 1924 Lah. 594; 6 L. L. J. 237, referred to.

Second appeal from a decree of the Additional District Judge, Ferozepore, dated the 13th May 1925, reversing that of the Subordinate Judge, Fourth Class, Muktsar, District Ferozepore, dated the 4th June 1924.

Lala *Jagan Nath Bhandari*, for the Appellant.

Lala *Jagan Nath Aggarwal*, for the Respondents.

JUDGMENT.—The learned District Judge has held that the consignment was booked under Risk Notes A and B and that missing bags were lost somewhere between the Rewari and Hansi Railway Stations, and also that the Railway Administration were guilty of wilful neglect, inasmuch as they did not take such care of the consignment as a prudent person would take in respect of his own property. The neglect consisted in the omission by the Railway Administration to put a lock on the wagon in which the consignment was loaded. In the opinion of the learned Judge it was a case of mere "theft" and not of robbery from a running train because the latter imported the idea of use of force. This view of the learned District Judge is against authority. The word "robbery" as used in the Risk-Note is synonymous with theft, as to the meaning of the term "theft" from a running train, *Secretary of State for India* v. *Charanjit Lal* (1) is an authority in support of the view of the learned Judge. That judgment also is an authority in support of the contention of Counsel for the respondent that the finding of the District Judge that there was wilful neglect was a finding of fact and, therefore, conclusive against the appellant. But for the ruling already cited I would have felt considerable doubt as to the existence of wilful neglect in this case. The authority cited, however, fully covers the case and, therefore, I dismiss this appeal with costs. *Appeal dismissed.*

R. L.

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(1) 79 Ind. Cas. 428; A. I. R. 1924 Lah. 594; 6 L. L. J. 237.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 77 OF 1925.
March 12, 1926.
Present:—Mr. Justice Misra.
LAL JAGDISH BAHADUR SINGH—
PLAINTIFF—APPELLANT
versus
RAGHO RAM—DEFENDANT—
RESPONDENT.

Grove—Plot of land given for planting trees—Landlord's right to re-enter on portion becoming devoid of trees—Grove-holder, status of—Illegal ejectment of grove-holder—Rights of grove-holder.

Where a plot of land has been given to a person to plant a grove thereon, the landlord is not entitled to enter into possession of portions of the grove which have become vacant or to cultivate them himself or to let them for cultivation to others. [p. 350, col. 2.]

Jwala Singh v. *Saheb Din Singh*, 9 O. C. 109 and *Har Sahai* v *Dhanpal Singh*, 32 Ind. Cas. 368; 2 O. L. J. 589, relied on.

Where a grove-holder is ejected illegally by the landlord whether through the Revenue Court or out of Court, a suit for possession by him would clearly lie in the Civil Court. If, after an order of ejectment by the Revenue Court, the grove-holder is able to recover possession or refuses to deliver possession, he is quite justified in his action and if he is subsequently sued in the Civil Court, the decision passed by the Revenue Court does not constitute a bar in his way to plead in the Civil Court that he was a grove-holder and was wrongly ejected by the Revenue Court. [p. 350, col. 2; p. 351, col. 1.]

A grove-holder cannot be considered to be a tenant within the meaning of the said word as defined in s. 3, cl. (10) of the Oudh Rent Act, such a person neither paying rent to the landlord, nor being liable to pay rent to him. [p. 350, col. 2.]

Durga Prasad v. *Ram Charan*, 48 Ind. Cas. 417; 5 O. L. J. 639, followed.

Second appeal against the judgment and decree of the Subordinate Judge, Partabgarh, dated the 14th October 1924, reversing that of the Munsif, Kunda, dated the 18th August 1924.

Mr. *H. D. Chandra*, for the Appellant.

Messrs. *Radha Krishna* and *S. N. Srivastava*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal in a suit for possession brought by him against the defendant on the allegation that the defendant had been ejected from the land in suit through the Revenue Court, but had wrongfully planted new trees which constitute the dispossession of the plaintiff. The land in dispute consisted of three plots Nos. 1506, 1507 and 1508 (recent), situate in village Nariyawan, District Partabgarh.

The defendant contended that the land in suit constituted his old grove which had been planted by his ancestors on land granted to them by the *talaqdar* under an old *shankalap* deed. He also contested the validity of his ejectment through the Revenue Court.

The Trial Court, the learned Munsif of Kunda, found that the plots in suit did not constitute the grove of the defendant and in view of the ejectment proceedings held in the Revenue Court, he held that the defendant was no more entitled to retain possession of the said land. On these findings he decreed the plaintiff's suit and ordered that the defendant should be ejected therefrom.

On appeal the learned Subordinate Judge of Partabgarh took a different view of the matter and held that the plots in suit constituted the defendant's grove and that the proceedings in the Revenue Court were without jurisdiction and on that finding he decreed the defendant's appeal and dismissed the plaintiff's suit.

The plaintiff has now come up to this Court in second appeal and the learned Pleader on his behalf raises two main grounds in appeal. The first point which he argued was that the land in dispute did not any more bear the character of a grove, and the second point was that under the circumstances the decision of the Revenue Court was binding on the parties and the defendant's plea could not, therefore, be maintained.

I will deal with the first point, namely, whether the plots in dispute still retain the character of a grove. It is necessary for me to give my own finding upon this point inasmuch as the finding of the learned Subordinate Judge in appeal in this matter is, in my opinion, rather unsatisfactory. He has not dealt with all the evidence which has a bearing on this point and has not referred in his judgment to much that was relevant and it is on that ground that his finding has been challenged before me in this appeal. I have, in many cases, drawn the attention of the lower Appellate Courts that their judgments should be complete and self-contained and that the result of their writing short and unsatisfactory judgments is that the work of this Court is thereby increased to a great extent.

The evidence on the record shows that the three plots in dispute, namely, plots Nos. 1506, 1507 and 1508 formed part of one plot old No. 708. In the *khasra* of 1300-F. (Ex. A-2) which is the recent settlement *khasra*, plots Nos. 1506, 1507 and 1508 are recorded as corresponding to Nos. 708/1, 708/2 and 708/3 respectively. It is admitted by the parties before me that recent No. 1509 was old No. 708/4. The *patwari* of the village, who was examined in the case on behalf of the plaintiff *taluqdar*, stated in his evidence that at first plots Nos. 1506, 1507, 1508 and 1509 constituted one grove and the trees on these four plots were in possession of the defendant. It is, therefore, quite clear that the three plots in suit are only a portion of a big plot No. 708 which constituted the defendant's grove at the time of the old settlement. It is also clear from the *patwari's* evidence that in 1916 when the ejectment proceedings took place in the Revenue Court there were 5 trees on plot No. 1506, 4 mango trees on plot No. 1507 and 2 mango trees on plot No. 1508. Out of the 5 trees on plot No. 1506, 2 were very old and the rest four years old in 1916. It is also clear from the report of the Commissioner that on plot No. 1509 there were 29 trees, of which 26 were mango trees, 2 *mahwa* and 1 *jamun* and that excepting one *mahwa* tree which appeared to him to be 12 years old the rest of the trees were more than 50 years old. From this it appears that plot No. 1509 cannot by any stretch of imagination be considered to have lost the character of a grove and similarly regarding plots Nos. 1506, 1507 and 1508 which at present contain 11 trees and which originally formed part of a big plot of which 1509 is the major portion, it cannot be said that they have lost the character of a grove. My finding on this point, therefore, is that in the year 1916 when the plaintiff-appellant took ejectment proceedings against the defendant-respondent the plots in suit retained the character of a grove and that the defendant was not liable to ejectment from them.

It was contended by the learned Pleader for the appellant that although these plots of land originally constituted portions of a larger plot yet they were treated as separate plots, having been recorded as such in the village papers and having been brought under cultivation. This may have been, so, but I am not prepared to look upon these three plots in suit as separate from the larger plot No. 1509. It appears to me that the entire plot No. 708 must be taken to have been granted as a whole by the plaintiff's predecessors-in-title to the ancestors of defendant for the purpose of planting a grove thereon and the tenure must stand or fall as a whole. I am supported in this view by two decisions of the late Court of the Judicial Commissioner of Oudh, one by Chamier, A. J. C. in *Jwala Singh* v. *Saheb Din Singh* (1) and the other by Kanhaiya Lal, A. J. C., in *Har Sahai* v. *Dhanpal Singh* (2). These cases lay down the proposition, and in my opinion correctly, that where a plot of land had been given to a person to plant a grove thereon, the landlord was not entitled to enter into possession of portions of the grove which had become vacant or to cultivate them himself or to let them for cultivation to others. The plot must be taken to have been granted as a whole and the tenure must stand or fall as a whole unless some custom or contract is shown to the contrary. The mere fact that a portion of the grove has become devoid of trees does not entitle the landlord to resume that portion of it, in short, there can be no resumption piecemeal. I am aware that in some cases decided by the Board of Revenue, U. P., an opposite view has been taken, but I must confess that I do not consider these cases to have been correctly decided.

The conclusion to which I, therefore, arrive is that the defendant was wrongfully ejected from these plots in suit through the Revenue Court in the year 1916.

It, therefore, remains for me to consider what is the effect of the ejectment proceedings taken by the plaintiff-appellant in the Revenue Court in that year. If the defendant was a grove-holder, as I hold he was, of all these plots in dispute in the year 1916 he could not be, in any way, treated as plaintiff's tenant. It was held in *Durga Prasad* v. *Ram Charan* (3) by Kanhaiya Lal, A. J. C., that a grove-holder could not be considered to be a tenant within the meaning of the said word as defined in s. 3, cl. (10) of the Oudh Rent Act (XXII of 1886) because such a person neither paid rent to the landlord, nor was he liable to pay rent to him. This case was followed by me only recently in *Secretary of State for India* v. *Harcharan Das* (4).

Following these cases I hold that the defendant was not the tenant of the plaintiff and was, therefore, illegally ejected by him through the Revenue Court. If a grove-holder is ejected illegally by the landlord whether through the Revenue Court or out of Court, a suit for possession by him would clearly lie in the Civil Court. In my opinion, therefore, the decision passed by the Revenue Court in the year 1916 does not constitute a bar in the way of the defendant to plead in the Civil Court that he was a grove-holder and was wrongly ejected by the Revenue Court. If he has now been able to recover possession or has refused to deliver possession to the plaintiff he is quite justified in his action. In my opinion, therefore, the plaintiff's suit was rightly dismissed by the Court below.

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(1) 9 O. C. 109.
(2) 32 Ind. Cas. 368; 2 O. L. J. 589.
(3) 48 Ind. Cas. 417; 5 O. L. J. 639.
(4) 91 Ind. Cas. 927; A. I. R. 1926 Oudh 98; 3 O. W. N. 45; 13 O. L. J. 115.

The appeal, therefore, fails and is dismissed with costs.

G. H.
R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 554 OF 1925.
December 17, 1925.
Present:—Mr. Justice Devadoss and
Mr. Justice Wallace.
CHALLA ABBIREDDI AND OTHERS
—PETITIONERS
versus
CHALLA VENKATAREDDI AND ANOTHER
—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 5—Insolvency Court, power of, to review orders—Creditor who has tendered proof of debt, right of, to appeal.

By s. 5, Provincial Insolvency Act, an Insolvency Court is invested with the powers and jurisdiction to review its own orders in circumstances laid down in O. XLVII, C. P. C. [p. 351, col. 2.]

In re Langtry, Ex parte Stevenson, (1894) 1 Manson 169; 63 L. J. Q. B. 570; 10 R. 220; 70 L. T. 736; 42 W. R. 496, *Ex parte Ditton, In re Woods,* (1879) 11 Ch. D. 56; 40 L. T. 297; 27 W. R. 401, *Munnu Lal* v. *Kunj Behari*, 67 Ind. Cas. 317; 44 A. 605; 20 A. L. J. 517; 4 U. P. L. R. (A.) 66; A. I. R. 1922 All. 206 and *Official Receiver of Tanjore* v. *Nataraja Sastrigal*, 72 Ind. Cas. 225; 46 M. 405; 44 M. L. J. 251; (1923) M. W. N. 212; A. I. R. 1923 Mad. 355, relied on.

Arunagiri Mudaliar v. *Kandaswami Mudaliar*, 83 Ind. Cas. 955; 19 L. W. 418; 34 M. L. T. 170; (1924) M. W. N. 331; A. I. R. 1924 Mad. 635, not followed.

A creditor who has tendered proof of his debt is a person aggrieved by an order refusing to review an annulment of an adjudication and is, therefore, entitled to appeal against the order. [p. 352, col. 2.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the District Court, Guntur, dated the 27th January 1925, in O. P. No. 165 of 1924, in I. P. No. 46 of 1920, praying to excuse the delay in filing the said O. P. No. 165 of 1924 to review an order of the said Court annulling an order of adjudication, in I. P. No. 46 of 1920.

Mr. *Ch. Raghava Rao*, for the Petitioners.

Mr. *A. Sundaram Iyer*, for the Respondents.

JUDGMENT.—The first respondent was adjudicated an insolvent in I. P. No. 46 of 1920 on the file of the District Court of Guntur. As he failed to apply for discharge within the time fixed, his adjudication was annulled. The petitioners are some of the creditors and they applied to the District Court to have the order of annulment reviewed. The learned Judge thought that the petitioners had a good case on the merits but declined to grant the review as he thought that he had no power to review an order made in the exercise of insolvency jurisdiction. The petitioners have preferred this revision petition against his order.

Section 5 of the Provincial Insolvency Act V of 1920 says:—

"Subject to the provisions of this Act the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction."

The Court exercising ordinary original civil jurisdiction has power to review its orders. There is no warrant for the proposition that a Civil Court cannot correct its own orders or cannot modify any order which it has passed when it finds that the order is patently wrong. The power of review is inherent in the Civil Court and in what cases it can be exercised is laid down in O. XLVII. When an Insolvency Court has the same powers and follows the same procedure as a Civil Court exercising ordinary original civil jurisdiction it cannot reasonably be contended that the powers to review has been taken away. Under the English Bankruptcy Act the power to review is specifically given *vide* s. 103. Such provision is not specifically enacted in the Provincial Insolvency Act as the Insolvency Court is invested with jurisdiction which an ordinary Civil Court has in the exercise of its original jurisdiction.

This point has been specifically dealt with by Spencer, J., in the *Official Receiver of Tanjore* v. *Nataraja Sastrigal* (1). In

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(1) 72 Ind. Cas. 225; 46 M. 405; 44 M. L. J. 251; (1923) M. W. N. 212; A. I. R. 1923 Mad. 355.

Munnu Lal v. *Kunj Bahadur Lal* (2) a Bench of the Allahabad High Court held that a District Judge was competent to review his judgment in appeal. They observe at page 606:*

"We are content to say that, in our opinion, the District Judge had jurisdiction to review his own order, because s. 5 of the Provincial Insolvency Act V of 1920 gave him, when sitting as an Appellate Court, the same powers under the C. P. C., which he would have had if he had been sitting to hear any ordinary appeal."

In spite of these two rulings the learned Judge thought that the decision in *Arunagiri Mudaliar* v. *Kandaswawi Mudaliar* (3) was against his power to review his own order and he could not, therefore, review it. In *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (3) the question of the power of review of an Insolvency Court was not raised. One of the questions there was whether the time fixed for an application for discharge by the insolvent could be extended or not. Krishnan, J., was of opinion that he could, but Waller, J., thought that the Court had no power to extend the time fixed for an application for discharge by the insolvent and that the provisions of s. 43 were obligatory on the Court to annul the adjudication if an application was not made within the time fixed. It is not necessary to deal with this case in detail as the point raised here did not arise for decision there. If an expression of opinion is necessary, we would be inclined to hold with Krishnan, J., that the Court has power to extend the time for making an application for discharge, provided that the application is made before the order of annulment is made. The case of *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (3) does not decide anything about the power to review an order and the learned District Judge was not right in thinking that that decision stood in the way of granting a review.

The next point is whether the petitioners are persons aggrieved. It has been brought to our notice that at least two of them have tendered their proof. If they have tendered their proof, they are creditors and they are persons aggrieved by the order of the Court annulling adjudication. It was held in *In re Langtry, Ex parte Stevenson* (4) that a creditor who had tendered his proof was a person aggrieved within the meaning of s. 104 of the English Bankruptcy Act. In *Ex parte Ditton, In re Woods* (5) the Court of Appeal held that a person who had not tendered his proof was not entitled to appeal as a person aggrieved. Seeing that two of petitioners have already tendered their proof, they are entitled to maintain this appeal.

The appeal is allowed and the order of the learned Judge is set aside and he is directed to restore the application of the petitioner to file and dispose of it on the merits after taking such evidence as he may think necessary. Costs to abide the result.

V. N. V.

Appeal allowed.

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(2) 67 Ind. Cas. 317; 44 A. 605; 20 A. L. J. 517; 4 U. P. L. R. (A.) 66; A. I. R. 1922 All. 206.

(3) 83 Ind. Cas. 955; 19 L. W. 418; 34 M. L. T. 170; (1924) M. W. N. 331; A. I R. 1924 Mad. 635.

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(4) (1894) 1 Manson 169; 63 L. J. Q. B. 570; 10 R. 220; 72 L. T. 736; 42 W. R. 496.

(5) (1879) 11 Ch. D. 56; 40 L. T. 297; 27 W. R. 401.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 146 OF 1924.

December 4, 1925.

Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

KHETRA MOHAN SAHA AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

SARAT CHANDRA SAHA—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Stay of execution, refusal of—Appeal, if lies.

No appeal lies against an order refusing to stay execution of decree.

Appeal against an order of the Subordinate Judge, Third Court, Mymensingh, dated the 5th of April 1924.

Mr. *Gopal Chandra Dass* and Babu *Bhuban Mohun Saha*, for the Appellants.

JUDGMENT.—As this is an appeal purporting to be against an order which merely refuses to stay execution of a certain decree, there is no appeal under the Code against such an order which is not an order under s. 47, C. P. C.

The appeal is, therefore, dismissed but without cost as there is no appearance on behalf of the respondent.

M. B.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 25 OF 1926.
February 18, 1926.
Present:—Mr. Justice Adami.
SHEO PRASAD AND OTHERS—ACCUSED —PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 417—Taking thumb impression—Offence.

Mere taking thumb impressions on a blank piece of paper may be a preparation to cheat but unless something is written on it, it cannot amount to cheating or attempt to cheat.

Criminal appeal against an order of the Judicial Commissioner, Ranchi, dated the 21st November 1925, affirming that of the Deputy Commissioner, Ranchi, dated the 22nd June 1925.

Messrs. *Rai Guru Saran Prasad* and *S. R. Sen Gupta*, for the Petitioners.

JUDGMENT.—The petitioners Nos. 1 and 2 were convicted in the Trial Court under s. 417 read with s. 511 and sentenced to rigorous imprisonment for three months and a fine of Rs. 50 each; the third petitioner, a Constable, was sentenced to three months' rigorous imprisonment with a fine of Rs. 20 under s. 417 read with s. 114 of the Indian Penal Code. On appeal the convictions under s. 417 read with s. 511 of the first two petitioners have been changed to convictions under s. 417; the conviction of petitioner No. 3 under s. 417 read with s. 114 was maintained. The sentences have been maintained.

The petitioner No. 1 is the landlord of village Narekela and petitioner No. 2 is his relation.

There had been a paddy looting case in the village and the Sub-Inspector, accompanied by the Constable, petitioner No. 3, went to the village in order to take recognizance from certain tenants who were to be witnesses in the case. The Sub-Inspector stayed at the house of petitioner No. 1. The witnesses were called to that house to give recognizance to appear. The Sub-Inspector was sitting in the room, and the first and second petitioners as well as the Constable were also there. Before thumb impressions were taken on the recognizance bonds, it was suggested that it would be well first to test the ink with which the impressions were to be taken. The witnesses were, therefore, called forward to give their sample thumb impressions on a blank piece of paper; one of them refused but the others allowed the Constable to ink their hands and their impressions were taken on the blank piece of paper. The petitioner No. 1 supplied the paper, and after the impressions were put on it, took it away. The next day the witnesses, who had put their thumb impressions on the paper went to their *padre* the Rev. Father Bodson, and told him what had happened and expressed to him a fear that the landlord, with whom their relations were strained, might use the blank piece of paper with the thumb impressions upon it for the purpose of bringing a case against them. The *padre* went to the Police Station and told the Sub-Inspector the fears of the villagers and the Sub-Inspector promised to get the paper back. Next day the Constable, petitioner No. 3 was sent to the village from the Police Station and recovered the blank piece of paper from the petitioner No. 2 and tore away from it the portion containing the thumb impressions. The thumb impressions were taken on the 28th November 1924. Nothing more was done till the 13th February 1925 when the Sub-Divisional Officer of Gumala went on tour to the village. There he was told by the tenants that they were frightened that the petitioner No. 1 might make use of the document on which they had put their thumb impressions. Their statement was taken and was treated as a complaint and proceedings were started against the three petitioners, and they were convicted of an attempt to cheat and, in the case of petitioner No. 3, of an abetment of the offence of cheating.

An appeal was made to the Deputy Commissioner, Ranchi. He held that the facts showed, not an attempt to cheat, but a substantive offence of cheating and altered the convictions accordingly.

The learned Judicial Commissioner was then moved to refer the case to this Court, but he refused, for he found that the Appellate Court had come to the right conclusion in finding that the petitioners had committed the offence of cheating.

The prosecution case was that the petitioners intended from the first to obtain from the tenants thumb impressions on a blank piece of paper by representing to them that the reason for taking the thumb impressions was in order that the ink to be used might be tested, and that their dishonest or fraudulent intention was afterwards to convert the blank piece of paper into some document which they might use against the tenants for their own end.

Both the Courts below have found that the action of the petitioners amounted to more than a preparation for the offence. Evidently the Courts held that the petitioners fraudulently or dishonestly deceived the tenants, and thus intentionally induced them to put their thumb impressions on the blank paper, an action which they would not have taken if they had not been deceived by the petitioners, also that the action, which the tenants were deceived into taking was likely to cause damage or harm to the tenants in body, mind, reputation or property. There can be no doubt that, if the petitioners had this fraudulent or dishonest intention and deceived the tenants and thus induced them to give their thumb impressions, on the wording of s. 415 the offence of cheating would be complete when the action was taken. But there are elements in this case which, to my mind, cannot bring the action of the petitioners under the purview of s. 415. In the first place with regard to the intention, it is assumed that the petitioners intended to convert the blank piece of paper into some written instrument and to use it for their own purpose dishonestly. Had the petitioners gone one step further and made any entry on the blank piece of paper, if they had begun writing the words "I promise," there might have been some good reason for concluding that the intention was to use this paper for dishonest purposes. But in the present case all we have is a blank piece of paper with thumb impressions upon it; there is nothing written on the paper, and that being so, there is hardly sufficient to show a dishonest intention. It is not enough to assume that probably the intention of the petitioners was to convert the blank paper into a written document. Were we to find that the mere presence on the paper of thumb impressions was sufficient to show an intention to use that paper dishonestly, then the hobby of autograph collecting would be a dangerous one.

Then again the Court must be satisfied that the tenants were deceived. One tenant refused to give his thumb impression; the other tenants in their evidence state that they gave their thumb impressions unwillingly. It is clear, I think, that the thumb impressions were given by these tenants not under the impression so much that they were being used as a test, but because the Sub-Inspector and the Constable were present and they were told to put their thumb impressions on the paper. Their action in going to the *padre* next day and telling him what their fears were would point to the fact that they were not deceived. To my mind the elements necessary for constituting the offence of cheating were not all present in the present case. There may have been a preparation to cheat but the action of the petitioners fell short of an attempt at cheating and the substantive offence of cheating. No attempt was ever made to use the blank piece of paper, and, so far as we know, nothing was ever written on it. The petitioners could not even be prosecuted for an attempt at forgery until they had made some entry on the blank paper which would show a stage going further than mere preparation.

The convictions of the petitioners must be set aside and they must be acquitted and set at liberty; the fines, if paid, will be refunded.

R. L. *Convictions set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 294 OF 1926.

March 26, 1926.

Present:—Mr. Justice Broadway.

ABDUL RAHIM—PETITIONER

versus

Musammat AMIR BEGUM—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance—Another's child, maintenance of—Maintenance prior to date of application.

An order directing payment of maintenance for any period prior to the date of application is illegal.

Omree v. *Elahee Buksh*, 5 P. R. 1870 Cr., referred to.

A father is liable for the maintenance of his own child whether legitimate or otherwise but not for the child of another man.

Case reported by the Sessions Judge, Rawalpindi, with his No. 176-G of 13th February 1926.

FACTS.—This case was under s. 488, Cr. P. C., by a wife against her husband for an order of her own maintenance and that of her two children, one daughter of her present husband, the petitioner, and a boy by her former husband. The application under s. 488, Cr. P. C., was filed before the Magistrate on the 7th October 1925.

The defence was that the appellant had been divorced on the 4th July 1925. The Magistrate accepted the plea that the applicant had been divorced on the 4th May 1925 and held that her divorce was communicated to her on the 15th July 1925 and that the applicant with her children had been neglected by her husband from about the middle of October 1924 to about the 14th July 1925 and for this period he granted maintenance to the wife at the rate of Rs. 25 a month and to her two children at the rate of Rs. 10. The second party has filed a revision application on the following grounds :—

1. The Magistrate at the most could award in law maintenance from the date of the application and his order for maintenance for the period prior to the date of the application was illegal.

2. The petitioner was not liable for the maintenance of the boy who was the son of another man.

3. The monthly rate of maintenance is excessive.

Section 488 (2) says that such allowance shall be payable from the date of the order or if so ordered from the date of application for maintenance. According to *Omree* v. *Elahee Buksh* (1) the Magistrate had no power to make an order for payment of any sum for the maintenance for any period prior to the date on which the application for maintenance was lodged. As in this case the application for maintenance was filed in Court on the 7th October 1925 the order of maintenance for a period prior to this date was clearly illegal.

Under s. 488 (1) a father is liable for the maintenance of his legitimate or illegitimate child unable to maintain itself but not for the child of another man. So the order of the Magistrate regarding the maintenance of the boy in this case was also clearly wrong.

The petitioner is bound to maintain his minor daughter *Musammat* Shah Jahan Begum aged 15 months who is with her mother but the Magistrate made no order for her future maintenance. A sum of Rs. 5 per month for her maintenance is not too much because her father, the petitioner, is an Overseer and is drawing Rs. 80 a month.

The proceedings are forwarded to the High Court under s. 488, Cr. P. C. with the recommendation that the order for the maintenance of the divorced wife *Musammat* Amir Begum and her son be quashed and an order for the future maintenance of the minor daughter *Musammat* Shah Jahan Begum at the rate of Rs. 5 a month from the 7th October 1925 be passed against her father Abdul Rahim.

ORDER.—For the reasons given in first order of the reference I set aside the order directing payment of maintenance prior to the date of the application and order that the petitioner Abdul Rahim shall pay to the respondent *Musammat* Amir Begum the sum of Rs. 5 per mensem from the 7th October 1925 for the support of his daughter *Musammat* Shah Jahan Begum.

R. L. *Order set aside.*

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(1) 5 P. R. 1870 Cr.

PATNA HIGH COURT.

CRIMINAL APPEALS NOS. 216 AND 223 OF 1925.

March 3, 1926.

Present:—Mr. Justice Ross and Mr. Justice Kulwant Sahay.

CHANDRA PRASAD AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 409—Detention of money by postal servant against rules—False entries in register and false explanation—Offence.

Detention by a postal servant of monies received by him in his capacity as such through V. P. parcels etc., for several days in violation of the postal rules, coupled with a false explanation that the monies were not received on the days on which they were actually received and false entries in his register showing that the articles were still undelivered in the Post Office, constitutes an offence under s. 409, Penal Code. [p. 357, col. 2; p. 358, col. 1.]

Case-law reviewed.

Criminal appeal from a decision of the Sessions Judge, Darbhanga, dated the 9th of December 1925.

Messrs. *Deoki Prasad Sinha, B. P. Varma, Raghosaran Lal, S. P. Varma, B. N. Mitter, Bhagwan Prasad* and *Kamada Nath Moitra*, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Ross, J.—These are two appeals, one by Chandra Prasad who was Sub-Post Master of Roserah, Sub-Post Office, and the other by Debendranath Ganguly who was a clerk in the same office; against the conviction under s. 409 of the Indian Penal Code. The appellants were charged with criminal breach of trust in their capacities of public servants in respect of three sums of money, namely, Rs. 307-15-0 which was paid for V. P. Letter No. 641 on the 30th of May 1925, Rs. 119-7-0 which was paid for V. P. Letter No. 3 on the 27th of May 1925, and Rs. 303 which was paid on account of insured V. P. Parcel No. 738 on the 23rd of May 1925, these sums not being accounted for until the 9th of June 1925.

The defence of the Sub-Post Master was that the V. P. articles referred to in the charges were all along in the exclusive custody of Debendranath Ganguly and that the money realized for them was never made over to him and he did not know that it was realized before the 9th of June. The defence of Debendranath Ganguly was that the letters and parcel were not delivered to the addressees on the 23rd, 27th and 30th of May, but on the 9th of June.

This latter defence was found to be untrue at the trial where it was conclusively shown that the sums of money referred to in the charges had been paid to the Post Office on the dates specified therein; and in the appeal, this defence was abandoned.

The facts as found by the learned Sessions Judge are no longer disputed. These facts are that V. P. Letter No. 641 was sent by Messrs. H. D. Nandi and Co. of Taltola to a firm in Roserah called Friends and Co. of which the sole proprietor is Lachminarain Purvey. The letter contained the Railway receipt for a bicycle consigned to sender. The letter was despatched on the 25th and arrived at Roserah on the 27th. It was received by Debendranath Ganguly in the usual course and entered by him in the Register of V. P. articles received. He also issued a receipt form on the 27th of May. The money was paid to Debendranath Ganguly by Lachminarain Purvey on the 30th of May 1925; but the V. P. letter appears in the Register in an entry made by Debendranath Ganguly as still undelivered on the 4th of June, and the money-order in respect of this receipt was not issued until the 9th of June.

V. P. Letter No. 3 was sent by Jhallu Sahu Bijadhar Ram of Benares to Bhailal Gobind Lal of Roserah on the 19th of May. It contained the Railway receipt for a bag of German Silver *lotas*. The letter was received on the 21st of May and was registered by Debendranath Ganguly, who also issued the usual receipt form. On the 27th of May Badrilal, the proprietor of the firm, paid Rs. 119-7-0 to Debendranath Ganguly and got delivery of the letter. In this case also the money was not remitted to the sender by Debendranath Ganguly until the 9th of June.

The insured Parcel No. 738 which was said to contain gold-leaf was despatched by S. C. Singh from Strand Road, Calcutta, to Bhailal Gobind Lal at Roserah on the 22nd of May and was received at Roserah on the 23rd and entered as an ordinary value-payable article in the Register by Debendranath Ganguly on that date. He also issued the usual receipt form. The money Rs. 303 was paid by Badrilal on the date of receipt, namely, the 23rd of May to Debendranath Ganguly and the parcel was delivered to him. The parcel was still shown as undelivered on the 1st of June and on the 4th of June by Debendranath Ganguly in his Register and the money was not remitted to the sender until the 9th of June.

The contention, on behalf of the Sub-Post Master, Chandra Prasad, is that as the money was never entrusted to him, he cannot be held guilty of criminal breach of trust. The learned Assistant Government Advocate contended that both the appellants are Post Office servants and both are bound by the terms of their appointment to dispose of the property entrusted to them in accordance with the contract which is implied under the rules. If they are bound by the rules to send money received on account of value-payable articles to the sender on the date of receipt or at the latest on the next day, as the rules provide they violate the contract if they dishonestly retain the money. The duties of the parcels clerk are to receive parcels and deliver them and make over the money received for them to the Post Master. The duty of the Post Master is, as soon as he receives the money to send it to the Cash Office at Samastipur. It is admitted by the learned Assistant Government Advocate that the prosecution has not proved that the money was received by the Post Master; but it is contended that the Post Master wilfully suffered the parcels clerk to dispose of the money in a manner contrary to his legal obligations. He knew of the receipt of the money in the Post Office; and, if he dishonestly omitted to send off the money, he is guilty of criminal breach of trust. It is argued that once the money comes into the Post Office to the knowledge of the Post Master, it is entrusted to him. He has made some of the entries in the Register of value-payable articles received and has also initialled the balance of articles undisposed of. Now it seems to me that on the facts found no charge is proved against the Post Master. He may have been negligent in supervision; and from the fact that the parcels clerk, who was in receipt of a salary of Rs. 74 a month, must have been of almost the same standing in the service as himself, his pay being Rs. 78 a month, it is not unlikely that he exercised insufficient control. But from the mere fact that he made some of the entries in the Register and initialled the daily balance of articles undisposed of, it cannot be inferred that he knew that these monies had been paid. If he had checked the Register with the articles actually in hand, the fraud must have been discovered; but his failure to do this cannot take the place of proof that the money received on account of these articles was entrusted to his care. In the case of the insured article Art. 393 of the Post Office Manual requires that in Sub-Post Offices where the pay of the Sub-Post Master is less than Rs. 100 a month, the duty of examining the insured parcels must be performed by the Sub-Post Master and the undelivered insured parcels must be kept under lock and key in his personal custody. But this rule is not available to the prosecution for two reasons first, the insured article was entered in the Register as an ordinary V. P. article; and, secondly, it was delivered to the addressee on the date of receipt.

There is, in my opinion, no case against Chandra Prasad; and his appeal must be allowed.

The case of Debendranath Ganguly stands on a different footing. Learned Counsel argued on his behalf that accepting the findings, the facts do not amount to an offence under s. 409. They prove that certain sums of money were received on the 23rd, 27th and 30th May and were not transmitted until the 9th of June. But this only amounts to detention of the money and the prosecution must prove that within this priod of detention the money was converted to the appellant's own use; but there is no such finding and there is no evidence to show that the money ever left the Post Office, and the period of detention was so short that it was not safe to presume that the appellant intended to cause wrongful loss or gain. The following decisions were referred to: *R.* v. *Jones* (1) where it was held that the mere fact of not entering the sum of money received was insufficient to support an indictment for embezzlement: although it was observed that had the prisoner denied the receipt of the money, the case might have been different. Archbold in his Criminal Pleading and Practice (6th Edition page 618) refers to this decision and says that it must be taken to be overruled by the contrary decision in *R.* v. *Jackson* (2) where it was held by Coleridge, J., that "where it is the servant's duty to account for and pay over the monies received by him at stated times, his not doing so wilfully is an embezzlement, although he did do not actually deny the receipt of them." The next case was *In re Kuppili Prakasarow* (3). The head-note to that case says that "where the only evidence against the accused, charged with misappropriating a telegraphic money-order, is that the postal account contained entries of delivery on dates different from those on which the actual deliveries were made, that merely creates a suspicion and is not a sufficient proof of misappropriation." The finding was that there was no evidence to show that the sum was misappropriated by the accused and not by the postman. The decision, therefore, went on the facts which are entirely different from the facts of the present case. The next case was *Mathura Prasad* v. *Emperor* (4) where it was held that the detention of money by a servant or clerk for fifteen months after its receipt raises a very serious doubt of *bona fides* against him, but the detention is not conclusive proof of criminal misappropriation or criminal breach of trust. The decision in that case, however, proceeded on the absence of any rules regarding the paying in of money realized, as well as on facts showing that the accused had attempted on various occasions to pay the money, but it had been refused by the Treasurer. Knox, J., observed: "In the present case the estate is a private estate. No attempt has been made on the part of the prosecution to prove that any rule of the estate, or any contract, express or implied, lay between the estate and Mathura Prasad regarding the time and the manner in which all such monies were to be deposited. It is easy to say that they should be deposited without delay, but that must be a matter of proof as much as any other matter of fact in the case." This observation clearly differentiates that case from the present where the rules of the Post Office are definite that the money must be remitted on the day of receipt or at the latest on the following day. Reference was also made to *Ram Bajas Rai* v. *Emperor* (5) but that decision proceeded entirely on the facts which negatived any dishonesty on the part of the accused in retaining certain documents. The last case was *Queen-Empress* v. *Ganpat Tapidas* (6). There money received on account of the Government had been detained for sometime by a revenue patel. He had, however, taken formal receipts for the money from the payees and it was found that the reason for his not immediately paying the money to them was that they were willing to trust him with the money. That decision has, therefore, no application to the present case. The accused Debendranath Ganguly kept these monies which were entrusted to him as a public servant for periods of seventeen, thirteen and ten days in violation of the rules by which he was bound. This in itself raises a case which he has to answer. He gave a false explanation that the monies had not been received until the 9th of June. He also made entries in his Register showing that the articles were still undelivered in the Post Office long after they had been delivered and the money for them had been received. This amounts to a denial of the receipt of the money and is conclusive evidence of criminal breach of trust. In my opinion, therefore, Debendranath Ganguly was properly found guilty of the charges framed against him.

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(1) (1837) 7 C. & P. 833.
(2) (1844) 1 Car. & K. 384.
(3) 26 Ind. Cas. 307; 16 Cr. L. J. 3.
(4) 40 Ind. Cas. 303; 18 Cr. L. J. 455.

The result is that the appeal of Chandra Prasad is allowed and his conviction and sentence are set aside and he is ordered to be acquitted and released from bail. His fine, if paid, will be refunded. The appeal of Debendranath Ganguly is dismissed; and he will surrender to his bail to undergo the rest of his sentence.

Kulwant Sahay, J.—I agree.

R. L. *Conviction set aside.*

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(5) 47 Ind. Cas. 667; 19 Cr. L. J. 943.

(6) 10 B. 256; 5 Ind. Dec. (N. S.) 559.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 2044 OF 1925.

March 19, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice.

FAZAL AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 162—Police diaries, improper use of.

To believe a witness because a perusal of the Police diaries shows that he was examined at earliest opportunity and had made the same statement is to make an improper use of the diaries.

Petition for revision of an order of the Magistrate, First Class, with appellate powers, Lyallpur, dated the 7th December 1925, affirming that of the Magistrate, Second Class, Semundri, District Lyallpur, dated the 29th October 1925.

Lala *Nawal Kishore* for Lala *Ramchand Manchanda*, for the Petitioners.

Lala *J. N. Bhandari*, for Government Advocate, for the Respondent.

JUDGMENT.—The stolen bullocks were undoubtedly found in the hut of one Taju, but there was no evidence to connect Taju with the commission of the crime and the investigating officer was consequently justified in not proceeding with the case against him. Two persons, namely, Fazal and Nura were subsequently prosecuted for the theft of the bullocks, and they have been convicted and sentenced under s. 379, Indian Penal Code.

The judgment of the Appellate Court shows that the conviction rests upon the uncorroborated testimony of only one witness, namely, Turezi. Now, Turezi is related to Taju described as an independent witness. The Appellate Court has believed his evidence because a perusal of the Police diaries satisfied the Court that "this witness was examined at the earliest opportunity and at the very time he had stated that he had seen two persons with Taju along "with the cattle." This is an improper use of the Police diaries, and there can be no doubt that inadmissible evidence should not have been invoked in order to sustain the conviction.

After considering the matter carefully I have reached the conclusion that the guilt of the petitioners has not been established. Accordingly I accept the application for revision and setting aside the convictions and sentences I direct that both the prisoners be released forthwith.

R. L. *Convictions set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 70 OF 1926.

February 25, 1926.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Boys.

YAD RAM—APPELLANT

versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 403—*Autrefois acquit—*Acquittal on charge under ss. 325, 147, Penal Code—Subsequent trial under s. 302, Penal Code.*

Acquittal of an accused under s. 325, 147, Penal Code, by a Magistrate does not bar a subsequent trial of the accused on the same facts for an offence under s. 302, Penal Code. [p. 360, col. 1.]

Sheo Narain Singh v. *Radha Mohan*, 53 Ind. Cas. 618; 42 A. 128; 20 Cr. L. J. 778; 17 A. L. J. 1093; 1 U. P. L. R. (A.) 193 and *Krishna Reddi* v. *Subbamma*, 24 M. 136; 2 Weir 544, referred to.

Criminal appeal from an order of the Sessions Judge, Moradabad, dated the 22nd December 1925.

Mr. *S. C. Goyle*, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This riot case really presents very little difficulty on either the law or the facts. A riot took place at Jalalpur. As usual both sides were sent up, the Police leaving it to the Magistrate to convict both sides if he wished. In Trial No. 24 the accused, the complainants in the present case, were all acquitted. In Trial No. 23 against 17 persons including the present appellant the Magistrate convicted the other sixteen under s 325 read with s. 147 of the Indian Penal Code, and acquitted Yad Ram. We accept for the purpose of the present appeal, that the Police sent the accused up on charges under ss. 147 and 302, it being the fact established beyond doubt that one Mohan who was one of the present complainants' party, was killed in the course of the riot.

The sixteen men appealed to the Court of Session and their conviction was set aside and their commitment ordered on charges including one under s. 302. That case was finally disposed of by the upholding of the conviction of a number of men by this Court including the sentences of several of them to transportation for life. At the conclusion of that case in the Sessions Court the Assessors asked the Judge to record their opinion that in fact the present appellant before us, Yad Ram, ought to have been committed to the Court of Session too, as he was equally guilty with the other accused. As a result of this the District Magistrate ordered the committal of Yad Ram to the Court of Session on a charge of murder. As a result of that commitment Yad Ram has been convicted. The learned Sessions Judge has found the accused guilty under s. 302 of the Indian Penal Code and finding his guilt to be equal with that of Bed Ram, Lekha, Ganga and Dan Sahai, the four men who received the sentence of transportation for life in the previous case, sentenced Yad Ram also to transportation for life, and declined to make any recommendation for the reduction of the sentence. He was further convicted under s. 147 of the Indian Penal Code and sentenced to two years' rigorous imprisonment, which was to run concurrently.

In this Court a legal objection is taken that the accused having been acquitted by a Magistrate on a charge under s. 302, he could not be tried again on a charge under that section until and unless the previous acquittal under s. 302 had been set aside. It is clear that there is no force whatever in this objection. In the proceedings before the Magistrate in which Yad Ram was acquitted there was no "trial" of Yad Ram on a charge under s. 302, nor was he "acquitted" under s. 302. Nor, if the Magistrate had endeavoured to try him and had endeavoured to pass any order of acquittal or conviction under s. 302, would his procedure have been within his jurisdiction. This is such an elementary proposition of law that it is impossible to conceive of any Magistrate regarding himself as "trying" or attempting to "try" a charge of murder. We have seen a certified copy of the Magistrate's order and it is perfectly clear that he did what, holding the view that he did of the case (though that view was quite wrong), he was fully entitled to do, *i. e.*, refrained from framing any charge under s. 302, and proceeded to try the accused before him on charges under ss. 325 and 147. We have said that he was legally entitled to abstain from framing a charge under s. 302. We do not for a moment suggest that the facts justified any such self-restraint. We think that no authority is required for the interpretation which we put upon the law, which is, in our opinion, quite obvious. But if authority be needed it can be looked for in *Sheo Narain Singh* v. *Radha Mohan* (1) and *Krishna Reddi* v. *Subbamma* (2). There can be no doubt, therefore, in our opinion, that the trial on a charge under s. 302 was in no way contrary to any provision of law.

As regards the conviction under s. 147 no objection has been taken before us, but in fact the argument addressed to us in regard to the conviction under s. 302 though it is of no force in regard to s. 302 is a valid argument as regards the conviction under s. 147. In respect of that section there was a charge framed by the Magistrate. There was a trial of the case and there was an acquittal of Yad Ram on that charge, which acquittal has not been set aside by any due process of law.

Coming to the facts it is unnecessary to review them in detail. The whole case was examined when the facts regarding the offences for which the other accused were punished were examined in this Court. On that occasion the evidence for the prosecution as to the main facts of the case was accepted. We, of course, have to examine them minutely and have examined every line of it. We see no reason whatever to disbelieve that evidence. There is the evidence of four or five men clearly establishing that Gokul Singh *lambardar* went to appraise the field of Udmi, that having appraised it in the presence of Udmi he went on to a field of one Chutia about a 100 paces away, that while engaged on that field he and Udmi saw a number of men on the field of Udmi apparently engaged in cutting Udmi's crop. On Udmi going there he was assaulted and Mohan, who was in the close neighbourhood, on going to Udmi's assistance, was assaulted, and he was the man who was killed. On others, including Gokul, Durga and Baldeo arriving, they were in turn assaulted. Mohan was killed and died almost immediately on being taken to his house. Another of the complainants' party, Chutia, who received injuries, died later, his death being probably hastened by the injuries he had received. Others were badly beaten, but we are not really concerned with them in view of the main fact that Mohan was killed practically on the field. We note that Gokul Singh according to the learned Sessions Judge's English record says "Yad Ram was not one of the first to beat me but he joined when they thought Mohan was dead". We have looked at the evidence in vernacular of the witness and that makes it still more clear that what the witness said was that Yad Ram was engaged in beating Mohan while at first others were beating the witness Gokul Singh, but that when Yad Ram thought that Mohan was done for, then he left Mohan and joined those who were assaulting Gokul Singh. In one respect we think that the evidence is even stronger than the learned Sessions Judge's estimate of it. The Judge has remarked that all the witnesses for the prosecution are reliable and have not been shown to have any such enmity against the appellant as would be likely to lead them to implicate him falsely. But he continues "the utmost that has been suggested against any one of them is the fact that in a statement before the Police one Daulat Singh did not admit that he witnesses the assault on Mohan, although he named the accused as taking part in the riot. Even if this one witness did not see the assault upon Mohan, it helps the accused very little".

We think that the worst that could possibly be said against Daulat Singh is that he has spoken of seeing the assault on Mohan because in fact from some little distance he saw an assault taking place, and on running up closer to the spot found Mohan unconscious on the ground, and then in fact saw, from a close distance, later stages of the fight. We see no reason whatever to disbelieve the evidence that Yad Ram with his own hand and *lathi* took a leading part in the assault on Mohan, from injuries committed in the course of which assault Mohan very shortly died. There is not, in our opinion, any doubt that Yad Ram is guilty under s. 302 of the Indian Penal Code in respect of the death of Mohan without any necessity for reference to s. 149 of the Indian Penal Code. In regard to the conviction under s. 147 of the Indian Penal Code we have already given our reason for holding that that conviction should be set aside and we set it aside accordingly. In regard to s. 302 of the Indian Penal Code we maintain the conviction and sentence and dismiss the appeal.

R. L. *Appeal dismissed.*

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(1) 53 Ind. Cas. 618; 42 A. 128; 20 Cr. L. J. 778; 17 A. L. J. 1095; 1 U. P. L. R. (A.) 193.

(2) 24 M. 136; 2 Weir, 544.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 413 OF 1925.
(CRIMINAL REVISION CASE No. 585 OF 1925.)
November 26, 1925.
Present:—Mr. Justice Waller and
Mr. Justice Madhavan Nair.
BERMU CHETTY—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 96, 302, 304—Private defence, plea of—Fatal blows, infliction of.

In the course of a family quarrel between a brother and sister, as to possession of a store room, the sister was roughly handled and on hearing her cry out for help, the husband who was working near about turned up and finding the wife being assaulted by her brother and another and her hands cut and bruised, struck the brother one deadly blow with an *aruval* and on himself being attacked by the other man, dealt another fatal blow to him also :

Held, that the accused had reason to suppose that his wife might be severely injured and the blows struck by him on both the men were in exercise of the right of defence of his wife and himself.

Criminal appeal against an order of the Court of Session of the South Kanara Division, in Case No. 16 of the Calendar for 1925, and case taken up under the orders of the High Court, dated the 26th August 1925, calling on the appellant to show cause why the sentence passed on him should not be enhanced.

Mr. *T. A. Anantha Iyer*, for the Accused.

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.

JUDGMENT.—The appellant has been convicted of offences under ss. 303 and 304 of the Indian Penal Code. There can be no doubt that there was a fight in the course of which he caused the death of two persons and was himself seriously injured. He pleads the right of private defence.

One of the deceased men Sankappa Shetty was the brother of the appellant's wife. There was a dispute about the headship of a family under whom he and she were joint tenants. Sankappa was supporting one candidate, while his sister supported the other. On the day of the occurrence, he wanted paddy for paying his rent, broke out the store room, removed the paddy and put his own lock on the door. When he came back for more paddy, he found another lock on the door, and was told that it was his sister's. On this occasion he was accompanied by Narayana Hegde, the son of the candidate for the headship. When he was preparing to remove the lock, his sister came and held it. There was a struggle between them, in the course of which she called out that she was being killed. At this, the appellant who was working in a shed behind the house, ran up and struck Sankappa one blow with an *aruval* which killed him on the spot. This is the story of Sankappa's death as told by the prosecution witnesses themselves. It is clear that the appellant's wife was roughly handled. Her hands were cut and bruised, evidently with the idea of making her release her hold on the lock. The appellant heard her cry out that she was being killed, and found her being assaulted by certainly one and probably two men. Under the circumstances, we think that his plea should have been accepted. He had reason to suppose that his wife might be seriously injured and he struck one blow in her defence.

As regards the death of Narayana Hegde, it is obvious that the prosecution witnesses have concealed a great part of the truth. They do not attempt to account for the numerous wounds found on the appellant. The probability is that when he felled Sankappa in defence of his wife, he was attacked by Narayana Hedge who was undoubtedly armed. This being so, it is difficult to say that he was not exercising his right of private defence here also.

We set aside the conviction and sentences and direct that the appellant be set at liberty.

V. N. V.

Conviction set aside.

CALCUTTA HIGH COURT.

JURY REFERENCE No. 27 OF 1925.
August 7, 1925.
Present: —Mr. Justice Suhrawardy and
Mr. Justice Panton.
EMPEROR—PROSECUTOR
versus
EKABBOR AND OTHERS—ACCUSED.

Evidence Act (I of 1872), s. 114—Stolen property, possession of—Presumption—Possession, recent—Criminal Procedure Code (Act V of 1898), s. 307—Reference to High Court—Procedure.

In a case of possession of stolen goods no fixed time limit can be laid down to determine whether possession is recent or otherwise. Every case must be judged on its own facts. [p. 363, col. 1.]

If a few stolen articles are found in possession of a person under circumstances which may give rise to the probability of his coming by them honestly some time after the theft the presumption does not arise. [*ibid.*]

In making a reference to the High Court under s. 307 (2), Cr. P. C., the Sessions Judge should not enter his finding on any of the charges but should refer the entire case for consideration. [p. 363, col. 2.]

Reference made by the Assistant Sessions Judge, Pabna.

Mr. *Khondkar*, for the Crown.

JUDGMENT.—This is a Reference under s. 307, Cr. P. C. by the Assistant Sessions Judge of Pabna who was unable to agree with the unanimous verdict of the Jury finding the accused Nos. 2 to 6 guilty under s. 395, Indian Penal Code. With regard to accused No. 1 who was also found guilty under s. 395, the learned Judge has accepted the verdict of the Jury and sentenced him to transportation for life. In respect of the other accused persons the learned Assistant Sessions Judge has made no definite recommendation in referring the case to this Court under s. 307, Cr. P. C. but it seems from a perusal of this letter of reference that he is of opinion that these five accused should be acquitted.

All the six accused were charged under ss. 395, 412 and 120-B, Indian Penal Code. The facts which gave rise to the prosecution are that there were two dacoities committed on the 10th June 1923 in the houses of two persons Prasunno Kumar Guha and Girish Chandra Ghose. There were several other dacoities committed—one on the 21st June and another on the 18th July 1923. But in the present case the accused were charged with committing dacoities on the 10th June and with being found in possession of stated properties which were the subject of those dacoities. On the 14th August 1923 the Police which was deputed to petrol the river and watch the boats passing by, noted in the early hours of the morning a boat going down the stream. It was challenged and the boatmen gave an answer which did not satisfy the Police. They were asked to stop but they did not pay heed to it and adding more force dashed down the stream as quickly as possible. The Police gave chase—the Sub-Inspector following the boat in his boat and the several other Policemen pursuing the fugitives along the bank of the river. These men as they were running along raised a hue and cry and attracted a large number of villagers. After ten miles one of the villagers managed to reach the accused's boat and got into it but was thrown down into the river. One of the villagers then fired and the helmsman having left his charge the boat was secured. All the accused including the present accused persons gave fight and it was after a great deal of struggle that the men on the boat were secured one of whom subsequently died of the wound received in the affray. The boat was searched and a search list was prepared of the articles found on the boat. The persons who had complained of dacoities taking place in their houses were sent for and these articles were identified by them. A large number of articles (Exs. 1-35) were identified by Prasunno Kumar Guha and Girish Chandra Ghose as belonging to them and evidence was given by the prosecution to prove that these articles belonged to these persons and were taken away by the dacoits on the 10th June. On this evidence Jury brought in a verdict of guilty under s. 395 against all the accused persons and acquitted them under the other charges, namely, under ss. 412 and 120-B, Indian Penal Code. The learned Assistant Sessions Judge has been unable to accept the verdict of the Jury on the ground that there is no evidence that these persons took part in the dacoities of the 10th June and he has, therefore, asked us to set aside the verdict of the Jury convicting them under s. 395, Indian Penal Code. We have to see after giving due weight to the opinion of the Judge if the verdict of the Jury is so unreasonable that it ought not to be upheld. The evidence consists of the identification of the articles recovered from the boat and the confessions of accused No. 1, Waris and accused No. 6, Baram *alias* Badulla Bepari. As for the confession of Baram it is not very clear and it is difficult to convict him upon it of the dacoity of the 10th June. Waris in his confession implicates not only himself but accused Nos. 3 and 4, Afza-ud-din Sheikh and Ayez-ud-din Sheikh as being members of the party going to commit the two dacoities of the 10th June. As far as these two accused are concerned, we have the confession of Waris which is corroborated by the fact that the articles which were taken possession of by the dacoits were found in the boat in which these two accused were. Apart from this evidence as against these two accused persons, we have considered the whole evidence in the case against all the five accused whose case has been referred to us by the Judge. The evidence against them principally consists of the finding of these articles in the boat which they were in possession of, and secondly, the fight they set up and the desperate attempt they made to escape when challenged by the Police. This conduct of the accused might have some bearing upon the knowledge of the accused as to the nature of the articles found in their possession. Under s. 114 of the Evidence Act (Illustration A) if a man is found in possession of stolen goods soon after theft he is either a thief or a Receiver of goods knowing them to be stolen, unless he can account for his possession. In the present case the accused have given no sufficient explanation of their possession of those goods. In fact they denied it. It has, therefore, to be considered whether they were found in possession of the goods so soon after the dacoity as to raise the presumption that they were either thieves or receivers of stolen property. The learned Judge in his letter of reference has expressed his opinion that the things having been discovered two months from the date of the dacoities, their possession should not be considered to be recent. No fixed time-limit can be laid down to determine whether possession of articles is recent or otherwise. But every case must be judged on its own facts. If a few stolen articles were found in possession of a person under circumstances which may give rise to the probability of his coming by them honestly some time after the theft the presumption under the law might not arise against him. But in the present case the articles that were recovered from the boat were articles which were the loot of several dacoities the last of which took place on the 18th July 1923. It may not be wrong, therefore, to presume that these persons were out on the errand of committing dacoities all over the place and were still engaged in their occupation when they were arrested. In these circumstances, therefore, we cannot say that the Jury was wrong in holding that the possession of the accused was so recent as to raise the presumption that they were the thieves. There is enough evidence, therefore, to support the verdict of the Jury. We are accordingly of opinion that the verdict of the Jury should be upheld and the accused should be convicted under s. 395, Indian Penal Code.

It is not necessary to consider the verdict of the Jury under s. 412, Indian Penal Code, as they have acquitted the accused of that charge and that verdict has been accepted by the Judge. But we should like to point out that under s. 307, cl. (2) the Judge in referring a case to this Court should not enter his finding on any of the charges but should refer the entire case for the consideration of this Court.

The result is that the Reference is rejected, the verdict of the Jury upheld convicting the accused under s. 395 and each of them sentenced to four years' rigorous imprisonment. If they are on bail they must surrender and serve out their sentence.

M. B.
R. L. *Reference rejected.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 1043 OF 1925.
February 10, 1926.
Present:—Mr. Justice Lindsay.
CHANDAN AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 304, 325—Joint attack by accused with lathis—*Fracture of skull resulting in death—Offence.*

Where the accused in furtherance of a common intention beat a person with *lathis* and one of the blows causes fracture of the skull which results in death, the accused are guilty of an offence under s. 304 and not s. 325, Penal Code, even though it may not be ascertainable as to who dealt the fatal blow. [p. 364, col. 2.]

Barendra Kumar Ghose v. *Emperor*, 85 Ind. Cas. 47; 23 A. L. J. 314; 29 C. W. N. 181; A. I. R. 1925 P. C. 1; (1925) M. W. N. 26; L. R. 6 A. (P. C.) 1; 26 P. L. R. 50; 27 Bom. L R. 148; 6 P. L. T. 169; 41 C. L. J. 240; 48 M. L. J. 543; 1 O. W. N. 935; 1 Pat. L. R. 1 Cr.; 52 C. 197; 26 Cr. L. J. 431 (P. C.), referred to.

Criminal appeal against an order of the Sessions Judge, Muttra, dated the 21st of November 1925.

The Government Pleader, for the Crown.

JUDGMENT.—The three appellants in this case, Chandan, Udai Singh and Bansi, all brothers, have been convicted in the Court of the Sessions Judge of Muttra on charges under s. 325, Indian Penal Code and have been sentenced each to seven years' rigorous imprisonment and fine.

The accused were committed for trial on a charge under s. 304 and, in my opinion, they ought to have been convicted on this charge and not under s. 325.

The case against the accused was that on the 18th of September 1925 they joined in attacking one Kalla *jat* with *lathis* with the result that Kalla received injuries which caused his death on the following day. The medical evidence shows that death was caused by fracture of the skull.

On the morning of the 18th of September these three accused went to the door of Kalla's house where some cattle were ied up. It is said that they loosed the cattle and began to drive them towards the pound at Sadabad. Two brothers of Kalla named Moti and Bhopal heard about this and came and remonstrated with the accused. The accused retorted by saying that they were driving the cattle to the pound because Moti and his brothers had done the same thing to their, (accused's) cattle some eight or ten days before. The accused took the cattle to the pound at Sadabad. Moti and Bhopal followed them and there a report was made to the Police about the wrongful impounding of the cattle. Moti afterwards went to the pound and got the cattle released and handed them over to Bhopal to take back to the village. He himself went off meanwhile to file a complaint before the Honorary Magistrate of Sadabad.

It appears that some of the cattle belonging to Kalla and his brothers had remained behind and could not be taken to the pound along with the other animals. A brother of the accused, a man named Jaswant, remained behind to look after these cattle, and it is said that while doing so Jaswant was assaulted. Jaswant then went to Sadabad where he met the accused Chandan and Udai Singh to whom he related what had happened to himself. Udai Singh and Chandan then came back to the village where they got hold of their brother Bansi, the third accused. They proceeded to attack Kalla and some of his relations. The evidence shows that the conflict between these two parties began with the throwing of brickbats. Kalla and his party were posted on a *chabutra*, whilst the accused were in their fields close by. Eventually Kalla and the others retreated from the *chabutra* whereupon they were pursued by the three accused appellants. Bhopal a brother of Kalla who was present at the time was beaten but managed to make his escape. The three accused fell on Kalla with their *lathis* and knocked him to the ground. A report was made to the Police and Kalla was taken to the hospital where before his death he made a dying declaration which was recorded by a Magistrate and which has been used in evidence against the prisoners. In that statement he described how he had been assaulted by the three accused appellants. Bhopal, one of the men who was attacked by the accused and who escaped gave evidence in support of the prosecution case, and we have also the statements of three witnesses Girdhari, Ganpat and Bidha who are apparently independent witnesses and who all describe the occurrence in the same manner as is done by the witness Bhopal. They all say that the three accused felled Kalla to the ground with their *lathis*. Another witness, Shib Nath, corroborates the evidence of these men in part. He saw something of the preliminary fight during which the parties were throwing missiles at each other but he went away before the *lathi* attack was made upon Kalla.

The defence set up a plea of enmity of which the Judge says there is no proof forthcoming. In the Magistrate's Court they stated that they would account for the manner of Kalla's death when they would be put on their trial before the Sessions Judge. When they came into the Sessions Court, however, their story was that they knew nothing about the death of Kalla. There was some evidence put forward to show that there was enmity between the accused and Moti, the brother of the deceased Kalla, over the purchase of a bullock. The story was that Moti had bought a bullock from the accused for Rs. 100 and had not paid the money. The Judge disbelieved this statement, and there was no reliable evidence to show that any such incident had ever occurred.

The Assessors were all satisfied that the accused were the men who attacked Kalla with *lathis*. The Judge was of opinion that because it could not be ascertained from the evidence which of the accused struck the blow which resulted in the fatal injury, namely, fracture of the skull, none of them could be convicted under s. 304. He refers to a number of cases of this Court in support of this opinion. The law as stated by the learned Sessions Judge is wrong and has been correctly laid down in a recent case decided by their Lordships of the Privy Council [*Barendra Kumar*

Ghose v. *Emperor* (1).] The prisoners ought to have been convicted under s. 304 and I alter the conviction accordingly. I have entertained some doubt as to whether the sentences passed by the Sessions Judge are adequate to the gravity of the crime. On consideration, however, I have decided not to issue notice to the accused-appellants to show cause why those sentences should not be enhanced. They have each received a substantial sentence and on the whole I think the ends of justice are satisfied thereby. I dismiss the appeals.

R. L. *Appeals dismissed.*

(1) 85 Ind. Cas. 47; 23 A. L. J. 314; 29 C. W. N. 181; A. I. R. 1925 P. C. 1; (1925) M. W. N. 26; L. R. 6 A. (P. C.) 1; 26 P. L. R. 50; 27 Bom. L. R. 148; 6 P. L. T. 169: 41 C. L. J. 240; 48 M. L. J. 543; 1 O. W. N. 935; 3 Pat. L. R. 1 Cr.; 52 C. 997; 26 Cr. L. J. 431 (P. C.).

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 921 OF 1925.
March 12, 1926.
Present:—Mr. Justice Fforde.
LABH SINGH —APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 75—One previous conviction—Enhanced sentence.

One previous conviction does not necessarily mean that the convict is a habitual criminal, though a subsequent offence, shortly upon the release from Jail, is certainly a matter which entitles the Trial Court to impose a more severe sentence than would be the case if there has been no other conviction.

Criminal appeal from an order of the Magistrate, First Class, Lahore District, dated the 31st July 1923.

Dr. *Nand Lal*, for the Appellant.

JUDGMENT.—Labh Singh and Mathra Das have been convicted by the First Class Magistrate with s. 30 powers of an offence under s. 457 of the Indian Penal Code. Labh Singh has, under the enhanced provisions of s. 75 of the Indian Penal Code, been sentenced to seven years' rigorous imprisonment with three months' solitary confinement and has further, under s. 565 of the Cr. P. C., been ordered on release to notify his residence for the maximum term of five years. Mathra Das, who appeals through Jail, has been sentenced to two years' rigorous imprisonment with three months' solitary confinement.

The case against both appellants has been amply proved. I need add nothing to the reasons given by the learned Magistrate for coming to his conclusion that the guilt of the appellant has been established.

The only question is that of the sentence upon Labh Singh. It appears that he was previously convicted in 1922 when he received 18 months' rigorous imprisonment. One previous conviction does not necessarily mean that the convict is a habitual criminal, though a subsequent offence, shortly upon release from Jail, is certainly a matter which entitles the Trial Court to impose a more severe sentence than would be the case if there has been no other conviction. I think, however, that the present sentence is, under the circumstances, rather too severe, and I, accordingly reduce it to one of five years' rigorous imprisonment and set aside the order for notification under s. 565 of the Cr. P. C. In other respects both appeals are dismissed.

R. L. *Sentence reduced.*

CALCUTTA HIGH COURT.

JURY REFERENCE NO. 48 OF 1925.
January 29, 1926.
Present:—Mr. Justice Chotzner and
Mr. Justice Mukerji.
EMPEROR—PROSECUTOR
versus
GARIB HARI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 164—Confession, recording of, in Calcutta of offence committed in Mofussil—*Formalities to be observed.*

Where an accused is arrested in Calcutta in pursuance of a request made by the Police at Burdwan who evidently were holding the investigation with regard to the matter under the provisions of Ch. XIV, Cr. P. C., the arrest and production of the accused before a Magistrate at Calcutta for recording of confession must be taken to have been an act done in the process of investigation that was being held and the Magistrate is bound to comply with provisions of s. 164, Cr. P C., in recording the confession. [p. 367, col. 1.]

Where a Magistrate records the accused's confession not in the form prescribed for recording confessions but puts down the gist of the confession in the narrative form without recording the questions put to and answers given by the accused, though both the Magistrate and the accused are *Bengalees*, and does not remember the exact words used by the accused, and the only warning which he gives to the accused is that he asks the accused whether he is willing to make a voluntary confession and that if he makes a confession that might be used against him, and does not inform the accused that he is a Magistrate nor does he put to the accused questions to find out whether the reply which the accused is about to make is a voluntary one, there is no compliance with requirements of law for recording a confession. [p. 366, col. 2.]

Reference made by the Second Additional Sessions Judge, Burdwan, dated the 15th September 1925.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Crown.

Babu *Panchanan Choudhury*, for the Accused.

JUDGMENT.—This is a Refereuce by the Second Additional Sessions Judge of Burdwan under the provisions of s. 307, Cr. P. C. The accused Garib Hari was tried for an offence under s. 304, Indian Penal Code, for having caused the death of one Kiranbala Harini who is said to have been his mistress and to have been in his keeping for a number of years. The prosecution case is that on the day of the alleged occurrence there was a quarrel of some sort between the accused and the deceased and that on account of the provocation which the accused received in the course of the quarrel he struck her with a knife, the result of which was that she died. The Jury brought in a unanimous verdict of not guilty and the learned Judge being of opinion that that verdict should not be accepted but that the accused should be convicted under s. 335, Indian Penal Code, has made this Reference to us.

The learned Judge in his letter of reference has very clearly and carefully set out the different items of evidence upon which the prosecution relied for the purpose of showing that the accused was guilty of the offence. The first item of evidence relates to the confession which the accused is said to have made on the day shortly after his arrest. The accused was arrested about 4 or 4-30 in the afternoon of the 16th April 1925. He was thereafter taken to the Jorasanko *thana* and the Police Officer in charge of that *thana* took him to the residence of an Honorary Presidency Magistrate, Mr. B. N. Mitter, and at his house the confession was recorded. The evidence of the Police Officer is to the effect that at the time when he was so taken the accused was smelling of liquor but that he was not in a drunken state. The confession was not recorded in the form prescribed for recording confessions and it does not contain the questions which were put by the Magistrate to the accused; nor the answers which the accused gave to those questions but the whole confession was put down in a narrative form. The warnings, such as they are said to have been administered to the accused, also do not appear on the record of the confession. The Honorary Magistrate is a *Bengali* gentleman, and the accused spoke in *Bengali* and yet the confession was recorded in English. No explanation also appears to have been given as to why instead of waiting till the next day and producing the accused before a Magistrate who was sitting in Court, the accused was produced before the Honorary Magistrate that very night at his residence and the confession was recorded there. Under these circumstances it is necessary to scrutinise the evidence of the Magistrate with some degree of care in order to find out what he exactly did or whether he did really comply with those formalities which have been from time to time laid down for the guidance of Magistrates in the matter of recording confessions. The Magistrate in the course of his evidence stated that he remembered only the gist of the confession, and that the accused did not say for what time he had been in Police custody. The Magistrate also stated that he does not remember what the exact words were that were used by the accused; nor does he profess to remember the exact questions that were put to the accused or the order in which they were put. The only warning that he gave to the accused appears to have been this that he asked him whether the accused was willing to make a voluntary confession and that if he made a confession that might be used against him. He does not appear to have even informed the accused that he was a Magistrate and he certainly did not put to the accused questions in order to find out whether the confession which the accused was about to make was a voluntary one or not. Under these circumstances it is difficult for us to hold that there was such enquiry as was necessary for the Magistrate to make in order to enable us to form an opinion as to whether the confession was voluntary or not. This is the view that I take of the confession apart from the provisions of s 164, Cr. P. C. But, in my opinion, the learned Magistrate has failed in the present case to record the confession strictly in accordance with the provisions of that section. The accused was arrested in Calcutta in pursuance of a request made by the Police at Burdwan who evidently were holding the investigation with regard to this matter under the provisions of Ch. XIV of the Cr. P. C. The arrest of the accused by the officer of the Calcutta Police and his production by that officer before the Magistrate must be taken to have been an act done in the process of the investigation that was being held; and if that is so, the Magistrate was bound to comply with the provisions of s. 164, Cr. P. C., in the matter of the recording of the confession. Though he may have given the warnings required by the first part of cl. (3) of s. 164, Cr. P. C., he has done nothing which he is bound to do under the latter part of that clause which provides that "no Magistrate shall record any such confession, unless upon questioning the person making it he has reason to believe that it was made voluntarily." It has been urged by the learned Deputy Legal Remembrancer that although there was an investigation which was being held by the Burdwan Police the arrest of the accused and his production before the Magistrate in Calcutta must be considered as something done not in the course of that investigation but apart and quite detached from the investigation that was being so held. I am unable to accept this contention as I think the proper view of the matter is that the officer of the Calcutta Police merely lent his services to the Burdwan Police who were holding the investigation. But assuming for a moment that that was so and that the Police Officer had authority to act in this matter apart from the investigation that was being held by the Police at Burdwan there was no reason whatsoever why the Magistrate who has got to record the confession made by the accused should not comply with those statutory rules which have been embodied in s. 164, Cr. P. C., and why he should not proceed on the lines indicated in that section and in conformity with the Rules and Circular Orders issued by this Court.

On the whole, we are not satisfied that the record of the confession that is before us is one upon which we can act, nor is the record such as would enable us to say in disagreement with the verdict of the Jury that it was a confession made by the accused person voluntarily and that it should be acted upon.

The next item of evidence is the evidence of P. W. No. 2, Gobinda Hari, the son of the deceased. He is the only witness who speaks to the occurrence itself. He is a boy aged 12 and he professes to have been present at the time of the occurrence. He states that he was in the kitchen at the time when there was an altercation between his mother, the deceased, and the accused on the *verandah* adjoining the kitchen and that in that altercation the accused inflicted the injury upon his mother. In cross-examination, however, he stated that he did not see the actual stabbing and he did not notice how many times the accused struck his mother, and he stated also that it was quite dark at the time. The evidence of this witness is practically all the evidence that we have on the record as to the actual occurrence. Having regard to the statement made by this witness in his cross-examination to which I have referred I am not of opinion that the evidence is so very convincing that it should be right for us dealing with this case under the provisions of s. 307, Cr. P. C., to accept it as conclusive in view of the fact that the Jury evidently were of opinion that it was not sufficient to fix the guilt upon the accused.

The third item of evidence referred to by the learned Judge relates to the evidence of certain witnesses who spoke to the fact that shortly after the occurrence P. W. No. 2, Gobinda told them that he was an eye-witness to the occurrence and that the accused had inflicted the injury upon his mother. Having regard to what I have said as to the value of the evidence of Gobinda himself I do not think that the third item of evidence even if it be accepted as true, carries the case very far.

The last item of evidence is that of the P. W. Nos. 6 and 11 who say that on the day of the alleged occurrence and shortly before it took place the accused was seen in the village where the occurrence took place. This no doubt is a piece of circumstantial evidence but if we are not prepared to rely on the confession of the accused and if we are not satisfied with the evidence of Gobinda, it cannot be said that the mere fact that the accused was seen in the village where the occurrence took place short ly before the time of the occurrence is a fact upon which the conviction of the accused can possibly be founded.

There are certain other matters which present some difficulty to us, though perhaps if we were to deal with the case independently of the verdict of the Jury we might not regard them very seriously. Though the injury was inflicted on the *verandah* of the kitchen the deceased was found lying with the knife beside her at no less a distance than 130 feet from that place. It may be that she ran after the assault and was chased by her assailant who dropped the knife when she fell, or it may be that she ran with the knife sticking on to her and then she pulled out and threw the knife and herself fell. But these are mere theories, for there is no evidence on the point, and indeed we do not know whether it was possible for her to run this distance after the injury she had received. The learned Deputy Legal Remembrancer has argued on the presence of blood in the *verandah* and the fact that there were blood spots on the cloth which the accused was wearing at the time of his arrest. So far as the presence of blood on the *verandah* is concerned that only goes to show, if that evidence is accepted, that the occurrence took place there, and as regards the presence of blood on the cloth which the accused was wearing at the time of his arrest the chemical examiner's report is to the effect that although blood spots were found on the cloth, the origin of the blood could not be determined.

The evidence on the record is not of a very convincing character and we are of opinion that in this case we should not be justified in interfering with the unanimous verdict of the Jury. The Reference is accordingly discharged, the verdict of the Jury upheld and the accused Garib Hari is acquitted and directed to be set at liberty.

R. L. *Accused acquitted.*

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 93 OF 1926.
March 26, 1926.
Present:—Mr. Justice Broadway.
EMPEROR—PETITIONER
versus
HOSHIARA—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 562—Accused above 21 years—Benefit of section—Revision, interference in.

In case of an accused not under 21 years of age s. 562, Cr. P. C., is only applicable when the accused is convicted of an offence punishable with the imprisonment for not more than seven years.

The High Court is not bound to interfere on its revision side with an order under s. 562 even when it is illegal.

Abdul v. *Emperor*, 6 Ind. Cas. 639; 16 P. W. R. 1910 Cr.; 11 Cr. L. J. 389 and *Ala Dya* v. *Emperor*, 5 P. R. 1906 Cr.; 4 Cr. L. J. 75; 116 P. L. R. 1907, followed.

Case reported by the Sessions Judge, Karnal.

FACTS.—Hoshiara accused was challaned under s. 457, Indian Penal Code, for breaking into the shop of Gandhela, complainant, at night and has been convicted by the Bench of Honorary Magistrates at Panipat under s. 457, Indian Penal Code, and released on probation of good conduct under s. 562, Cr. P. C., on a small bail of Rs. 100 for the short period of four months.

GROUNDS.—Accused is aged over twenty-one years. He gave his age as twenty-two in the lower Court. Section 562, Cr. P. C., is only applicable (in cases of persons not under twenty-one) when an accused is convicted of an offence punishable with imprisonment for not more than seven years. House-breaking by night with intent to commit theft is punishable under s. 457, Indian Penal Code with 14 years' imprisonment. The order passed by the Magistrate is, therefore, illegal. It is recommended that the order may be set aside and the accused sentenced to whipping or a substantive term of imprisonment.

Lala *Parkash Chand*, for the Respondent.

ORDER.—It is clear that the order under s. 562, Cr. P. C., is illegal. The question is whether sitting as a Court of Revision I am bound to interfere and if not, whether I ought to interfere. In *Abdul* v. *Emperor* (1) Johnstone, J., refused to interfere in a case which was practically on all fours with the present. Sitting as a Court of Revision I am not bound to interfere even when an order is illegal. [*Ala Dya* v. *King-Emperor* (2).] And in the present case I do not feel called on to do more than record the fact that the order is illegal and draw the attention of the Trial Court to the illegality.

R. L. *Order accordingly.*

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(1) 6 Ind. Cas. 639; 19 P. W. R. 1910 Cr.; 11 Cr. L. J. 389.

(2) 5 P. R. 1906 Cr.; 4 Cr. L. J. 75; 116 P. L. R. 1907.

OUDH CHIEF COURT.

SECOND RENT APPEAL No. 21 OF 1925.
March 6, 1926.
Present:—Mr. Justice Misra.
B. BADRI BISHAL SINGH—PLAINTIFF—APPELLANT
versus
RAM AUTAR—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 127—Suit for rent—Person taking possession for cultivation—Section whether applicable to person realising rent from tenants.

Section 127 of the Oudh Rent Act is intended to cover the case of a person who has actually taken possession of the land for the purpose of cultivation and does not cover the case of a person who has merely realized the rent of the land, which originally belonged to him but has subsequently ceased to be his property, and who has thus caused the dispossession of the person to whom the land now belongs. [p. 370, col 1.]

Suraj Bali v. *Govinda*, 26 Ind. Cas. 904; 1 O. L. J. 701, *Sheo Piyarey Lal* v. *Aughar*, 4 Unpub. Dec. of the Board of Rev. 617 and *Kamta Prasad* v. *Panna Lal*, 18 Ind. Cas. 575; 11 A. L. J. 29; 35 A. 123, referred to.

Second rent appeal against a decree of the District Judge, Fyzabad, dated the 21st November 1924, setting aside that of the Assistant Collector, First Class, Sultanpur, dated the 22nd September 1924.

Mr. *Hyder Husain*, for the Appellant.

Mr. *R. D. Sinha*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal in a suit for arrears of rent under s. 127 of the Oudh Rent Act (XXII of 1886). The facts are to the effect that the plots in dispute regarding which the rent is claimed by the plaintiff, appertain to an under-proprietary *mahal* named Pura Bachchil, belonging to village Aidhi, District Sultanpur, the said village being situate within the *taluqdari* of the plaintiff. The said *mahal* consisted of a large area out of which one Kunj Behari was the owner to the extent of 14 *bighas* 2 *biswas* 16 *biswansis*. The defendant, Ram Autar, was also a co-sharer in the said *mahal*. Kunj Behari sold his under-proprietary holding to the plaintiff, Badri Bishal Singh, but soon after the sale the defendant, Ram Autar, instituted a suit for pre-emption against the plaintiff and got a decree in respect of the property sold. Subsequently in the year 1916 the plaintiff in execution of a decree held by him against the defendant, purchased the land in suit along with other property with which we are not, in any way, concerned in this appeal. The defendant did not deliver possession of the land in suit to the plaintiff in spite of his purchase but continued to realize rent himself from the tenants who cultivated the land in suit. An attempt was made by the defendant in the Rent Court to get ex-proprietary rights in this land but that Court rejected his claim by an order dated the 3rd July 1923 passed by Mr. Farid ud-din Ahmad, the Sub-Divisional Officer. The said order was upheld in appeal by Mr. Mudie, the Deputy Commissioner of Sultanpur, by his order, dated the 27th September 1923. He ordered that Ram Autar having no right in the land in suit his name should be removed as an ex-proprietary tenant and names of actual cultivators should be entered as statutory tenants of the said land. Armed with this order the plaintiff brought the present suit for arrears of rent under s. 127 of the Oudh Rent Act, as stated above, on the 11th December 1923.

The defendant contended *inter alia* that the suit under the aforesaid section was not maintainable and contested the right of the plaintiff to claim rent from him. It is not necessary to state in detail the various pleas taken by him in defence as they are not necessary for purposes of this appeal. The suit was tried and decreed by Mr. N. N. Chakarvarti, Assistant Collector, First Class, Sultanpur, by his decision dated the 22nd of September 1924. The defendant appealed to the learned District Judge of Fyzabad who, by his decree dated the 21st November 1924, allowed the defendant's appeal and dismissed the plaintiff's suit.

At the outset I may state that the case has been tried most unsatisfactorily by the learned Assistant Collector. Trials of rent cases by Assistant Collectors are usually unsatisfactory and this case is not an exception to the usual rule. I find that the learned Assistant Collector, who tried this case, instead of recording proceeding separately took down the statement of the *patwari* on the back of the plaint, as is usually done in a criminal case, and that the issues fixed in the case instead of being recorded separately in English proceedings were recorded by him on the back of the written statement. Besides this I find that the case has not been approached from the correct point of view. The issues fixed in the case were several, but the real issue whether the plaintiff could claim rent in respect of the land in suit under s. 127 of the Oudh Rent Act, was never framed.

The plaintiff has now come up to this Court in second appeal and looking to the enormous delay that has already occurred in the disposal of this case I have taken the trouble of going through the entire record and finding out the facts to see how far the plaintiff's suit was maintainable. After doing so I have come to the conclusion that the suit is not maintainable.

It is clear from the facts stated above that the suit was brought by the plaintiff for arrears of rent, under s. 127 of the Oudh Rent Act, as stated above in respect of the land which he had purchased at an auction-sale in execution of his decree against the defendant. It is also clear from Mr. Mudie's order, referred to above, that the plots in suit were in occupation of the tenants and that the defendant merely realized rent from them. In my opinion s. 127 was not intended to cover such a case. Section 127 of the Oudh Rent Act runs as follows:—

"(1) A person *taking or retaining possession* of land without being entitled to such possession may, at the option of the person entitled to eject him as a trespasser, be treated as a tenant, and shall thereupon be liable for the rent of that land...at such rate as the Court may determine to be fair and equitable, and he shall not in respect of that land have any of the statutory privileges conferred by this Act."

"(2) When a Court passes a decree for arrears of rent under sub-s. (1) read with cl. (2) of s. 108, it shall, on the application of the plaintiff, also pass a decree for *ejectment* of the defendant from the land."

I have underlined (*italicised*) the words "taking or retaining possession" and "ejectment" in order to show what the actual intention of the Legislature was. On my reading of the section, it appears to me that the section was intended to cover the case of a person who has actually taken possession of the land for the purpose of cultivation. It was not intended to cover the case of a person who had merely realized rent of the land which had originally belonged to him but subsequently ceased to be his property and who had thus caused the dispossession of the person to whom the land now belonged In *Suraj Bali* v. *Govinda* (1) a case decided by the Board of Revenue, United Provinces, it was held by Sir Duncan Baillie that such a suit was not maintainable in the Rent Courts under the provisions of s. 127 of the Oudh Rent Act. In that case a person had got a decree from the Civil Court against a *lambardar* for possession of some land and the Civil Court directed him to claim mesne profits through the Revenue Courts. The *lambardar*, even after the decree had been passed against him, continued to collect rents from the tenants in actual possession of the land. The decree-holder thereupon issued a notice of ejectment against the *lambardar* treating him as his tenant under s. 127 of the said Act. It was held that s. 127 was not applicable to the case and that the remedy of the decree-holder lay in the Civil Courts, and the notice of ejectment was, on that view of the case, cancelled. In a subsequent case the Board of Revenue held that s. 127 was applicable also in the case of a person who had taken possession of the land without the consent of the landlord but had not actually cultivated it but had allowed it to lie fallow, *vide Sheo Piyarey Lal* v *Aughar* (2). I am also supported in this view by a decision of the Allahabad High Court in *Kamta Prasad* v. *Panna Lal* (3). That case dealt with s. 34 of the Agra Tenancy (Act II of 1901). In that case Sir Henry Richards, KT., C. J., and Tudball, J., observed that s. 34 of the Agra Tenancy Act was intended to apply to the case of a person taking possession for the purpose of cultivating the land as a tenant without the consent of the landholder. It is clear in the present case, that the land is in occupation of tenants and not in that of the defendant. He cannot, therefore be said to have taken possession or retained possession in the sense in which these words are used in s. 127 of the Oudh Rent Act.

It has also been brought to my notice that the plaintiff appellant subsequent to the dismissal of his suit by the learned District Judge of Fyzabad, brought a suit for profits against the defendant. A certificated copy of the plaint in that suit has been filed before me, which is admitted by the other side as correct. In para. 5 of the plaint, the plaintiff has clearly stated that the defendant being an influential man had realized the rent and spent the sum so realized for his own benefit. In my opinion these allegations show clearly that the defendant cannot be sued under s. 127 of the Oudh Rent Act, and that the plaintiff appellant has chosen his proper remedy by instituting a suit for profits in respect of the land in suit against the defendant who is alleged to be the perpetual lessee of the other lands situate in the aforesaid under-proprietary *mahal.*

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(1) 26 Ind. Cas. 904; 1 O. L. J. 701.

(2) 4 Unpub. Dec. of the Board of Rev. 617.

(3) 18 Ind. Cas. 575; 11 A. L. J. 29 35 A. 123.

In my opinion, therefore, the suit was rightly dismissed by the Court below and I dismiss the appeal with costs.

G. H. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No 702 OF 1925.
February 2, 1926.
Present:—Mr. Lobo, A. J. C.
RAMESHWERDAS BENARASIDAS—
PLAINTIFFS.
versus
NEW JOORIA BAZAR SUGAR COY.—
DEFENDANTS.

Contract Act (IX of 1872), ss. 28, 30, 251, 263—Evidence Act (I of 1872), s. 92—Agreement to abide by decision in another matter, validity of—Partnership, dissolution of—Rights and obligations of partners—Oral evidence, admissibility of, to prove consideration—Wagering contract, definition of.

An agreement to abide by the decision in certain appeal in cognate matters pending in Court between third parties and pay and receive damages according to the rate fixed by the decision in the said appeal and not to raise any question as to breach of contract or any other contention and to treat the agreement as a new arrangement giving rise to a fresh cause of action, is neither without consideration nor illegal nor opposed to public policy and can be legally enforced. [p. 372, col. 1.]

Coringa Oil Co., Ltd. v. *Koegler*, 1 C. 466; 1 Ind. Jur. 170; 1 Ind. Dec. (N. S.) 291, *Mulji Tejsey* v. *Ransey Devraj*, 3 Ind. Cas. 837; 31 B. 13; 11 Bom. L. R. 273, *Burla Ranga Reddi* v. *Kalapalli Sithaya*, 6 M. 368; 2 Ind. Dec. (N. S.) 536, *Raja of Venkatagiri* v. *Vemuru Chinta Reddi*, 15 Ind. Cas. 378; 37 M. 408; 11 M. L. T 209; (1912) M. W. N. 393; 22 M. L. J. 447, *Seumal Nihalchand* v. *Pursomal*, 19 Ind. Cas. 450; 6 S. L R. 166, *Naraindas* v. *Kewalram*, 42 Ind. Cas. 706; 11 S. L. R. 43, *Kaluram* v. *Ram Dayal*, 3 Ind. Cas. 55; 5 N. L. R. 107, *Vithoba* v *Sitaram*, 65 Ind. Cas. 324; 19 N. L. R. 21; A. I. R. 1923 Nag. 291, *Cooper* v. *Willis*, (1906) 22 T. L. R. 522 and *Walter Mitchel* v. *A. K. Tennent*, 90 Ind. Cas. 59; C. 677; A. I. R. 1925 Cal 1007, distinguished.

Munshi Amir Ali v. *Maharani Inderjit Koer*, 9 B. L. R. 460; 14 M. I. A. 203; 2 Suth. P. C. J. 479; 2 Sar. P. C. J. 731; 20 E. R. 763, *Anant Das* v. *Ashburner & Co.*, 1 A. 267; 1 Ind. Dec. (N. S.) 181 and *Carlill* v. *Carbolic Smoke Ball Co.*, (1892) 2 Q. B. 484; 61 L. J. Q. B. 696; 56 J. P. 665, relied upon.

Under ss. 251 and 263 of the Contract Act after dissolution of partnership the rights and obligations of partners continue in all things necessary for winding up the business of the partnership. [p 373, col. 2; p. 374, col. 1.]

Under s. 92 of the Evidence Act oral evidence is admissible to determine what the consideration for an agreement in writing was. [p. 374, col. 1.]

A wagering contract is one where two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependant upon the determination of that event, one shall win from the other and that other shall pay or hand over to him a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he shall so win or lose, there being no other real consideration for the making of such contract by either of the parties. [p. 376, col. 2.]

Carlill v. *Carbolic Smoke Ball Co.*, (1892) 2 Q. B. 484; 61 L. J. Q. B. 696; 56 J. P. 665, followed.

Mr. *Kimatrai Bhojraj*, for the Plaintiffs.

Mr. *Khanchand Gopaldas*, for the Defendants.

JUDGMENT.—In 1921 a considerable amount of business known as 'Golo' business was done in Karachi in white Java sugar of June 1921 *vaida* godown delivery. The parties to these transactions acted really as principals and the transactions were on the *pukka adatia* system. After June 1921 disputes arose in the *bazar* relating to these transactions between sellers and buyers. The buyers generally contended that the sellers had committed breach of contract; that the due date in respect of the June *vaida* was 25th or 26th June; that the market rate on due date was Rs. 35-0 per cwt, and that they were entitled to damages on the basis of that rate The sellers on the other hand contended that the breach of contract was on the part of the purchasers, that the due date for the *vaida* was the last day of the month, and that the rate on such due date was something like Rs. 23-8 per cwt.

Litigation followed and about the first suit filed in respect of these transactions of June 1921 *vaida* was suit 134 of 1922 of this Court. The plaintiffs in that suit were the firm of Jetha Devji, purchasers, the defendants being the Joria Bazar Sugar Co., in which Jetha Kallianji was the principal partner. The Joria Bazar Sugar Co., replied by filing a counter suit No. 389 of 1922 against the firm of Jetha Devji. The contentions of the purchasers in these suits were that the breach of contract was on the part of the sellers, that 25th or 26th June was the due date, that the market rate on such due date was Rs. 35-0 per cwt., and that they were entitled to a decree for damages on the basis of that rate. The sellers in these suits contended that the purchasers were guilty of breach of contract, that 30th June was the due date and that the rate on the due date was Rs. 23-8 per cwt. The two suits came to be regarded by dealers who had entered into Golo contracts of June 1921 *vaida* as test suits, The suits were tried by Aston, A. J. C., who in February 1924 decided that the breach was on the part of the sellers, that 25th or 26th June was the due date of the *vaida*, that the rate on such due date was Rs. 31 10. On these findings Suit No. 134 of 1922 was decreed in favour of the plaintiffs and Suit No. 389 of 1922 was dismissed.

Some time later the parties in the above test suits appealed from the decision of Aston, A. J. C., Jetha Devji's appeal being First Appeal No. 35 of 1924, and that of the Joria Bazar Sugar Co., being First Appeal No. 36 of 1924.

The plaintiffs in this suit had entered both as purchasers and sellers into Golo contracts for white Java sugar of June 1921 *vaida*. *Inter alia* they had purchased from the defendants 175 bags of this *vaida* at rates ranging between Rs. 26·2 and Rs. 27-8 per cwt. Till the decision of the test suits referred to above, the plaintiffs had filed no suits in respect of their purchases of sugar of June 1921 *vaida*. Their period of limitation for filing such suits was to expire in June 1924. On 16th June 1924 the plaintiffs and the defendants in this suit executed an agreement which is Ex. 5 in this case. This agreement after reciting the facts relating to the test suits referred to above, states that the parties thereto agree to abide by the decision in Appeals Nos. 35 and 36 of 1924, that the parties will in accordance with the said decision of the appeals pay and receive damages according to the rate fixed by the decision and that they shall not raise any question as to breach or any other contention. The agreement refers to the contracts between the parties for 175 bags of June 1921 *vaida* and states that it is an arrangement which is to operate as a new arrangement and/or new agreement giving rise to a fresh cause of action.

Having secured the execution of Ex. 5 by the defendants, the plaintiffs desisted from filing suits against the defendants in respect of their contracts for sugar of June 1921 *vaida*.

First Appeals Nos. 35 and 36 of 1924 were disposed of on 21st August 1925. Appeal No. 36 arising out of Suit No. 389 of 1922 was dismissed with costs. In Appeal No. 35 of 1924 arising out of suit No. 134 of 1922 the rate fixed by the Appellate Court was Rs. 30·8 per cwt.

Thereupon the plaintiffs called upon the defendants for payment of Rs. 1,068-10-6 as damages on the above recited contracts for 175 bags on the basis of the decision of the Appellate Court and under the agreement, Ex. 5. The defendants having refused to pay the amount the plaintiffs instituted the present suit, based on the agreement, Ex. 5.

The main defence raised by the defendants to this suit is contained in para. 6 of their written statement. Therein they contend that the agreement, Ex. 5, is not valid and binding as it was signed by the defendant No. 1, Jethalal Kallianji, after the defendants firm had, to the knowledge of the plaintiffs, been dissolved. They further contend that the agreement, Ex. 5, is void as being without consideration. By an amendment of their written statement which was allowed by me, they have further pleaded in amended para. 6 of their written statement that the agreement, Ex. 5, is void as being against law and public policy and by way of wager.

Issues were framed on 10th November, 1925. By consent of the parties I have tried Issues Nos. 3, 6 and 7 as preliminary issues, as obviously if these issues are decided in favour of the plaintiffs, the suit will be disposed of.

Issue No. 3 is: "Is the agreement referred to in para. 4 of the plaint for consideration and binding on the defendants for reasons given in para. 6 of the written statement?"

Issue No. 6 is: "If the agreement referred to in para. 4 of the plaint is valid and binding, can the defendants be permitted to raise the pleas involved in Issues Nos. 4 and 5?

The seventh is the general issue.

Before dealing with the legal arguments addressed to me on the various legal points involved in Issue No. 3 it is necessary to have a clear idea of the facts and circumstances attending the execution of Ex. 5 which is the basis of this suit.

As I have stated above, the test suits in these Golo transactions were disposed of by Aston, A. J. C., in February 1924. The proprietor of the plaintiffs Benarsidas Bhagwandas was in Karachi at the time, but as he states, left soon after for his native place. The fact has not been denied. Banarsidas returned at the end of May or in early June 1924, and there can be no doubt that the object of his return to Karachi was to take action in respect of the Golo transactions in which his firm was concerned as purchasers. He states that he approached Jethalal of the defendants firm for payment of his due on the basis of the judgment in the test suits. He states he was on friendly terms with Jethalal, and unwilling, therefore, to file suits against him in respect of the transactions in question. According to Benarsidas he proposed to Jethalal that it would be unnecessary waste of money to file suits against Jethalal's firm in view of the decision of Aston, A. J. C., and of the fact that an appeal was pending against that decision and proposed to Jethalal that an agreement might be come to under which his firm and Jethalal's firm should pay or receive damages according to the decision of the High Court on the appeal in the test suits. He states that Jethalal said he would consider the matter. Mr. Kalumal who has been examined as a witness states that after the decision in the test suits Benarsidas came to him and requested him to file suits against Jethalal's firm in respect of his contracts of purchase from Jethalal's firm of sugar of June 1921 *vaida*. Mr. Kalumal, according to his evidence, was unwilling to do this for more reasons than one. In the first place his position was awkward because both Benarsidas and Jethalal were his standing clients. In the second place, he had appeared for Jethalal's firm in the test suits tried by Aston, A. J. C., and it was awkward for him in these circumstances to espouse the cause of Benarsidas who stood in the same position as Jetha Devji stood in the test suits He, therefore, according to his evidence, took the opportunity when both Benarsidas and Jethlal were in his office to advise them not to go to Court in respect of their contracts but to execute an agreement that both parties would be bound by the decision of the Appellate Court in the test suits. There seems little doubt that this must have occurred after Benarsidas had returned from his native place in May or June 1921.

Jethalal, who has given evidence in this case, denies the negotiations referred to by Benarsidas which led to the execution of Ex. 5. Having regard, however, to the circumstances of the case I feel that Benarsidas' version of what led to the execution of Ex. 5 is true and can well be relied on. Both parties accepted the advise of Mr. Kalumal; Ex 5 was drafted and after some alteration, finally executed on 16th June 1924.

These are my findings with regard to the facts and circumstances attending the execution of Ex 5, and, in my opinion, they are well justified on the evidence of Benarsidas, Ex. 6, of Mr. Kalumal, Ex. 9 and of Jethalal Ex. 13.

I will now deal with the various legal points involved in para. 6 of the written statement of the defendants, and covered by Issue No. 3 in the case.

The first contention is that Ex. 5 having been signed by Jethalal alone after the defendants firm had, to the knowledge of the plaintiffs, been dissolved, it is not valid and binding on the defendants.

Jethalal has given evidence that he and Moosa Usman carried on business in the name and style of the Joria Bazar Sugar Co., till 31st May or 1st June 1924 when they dissolved the partnership; that thereafter he alone carried on business in the name and style of the New Joria Bazar Sugar Co. Jethalal alleges that Benarsidas was aware of the dissolution and relies on the fact that prior to 31st May 1924 the form of acceptance letters used by the Joria Bazar Sugar Co. contained the names of himself and Moosa Usman as proprietors whereas after 1st June 1924 the form of acceptance letters used by the New Joria Bazar Sugar Co. contained only his name as proprietor. He admits, however, that no public notice was given of the dissolution of the partnership between him and Moosa Usman. He further admits that the plaintiffs did no business with the New Joria Bazar Sugar Co. He also admits that the New Joria Bazar Sugar Co. carried on business in the very premises in which the Joria Bazar Sugar Co. had its place of business. Benarsidas denies that he was aware of any dissolution between Jethalal and Moosa Usman. In these circumstances, it is impossible to hold that the plaintiffs had any knowledge of the dissolution of partnership between Jethalal and Moosa Usman. The agreement, Ex. 5, therefore, would not be invalid or not binding on the defendants for the reason alleged.

But even assuming that Benarsidas was aware of the dissolution of the partnership between Jethalal and Moosa Usman, the execution of Ex. 5 by Jethalal was clearly a necessary act for winding up the business of the partnership and, therefore, under ss. 251 and 263 of the Indian Contract Act the partners would be bound by the agreement as after a dissolution of partnership the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership.

I am, therefore, of opinion that there is no substance in this contention of the defendants.

The next contention of the defendants is that the agreement, Ex. 5, is void as being without consideration; (section 25 Indian Contract Act). Various authorities have been quoted by Mr. Khanchand to the effect that motive must be distinguished from consideration, that consideration must be real that consideration must move from the promiser etc. He argues that it is to be gathered from Ex. 5 that the consideration for it was the mutual promise of the parties to abide by the decision of the High Court, that therefore, no oral evidence can be referred to as to what was the consideration for the execution of Ex. 5.

In my opinion the arguments on this question of consideration are largely technical and academical. The agreement, Ex. 5, is, as a matter of fact, silent on the question of consideration and under s. 92 of the Evidence Act oral evidence is admissible to determine what was the consideration for Ex. 5. Mr. Kimatrai for the plaintiffs argues that the consideration for which Jethalal executed Ex. 5 was that Banarsidas agreed to refrain from suing Jethalal's firm on his contracts for sugar of June 1921 *vaida*. Having regard to the evidence recorded and the general facts and circumstances attending the execution of Ex. 5, I am of opinion that Mr. Kimatrai's contention is well founded. The position between the parties in June 1921 was as follows: Benarsidas' period of limitation for suits in regard to sugar of June 1921 *vaida* would expire by the 25th of that month. He was, therefore, anxious either to file his suits or obtain a settlement by means of an agreement in the nature of Ex. 5. There can be no doubt that it was for this very reason that he came down to Karachi from his native place at the end of May or in early June 1924 and I believe his evidence in which he states that he gave Jethalal notice verbally that he must either settle and enter into an agreement to abide by the decision of the High Court in the test suits or that he would be compelled to file his suits. It may be, of course, that there was no actual request by Jethalal in so many words to Benarsidas that he should refrain from filing suits, but the law certainly does not require such actual request and there can be no doubt reading the evidence, as a whole, and bearing in mind the general facts and circumstances, that the consideration for which Jethalal executed Ex. 5 was Benarsidas' refraining from filing any suits in respect of sugar of June 1921 *vaida* against his firm.

I am, therefore, of opinion that Ex. 5 was executed for consideration and is, therefore, binding on the defendants.

A more serious objection, however, to Ex. 5 is that it is void as being against law and public policy in so far as it offends against s. 28 Indian Contract Act.

Mr. Khanchand argues that in the operative part of Ex. 5 the third clause is that the parties to the agreement shall not raise any question as to breach or any other contention, that this is an agreement by which the defendants are restricted absolutely from enforcing their rights under the original contracts by the usual proceedings in the ordinary tribunals, that a contract which includes such an agreement is void to that extent and that it is, therefore, open to the defendants in this suit to raise and have decided the pleas involved in issues Nos. 4 and 5.

Before dealing with the authorities relied on by Mr. Khanchand in support of his proposition three points in connection with Ex. 5 must be noted; In the first place, Ex. 5 recites that the parties thereto enter into an agreement and arrangement which is to operate as a new arrangement and/or new agreement giving rise to a fresh cause of action. This can only mean that the parties to Ex 5 mutually agree to abandon or relinquish their respective rights, liabilities, and obligations which have already arisen under the original contracts referred to in Ex. 5, and to substitute for them new rights, liabilities and obligations which are embodied in Ex. 5. Again, it has to be noted that there is in Ex. 5 no express provision by which the defendants are restricted absolutely from enforcing their rights under the original contracts by the usual proceedings in the ordinary tribunals. Lastly, Ex. 5 makes it clear that there is no restriction of any kind on the parties, thereto enforcing their rights under that agreement by the usual proceedings in the ordinary tribunals. On the contrary the use of the words "giving rise to a fresh cause of action" indicate that the parties to Ex. 5

contemplate the possibility of litigation in the ordinary course.

Coming now to the authorities quoted by Mr. Khanchand:

The cases cited by him and reported as *Coringa Oil Co., Ltd.* v. *Koegler* (1), *Mulji Tejsey* v. *Ransey Devaraj* (2), *Burla Ranga Reddi* v. *Kalapalli Sithaya*(3) and *Naraindas* v. *Kewalram* (4), are all cases in which parties agreed by virtue of a clause in the original contracts which established legal relations between them that in respect of disputes that may arise out of such contracts they would abide by the decision of brokers, arbitrators, the sub-committee of an Association etc., and that such decision should be final, unappealable etc.. It was held in these cases that such clauses offended against s. 28, Indian Contract Act, and were to that extent void as being attempts to oust the jurisdiction of the Courts. These cases are entirely distinguishable from the present case. There is a statutory right to attack an award made by arbitrators, surveyors, etc., in a Court of law, and parties who purport to contract themselves out of such statutory rights may well be said to be attempting to oust the jurisdiction of the Court, and thus to be offending against the principle involved in s. 28, Indian Contract Act. Here there was no clause in the original contracts between the parties which in any way restricted them from enforcing their rights thereunder by the usual proceedings in the ordinary tribunals. It was only when there had been a breach of the contracts and disputes had arisen between the parties, each party asserting and claiming his rights thereunder and demanding from the other the fulfilment of his obligations thereunder, that the parties by Ex. 5 agreed to relinquish or abandon their respective rights, liabilities and obligations under the original contracts and to substitute for these new rights, liabilities and obligations. This is an entirely different thing from agreeing to oust the jurisdiction of the Civil Courts.

Equally distinguishable are the cases quoted by Mr. Khanchand and reported, as *Raja of Venkatagiri* v. *Vemuru Chinta Reddi* (5) and *Cooper* v. *Wills* (6) for these were cases where the parties having actually taken action in a Civil Court and submitted themselves to its jurisdiction attempted by agreement to prevent the Court from deciding matters which it had jurisdiction to decide and which the parties had actually put before it for decision. The case in *Seumal Nihalchand* v. *Pursomul* (7) dealt merely with the validity or legality of a compromise under O. XXII, r. 3, C. P. C., by which parties to a pending suit agreed to abide by the decision of their Pleaders, in whatever manner arrived at.

No case has been cited which could be regarded as judicial authority for the proposition that an agreement which embodies a compromise of doubtful rights arising out of a previous contract between the parties offends against s. 28, Indian Contract Act, because thereby the parties thereto agree that they abandon their rights under the original contract which necessarily include the right to resort to a Civil Court in regard to the contract. And this, in my opinion, is exactly what has taken place between the parties to this suit. On the contrary, there are rulings entitled to the greatest weight which establish the proposition that a compromise of doubtful rights is outside the scope of s. 28, Indian Contract Act. In the Privy Council case reported as *Munshi Amir Ali* v. *Maharani Inderjit Koer* (8) Counsel for the appellant had agreed at the hearing of the appeal before the High Court that if the High Court would restrict its judgment to a finding on one of several issues, his client would not appeal to the Privy Council. It was held that the agreement was for consideration and binding and that the appeal to the Privy Council could not be heard. This was a case before the enactment of the Indian Contract Act. It was however followed by a Full Bench of the Allahabad High Court in the case reported as *Anant Das* v. *Ashburner & Co.* (9) after the Indian Contract Act was passed. In this case, in consideration of *A* giving *B* time to satisfy a decree against him held by *A*, *B* agreed not to appeal against the decree and did appeal. It was held that the agreement was not prohibited by s. 28 of the Indian Contract Act, and that the Appellate Court was bound by the rules of justice, equity and good conscience to give effect to it, and to refuse to allow *B* to proceed with the appeal instituted in contravention of it. The learned Judges said, "By the agreement not to appeal, for which the indulgence granted by the respondents was a good consideration, the appellant did not restrict himself absolutely from enforcing a right under or in respect of any contract. He forewent his right to question in appeal the decision which had been passed by an ordinary tribunal." To my mind these decisions are entirely in point.

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(1) 1 C. 466; 1 Ind. Jur. 170; 1 Ind. Dec. (N. S.) 291.

(2) 3 Ind. Cas. 837; 34 B. 13; 11 Bom. L. R. 273.

(3) 6 M. 368; 2 Ind. Dec. (N. S.) 536.

(4) 42 Ind. Cas. 703; 11 S. L. R. 43.

(5) 15 Ind. Cas. 378; 37 M. 408; 11 M. L. T. 209; (1912) M. W. N. 393; 22 M. L. J. 447.

(6) (1906) 22 T. L. R. 582.

(7) 19 Ind. Cas. 450; 6 S. L. R. 166.

(8) 9 B. L. R. 460; 14 M. I. A. 203; 2 Suth. P. C. J 479; 2 Sar. P. C. J. 731; 20 E. R. 763.

(9) 1 A. 267; 1 Ind. Dec. (N. S.) 181.

Other aspects of the case have been presented to me by Mr. Kimatrai for the plaintiffs. He has drawn my attention to the cases referred to at pages 218, 219 of Pollock and Mulla's Commentary on the Indian Contract Act dealing with agreements providing for the enforcement of rights by suit within a period shorter than that prescribed by law. *Prima facie* such agreements are contrary to the provisions of s. 28, but in many cases they have been held to be valid and binding as providing for a release or forfeiture of rights if no suit is brought within the time stipulated in such agreements, and not limiting the time within which rights may be enforced.

Again Mr. Kimatrai has argued—and in my opinion with considerable force—that the case of the plaintiffs may well be considered to fall within Exception I to s. 28, Indian Contract Act. If an agreement to abide by the decision of arbitrators, brokers, referees, etc., be held to fall within the Exception, why not also an agreement to abide by the decision of a Court *albeit* in a case not *inter parties.* Lastly Mr. Kimatrai has pointed out that the offending cl. 3 in the operative part of Ex. 5 is really redundant and may well have been omitted. It is a mere corollary to cls. 1 and 2.

I have given this objection to the validity of Ex. 5 my best consideration and cannot but conclude that s. 28, Indian Contract Act, does not render Ex. 5 invalid or void.

The last objection urged against Ex. 5 is indeed both novel and ingenious. It is argued that if the original contracts between the plaintiffs and the defendants were by reason of Ex. 5 entirely wiped out, then Ex. 5 must be regarded as a wagering contract and as such is void and unenforceable under s. 30, Indian Contract Act.

When it is borne in mind that there is no allegation that the original contracts between the parties for sugar of June 1921 *vaida* were wagering, it is really difficult to understand this plea of wager. It really seems to me to be based on a misapprehension as to what a wager really is. Mr. Khanchand refers to Pollock and Mulla's Commentary on the Indian Contract Act, page 226 (5th Edition) for a definition of 'wager'. The passage is really a quotation from Anson's Law of Contract, page 228 (14th Edition). A reference to the Illustrations given by Anson, however, makes it clear that the agreements by *A* with the *D* referred to in the Illustrations were clearly wagering because *D* had no interest whatsoever in the contract between *A* and *X*, and his agreements with *A* were collateral agreements in which each side stood to win or lose according to the uncertain or unascertained event *in reference to which alone A* and *D* had agreed. Reference has also been made to the cases reported as *Kaluram* v. *Ram Dayal* (10), *Vithoba* v. *Sitaram* (11) and *Walter Mitchel* v. *A. K. Tenant* (12) for the same purpose. A really exhaustive and truly classical definition of a wagering contract is that given by Hawkins, J., in the well-known case of *Carlill* v. *Carbolic Smoke Ball Co.* (13) and quoted at length by Chitty in his Law of Contract (17th Edition) page 795: "A wagering contract within the Statute is one" it is said by Hawkins, J. "by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agreed that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; *neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties.*" The latter part of this definition which I have underlined (*italicised*) makes it manifest that Ex. 5 is not a wagering contract. The parties to Ex. 5 each had an interest in the original contracts for which Ex. 5 was substituted, and Ex. 5 was executed for real consideration.

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(10) 3 Ind. Cas. 55; 5 N. L. R. 107.

(11) 65 Ind. Cas. 324; 19 N. L. R. 21; A. I. R. 1923 Nag. 291.

(12) 90 Ind. Cas. 59; 52 C. 677; A. I. R. 1925 Cal. 1007.

(13) (1892) 2 Q. B 484; 61 L. J. Q. B. 696; 56 J. P. 665.

This last objection must, therefore, also fail.

My answer to Issue No. 3, therefore, is that the agreement Ex. 5 is for consideration and binding on the defendants. It is unnecessary to discuss Issue No. 6. As Ex. 5 is valid and binding on the defendants, it follows that they cannot be permitted to raise the pleas involved in Issues Nos. 2, 4 and 5 which relate to the original contracts between the parties. As to issue No. 1, the suit is obviously in time. This disposes of the suit.

The plaintiffs claim Rs. 1,068-10-6 as per memo attached to the plaint the correctness of which is not disputed. There will, therefore, be a decree against the defendants for Rs. 1,068-10-6, costs of the suit, and interest at 6 per cent. per annum from date of suit till payment.

I am asked by the Pleader for the plaintiffs to note that in view of this judgment it has become unnecessary to dispose of his amendment application filed on 16th January 1926.

SUITS NOS. 994 AND 995 OF 1925.

Suits Nos. 994 and 995 of 1925 transferred to this Court from the Court of Small Causes, Karachi, have with the consent of the parties been tried along with Suit No. 702 of 1925. The plaintiffs in all the three suits are the same, the defendants in suits Nos. 994 and 995 though described as the firms of Abdulla Moosa and Moosa Usman are really the same as the defendants in Suit No. 702/25. By consent of the parties the evidence recorded in Suit No. 702 of 1925 has been treated as evidence in these two suits and no further evidence has been called. My judgment in Suit No. 702 will, therefore, cover Suits Nos. 994 and 995 of 1925. In the former there will be a decree for plaintiffs for Rs. 233-15 6 with costs and interest at 6 per cent. from date of suit till payment. In Suit No. 995 there will be a decree for plaintiffs for Rs. 364-5-0 with costs and interest at 6 per cent. from date of suit till payment.

In both these suits costs to be calculated on the Small Cause Court scale.

P. B. A. *Order accordingly.*
K. L.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 155 OF 1924.
November 26, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

JAWAHAR SINGH—PLAINTIFF—APPELLANT
versus
E. D. SASSOON & Co., KARACHI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—*Suit for declaration that decree is obtained by fraud and for injunction restraining decree-holders from executing it—Cause of action—Jurisdiction.*

Cause of action for a suit for a declaration that a particular decree was obtained by fraud and for an injunction restraining the decree-holders from executing it partly arises at the place where the decree is obtained and partly where it is sought to be executed and consequently Courts at both the places have jurisdiction to try the suit. [p. 378, col. 1.]

Banke Behari Lal v. *Pokhe Ram,* 25 A. 48; A. W. N. (1902), 179, *Jawahir* v. *Neki Ram,* 28 Ind. Cas., 502; 37 A. 189; 13 A. L. J. 190, *Khushali Ram* v. *Gokul Chand,* 41 Ind. Cas. 352; 39 A. 607; 15 A. L. J. 638, and *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee,* 5 C. W. N. 559, referred to.

Umrao Singh v. *Hardeo,* 29 A. 418; A. W. N. (1907) 112; 4 A. L. J. 392, distinguished.

Letters Patent Appeal against the judgment of Mr. Justice Harrison, dated the 31st March 1924.

Mr. *Dev Raj Sawhney,* for the Appellant.

Mr. *J. M. Mackay,* for the Respondent.

JUDGMENT.—On the 26th March, 1918, Messrs. E. D. Sassoon and Company obtained a decree for a certain sum of money against the Firm of Nidhan Singh-Jawahar Singh in the Court of the Additional Judicial Commissioner, Karachi. The decree was transmitted for execution to the Senior Subordinate Judge of Amritsar, and in execution thereof certain immoveable property belonging to the judgment-debtors was attached

The plaintiff, Jawahar Singh, has brought the present suit for a declaration that the decree is inoperative as it was obtained by fraud, and for an injunction restraining the decree holders from executing the decree against his property in Amritsar. The question for determination is whether the Amritsar Court has jurisdiction to entertain the suit. Now, s. 20, C. P. C., lays down, *inter alia,* that a suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. The cause of action in the present case consists of two parts, one of which arose at Karachi where the decree sought to be impeached as fraudulent was passed, and the other at

Amritsar where the property of the plaintiff was attached. The Amritsar Court has, therefore, jurisdiction to entertain and determine the suit. This rule has been laid down in *Banke Behari Lal* v. *Pokhe Ram* (1), *Jawahir* v. *Neki Ram* (2), *Khushali Ram* v. *Gokul Chand* (3) and *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee* (4).

The learned Counsel for the decree-holders contends that in the cases cited above the suit was brought by a judgment-debtor, but that the present action was brought by the plaintiff as a third party on the allegation that he was not liable under the decree. Now, we have carefully considered the allegations in the plaint, and we are of opinion that, though that document is not artistically framed, the substance of the plaintiff's claim is that, while under the decree as it stands he is liable for the payment of the money, there are various reasons why the decree should be held to be inoperative as against him. The suit must, therefore, be treated as one brought by a judgment-debtor; and, as a material portion of the cause of action, namely, the attachment of his property, arose at Amritsar, he is entitled to ask the Amritsar Court to determine the suit.

If the suit had been *solely* for setting aside the decree obtained at Karachi, the Amritsar Court would not have been competent to entertain it. The only cause of action in that case would have been the obtaining of the decree by fraud, and, as it arose in Karachi, no Court other than the Karachi Court would have been competent to hear the suit. Such a suit belongs to the category exemplified by the judgment in *Umrao Singh* v. *Hardeo* (5), but, as pointed out above, the plaintiff in the present case seeks two reliefs: (1) a declaration that the decree is inoperative on the ground of fraud, and (2) an injunction for the protection of his property against attachment and sale in execution of that decree; and we consider that the second prayer cannot be ignored for the purpose of determining the jurisdiction of the Court. It is, therefore, clear that part of the cause of action arose at Amritsar, and the suit is consequently cognizable by the Senior Subordinate Judge of Amritsar.

For the aforesaid reasons we accept the appeal, and setting aside the judgment of the Single Bench as well as that of the Subordinate Judge we remit the case to the latter for disposal in accordance with law. Costs of this appeal shall be costs in the cause.

R. L. *Appeal accepted.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO 237 OF 1925.

March 18, 1926.

Present:—Mr. Justice Raza.

SHEO NARAIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KHADERU AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale-deed containing wrong number of plot—Execution of another deed after 4 years containing correct number—Subsequent-deed, whether sale.

A plot of land was transferred by sale-deed. Subsequently another deed was executed after 4 years stating that the plot of land in the first deed was misdescribed and that the correct number was mentioned in the later deed. In a suit for pre-emption on the basis of the second deed :

Held, that it was not a sale-deed and the suit was barred by time. [p. 379, col. 2.]

Harpal Singh v. *Bajrang Bahadur*, 8 O. C. 288, followed.

Second appeal from a decree of the Additional Subordinate Judge, Fyzabad, dated the 24th March 1925, in Regular Civil Appeal No. 84 of 1924, confirming that of the Munsif, Fyzabad, dated the 31st October 1924.

Mr. *Ali Zaheer*, for the Appellants.

Mr. *Naimullah*, for the Respondents.

JUDGMENT.—This is an appeal from the appellate decree of the learned Subordinate Judge, Fyzabad, dismissing the plaintiffs-appellants' suit for pre-emption in respect of plot No. 113/3 in village Nandapur.

The facts of this case, so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows :—

Durga executed a sale-deed in favour of Khaderu, defendant No. 1 in respect of a plot which was described in the deed as No. 113/2 for Rs. 80 on the 18th July 1919. After Durga's death, his widow *Musammat* Dasi, defendant No. 2, executed a deed in respect of No. 113/3 for the purpose of correcting the number entered in the deed of the 18th July 1919. The plaintiffs brought the present suit alleging that Durga had no title to plot No. 113/2 and consequently nothing was transferred by that deed and so the present suit for pre-emption does not relate to that deed, that *Musammat* Dasi had executed the sale-deed in respect of Nos. 113/3 and it was by this deed that Plot No. 113/3 was transferred to the vendee Khaderu, that the vendee came into possession of the said plot (*i.e*, 113/3) after this sale deed was executed in his favour by *Musammat* Dasi and that it is the sale-deed dated the 31st May 1923 which gives rise to a right of pre-emption.

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(1) 25 A. 48; A. W. N. (1902) 179.
(2) 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190.
(3) 41 Ind. Cas. 352; 39 A. 607; 15 A. L. J. 638.
(4) 5 C. W. N. 555.
(5) 29 A. 418; A. W. N. (1907) 112; 4 A. L. J. 392.

The claim was resisted by Khaderu vendee, defendant No. 1. He denied the plaintiffs' right of pre-emption and alleged that No. 113/3 was actually transferred by Durga by the deed dated the 18th July 1919, but by a mistake No. 113/2 was entered in the deed, that it was to correct this mistake that the deed of 31st May 1923 was executed in his favour by *Musammat* Dasi, widow of Durga, that the deed of 31st May 1923 cannot give rise to any right of pre-emption as it was not a sale-deed at all and that any suit in respect of the earlier deed of 18th July 1919 is now barred by time. *Musammat* Dasi, defendant No. 2, also supported the defendant No. 1 in his defence.

The learned Munsif found that the plaintiffs have got a preferential right of pre-emption but the deed dated the 31st May 1923 is not a sale-deed at all and does not give rise to any right of pre-emption, that it was executed simply to correct a clerical mistake in the sale-deed dated the 18th July 1919, by which the real plot transferred was No. 113/3, but by mistake it was written as No. 113/2 in the deed and that the vendee came into possession of No. 113/3 on the 18th July 1919 and consequently the suit was barred by time. The plaintiffs' claim was, therefore, rejected. The learned Subordinate Judge agreed with the findings of the learned Munsif and dismissed the plaintiffs' appeal on the 24th March 1925. The plaintiffs have now come to this Court in second appeal.

The only point for determination in this appeal is:—

Whether or not the deed dated the 31st May 1923 executed by *Musammat* Dasi in favour of Khaderu gives rise to a right of pre-emption?

It has been found that No. 113/3 was really transferred to the defendant No. 1 by the deed dated the 18th July 1919, that plot No. 113/2 was entered in the deed by mistake, that that mistake was corrected by the deed dated the 31st May 1923 and that the deed dated the 31st May 1923 is not really a sale-deed as alleged by the plaintiffs. These are the concurrent findings of both the lower Courts in this case. In my opinion the appeal must fail on these findings. In the case of *Harpal Singh* v. *Bajrang Bahadur* (1), the vendor executed a deed of sale of certain plots of land in favour of the vendee on the 5th June 1895. Certain numbers with areas were given as those of the plots sold. Subsequently on the 18th July 1902, the vendor executed another document, in which it was stated that a mistake had been made in the deed of the 5th June 1895, which did not contain the exact area and particulars of the land which had been actually sold and purported to give the actual numbers and areas. The plaintiff claimed the right of pre-emption in respect of the plots which were entered in the latter document, but not referred to in the former. It was not stated that there was any consideration for the execution of the second document. It was held that the deed of 18th July 1902 was not a sale deed, as it did not purport to transfer anything to the vendee for a price, and that the suit was barred by time. The ruling in fact supports the respondents. It is on all fours with the present case. The appellants' learned Counsel has argued that this ruling is not good law. I am not prepared to agree with him on that point. Following that ruling I hold that the plaintiffs' claim must be rejected. The suit was rightly dismissed by the lower Courts.

I should like to note that the appellants' learned Counsel has referred to a statement made by the Pleaders of the parties in the Court of first appeal. I do not think that that statement really means that Khaderu had not really got possession of No. 113/3 by virtue of the sale-deed dated the 18th July 1919. The statement was made with reference to the said deed. No. 113/3 was not of course entered in that deed.

The result is that the appeal fails and must be dismissed. I dismiss the appeal with costs. The decree of the lower Appellate Court is confirmed in all respects.

G. H. *Appeal dismissed.*

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(1) 8 O. C. 288.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL NO. 13 OF 1925.
September 22, 1925.
Present:—Mr. Hallifax, A. J. C.
NATIONAL STORES—APPELLANT
versus
RAMSARAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Company going into liquidation—Devolution of interest—Legal representative, necessity of bringing on record.

When a plaintiff Company registered under the Companies Act goes into liquidation, there is no assignment, creation or devolution of an interest within the meaning of O. XXII, r. 10, C. P. C., the Company continues to be the plaintiff and there is no need of bringing any legal representatives on the record.

Appeal against a decree of the Additional District Judge, Wardha.

Mr. *M. B. Niyogi*, for the Appellant.
Mr. *V. N. Herleker*, for the Respondent.

JUDGMENT.—There has been a waste of some years of time and hundreds if not thousands of rupees in this case. That must always result from not getting down to the bottom of question that arises, or rather that is raised in a suit; a question that is raised will often be found as here not to rise. The suit was properly instituted by the Company duly incorporated as limited under Act VII of 1913. One of the specified powers of the Board of Directors is to institute, conduct, defend, or compound or abandon any legal proceedings by and against the Company, and the plaintiff as well as the *vakaltnama* of the Pleader who presented it, are duly signed by the Chairman of the Board, as is provided by the r. 1 of O. XXIX, of the C. P. C.

About five months after the suit had been instituted the Company went into voluntary liquidation and the application was made to the Court that name of one T. N. Deshpande should be "brought on the record" as he had been appointed Liquidator. The defendant opposed this on the ground that the appointment of Deshpande was illegal and void because one V. Kshirsagar, had been previously appointed Liquidator and his appointment had never been cancelled by the competent Court.

For two years the parties have been disputing about whether the second appointment could be valid after the first had been made. On the assumption that the validity of the first was unquestionable, grounds were stated for the contentions that it was invalid and, therefore, not an appointment at all that could stand in the way of the making of another without cancellation by a Court, but they have never been examined. It seems clear that if the validity or the legality of the second appointment can be attacked, that of the first can be also.

But there was never a question of bringing any name on the record at all and, therefore, no question of the validity of either appointments of the Liquidator. Under s. 205 of the Companies Act the "corpotestate and corporate power of the Company contained till it is dissolved" and there has been no "assignment, creation or devolution of an interest" by the Company's going into liquidation so as to bring r. 10 of O. XXII of the C. P. C. into operation. All that has happened is a certain internal change in the Company of which the result under cls. 3 and 4 of s. 207 and cl. (*a*) of s. 179 of the Companies Act is that the powers of the Directors in respect of this suit are transferred to the Liquidator, whoever he may be.

But the plaintiff is still the Company, and there is no necessity to bring the name of person entitled to act on its behalf on the record. If there were then the name of the Chairman should have been brought on the record in the first place or perhaps the name of the Pleader appointed by him. As a matter of fact there is no body to conduct the suit at present but that Pleader and we are not concerned with any Liquidator unless a person claiming to be Liquidator appears and says he wishes to take the conduct of the suit out of that Pleader's hands or to compound or abandon it. The position of the Company is exactly similar to that of Municipality which instituted a suit through one of its officer generally authorised by it to institute and conduct suits and while it was pending transferred that general authority to another of its officers.

The orders of the Courts below are set aside. It is difficult and unnecessary to specify them all. All that need be said is that all the proceedings subsequent to the application for bringing the name of Deshpande on the record are to be considered void and ineffective and the trial of these are to be carried on from the beginning. Any decree against the Company will be equally binding on it and any payment to it by the defendant will give him an equally clear quittance, whoever the person may be from whom the Pleader in charge of it takes his instructions.

The defendant-respondent is responsible for the whole of this waste of time and money. He will accordingly pay all the costs incurred by the plaintiff Company in both Appellate Courts with the exception of the Court-fees paid on the two petitions of appeal of which the appellant can obtain a refund by applying for it under s. 13 of the Court Fees Act. He will also pay all costs the Company has incurred up to the present in the first Court with the exception of the Court fees on the plaint and the Pleader's fee. In respect of the Pleader's fee the first Court will consider, in case the defendant eventually succeeds whether he ought not be ordered to pay so much of that as can fairly be assigned to the proceedings that have now terminated in nothing.

R. L. *Orders set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 116 OF 1924.
March 18, 1925.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir George Claus Rankin, KT.

GUS ALEXANDER MACKENZIE—
PLAINTIFF—APPELLANT
versus
HIMALAYA ASSURANCE Co., LTD.
AND ANOTHER—DEFENDANTS—RESPONDENTS.

Principal and agent—Agency, termination of.

Where a deadlock has been created owing to the conduct of the members of the Firm of Managing Agents, the Directors of the Company are justified in the interests of the Company to put an end to contract of managing agency. [p. 382, col. 1; p. 383, col. 2.]

Appeal against the judgment of Mr. Justice Pearson, dated the 17th April 1924.

Messrs. *Pugh, Langford James* and *Westmacott*, for the Appellant.

Messrs. *B. C. Mitter, A. N. Chaudhdri, B. K. Ghose, T. A. Bradley* and *J. C. Hazra*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the plaintiff Mr. Gus Alexander Mackenzie against the decision of my learned brother Mr. Justice Pearson which was delivered on the 17th of April 1924.

The plaintiff sued to recover a large sum of money as damages from the Himalaya Assurance Co., Ltd., for the alleged breach of an agreement by which the plaintiff and the 2nd defendant, Rajabally, were appointed Managing Agents of the Company.

The 2nd defendant was joined as a party to the suit, because it was alleged that the plaintiff had requested Rajabally to join as a plaintiff in the suit but Rajabally had declined so to do. Therefore, the plaintiff had joined him as a defendant.

The plaintiff and Rajabally were in partnership. There were two agreements which dealt with the matter of partnership. The first was dated the 24th of September 1919 and the second one was dated the 29th of May 1920. In the interval, the Company had been registered on the 27th of October 1919 and the agreement, dated the 30th December 1919, between the defendant Company and the firm of Mackenzie and Rajabally, had been entered into. By the agreement the firm of Mackenzie and Rajabally were appointed Managing Agents of the Company for a period of at least 35 years. The agreement contains provisions about remuneration which are not material for the purpose of this appeal: Clause 5 provides that "the Managing Agents shall, subject to the supervision and control of the Directors, manage, conduct and carry on the business of the Company both at the head office and at all branches and agencies wheresoever situated" and then it provides that they "shall have and possess all powers, authorities and discretions necessary for or incidental thereto, and, without in any way limiting or restricting the general powers hereby conferred upon them, the Managing Agents shall in particular possess and enjoy the following powers."

Mr. Mackenzie and Mr. Rajabally were also appointed Directors of the Company.

The suit, as I have already said, was brought on the ground of an alleged wrongful breach of the managing agency agreement.

In the plaint there was an allegation in para. 7 that "at sometime during the first half of the year 1922 the Directors (other than the plaintiff) decided to oust the plaintiff from the said managing agency and to appoint the defendant Rajabally sole managing agent and also decided to dismiss all the European staff from the service of the Company and in furtherance of such designs in concert and collusion with each other they carried out the following plan of action: On the 12th of August 1922 the defendant Rajaballv wrote and addressed a letter to the plaintiff suggesting that the latter should retire from the said partnership but the plaintiff declined to do so."

It is material to notice that in the letter of the 12th of August, amongst other things, Rajabally cancelled the power-of-attorney which he had given to the plaintiff whereby the plaintiff was conducting the affairs of the Assurance Company and those of the firm of Mackenzie and Rajabally.

The plaint further alleged that "on the 14th August 1922 the defendant Rajabally caused his attorney K. B. Ghose to address a letter to the plaintiff purporting to give the latter notice that the partnership would be dissolved as from that date and informing the plaintiff that in default of his consenting to that course within 24 hours the said Rajabally would file a suit for dissolution of the firm." It then alleged that the Directors had passed a resolution on the same day whereby Rajabally was appointed the Managing Agent of the Company.

The learned Judge came to the conclusion that the plaintiff had not proved that Rajabally was acting in concert and collusion with the Directors as alleged in the plaint: and, he also came to the conclusion, shortly stated, that such a situation had arisen on the morning of the 14th of August 1922 between Rajabally on the one hand and Mackenzie on the other that the Directors were justified in putting an end to the agency agreement.

The position seems to me to be as follows: The agreement between the Company on the one hand and the plaintiff and Rajabally on the other was admitted. There was no doubt that that agreement was put an end to by the Directors of the Company.

The onus, therefore, was on the Company to justify the action which the Directors took in terminating the agreement. The agreement was alleged to have been terminated because of the deadlock which had been created by the action of the members of the partnership. It would then be for the plaintiff to prove, if he could, that the situation which undoubtedly existed on the morning of the 14th of August 1922 had been brought about or engineered by the Directors or that they had been parties to the scheme which it is alleged Rajabally had conceived, and which, in fact, he carried out.

I am of opinion that the learned Judge's decision, that the plaintiff had not proved that Rajabally was acting in concert with the Directors of the Company in bringing about the situation which existed on the 14th of August 1922, was correct.

The learned Counsel for the plaintiff-appellant in his argument (which, if I may say so, was a very able argument) placed great reliance on the letter of the 12th of August 1922 which was written by Rajabally to the plaintiff. He urged that only one inference could be drawn from the terms of that letter, and that was that Mr. Rajabally had made up his mind to bring the partnership to an end in one way or an other, and that for the purpose of doing so he had before-hand consulted the Directors and had obtained their consent to that course.

The learned Counsel made some severe criticisms upon the evidence of Rajabally; and, argued with much insistence that the explanation which Mr. Rajabally had given for the writing of that letter was one which should not be accepted.

It is not necessary for me to give any decision upon that point, because, even if we reject the reason which Rajabally gave for the writing of the letter of the 12th of August 1922, and even if it be assumed that Mr. Langford James' argument was correct that Rajabally's evidence ought not to be relied upon, that is not sufficient for the plaintiff. The plaintiff had to go much further than that: it was necessary to show that the only inference that could be drawn from the facts of this case was that the Directors were a party to the course which Rajabally took on the 12th and the 14th of August.

I agree with the learned Judge that that has not been proved.

Even if Mr. Daud's evidence be accepted to its full extent it merely amounts to this, that in July 1922 Rajabally in Mr. Daud's presence told Mackenzie that some of the Directors were very antagonistic towards Mackenzie and that he had been asked by one or two of the Directors (without naming them) if it was possible for Rajabally to lay charge against Mackenzie whereby the Directors might be in a position to get rid of him, and that (then turning towards Macknzie) Rajabally said;

"If at any time I appear to side with the Directors, that is not so : it was only to find out what their plans may be towards you."

As I understand, it was common ground that at that time Rajabally was on good terms with Mackenzie.

It is not possible for the Court to hold, by reason of the above-mentioned conversation between Rajabally and the plaintiff in July 1922, that the Board of Directors were acting in concert with Rajabally in the action which he took on the 12th and the 14th of August.

Therefore, as I have said already, I agree with the learned Judge's finding that the plaintiff had not proved that the Company was responsible for the action which was taken by Rajabally on the 12th and the 14th of August.

There remains the question whether the Company was justified in putting an end to the agency agreement.

Having read the evidence I have come to the conclusion that the learned Judge summed up the situation accurately in his judgment. He said as follows: "There had been Rajabally's letter of the 12th August, the cancellation of the power-of-attorney, notice of dissolution of partnership, the plaintiff's action in consequence, the visit to the office on the 13th, tearing off the 2nd defendant's padlock to obtain admission, and removal of certain things to protect his own interest; another visit on the 14th with Mr. Warden, the cancellation by the plaintiff of his power-of-attorney to the second defendant. I think there can be no doubt that conflicting and contradictory orders were given to the office staff by the plaintiff and 2nd defendant. As one of the witnesses said. 'There was more than an earthquake' Mr. Gregory's account gives some indication of how they felt to each other on the 14th. Both said the position was such that they could not work with each other, because neither could trust the other and Mackenzie had ordered the clerks not to obey the orders of Rajabally, and Rajabally had dissolved the firm and would not work with him any more. Plaintiff's conduct in cancelling the power-of-attorney and breaking the padlock shows his attitude."

In discussing this part of the case, I desire to make it clear that I am not deciding which of the two parties was responsible for bringing about the deadlock. It may be that everything which the learned Counsel for the plaintiff urged as regards Mr. Rajabally was correct: on the other hand, we have not heard what the learned Counsel for the Company, Mr. Chaudhuri, had to say on that point. Assuming, however, for the sake of argument that Rajabally was in the first instance in the wrong, it seems to me that the plaintiff by the action which he took, played into the hands of Mr. Rajabally ; and, the result was that such a situation was created that it was necessary for the Directors of the Company to take action immediately. It is clear to my mind that the business of the Company could not be carried on, having regard to the action which had been taken by Mr. Rajabally and by Mr. Mackenzie. The office had been closed on the 14th August and the Company had to take steps at once with a view to carrying on the business. In my judgment, they were justified in putting an end to the partnership business: and, they carried that out by the resolution which they passed. That resolution was as follows:—

"Resolved that having regard to the position now and in the face of the dissolution of the Firm of Messrs. Mackenzie and Rajabally and the difference existing between them, Mr. N. Rajabally be asked to carry on the business as the Managing Agent. . . . . ."

It is true that Mr. Mackenzie had stated that the firm was not dissolved. On the other hand, Mr. Rajabally had given notice of the dissolution and he was asserting that it was dissolved although he declared that the Solicitors had advised him that it would be necessary to take legal proceedings to make it effective. There is no doubt about the position which existed in the office on that day and there is no doubt about the difference which was existing between these two parties: each of them declared that it was impossible for him to work with the other. It seems to me that it became absolutely necessary for the Directors to appoint somebody to carry on the business of the Company. The facts that they appointed Mr. Rajabally to carry on as Managing Agent until the share-holders could be communicated with and a meeting held either to confirm him or to appoint another Managing Agent cannot be said to be unreasonable. This was a Company which had been promoted to a large extent by the efforts of

Mr. Rajabally, and having regard to the state of affairs which had arisen it was necessary to appoint somebody as Managing Agent and I cannot say that it was unreasonable for them to appoint Mr. Rajabally.

For these reasons, I agree with the decision at which the learned Judge arrived that the defendant Company were justified in putting an end to the managing agency agreement, and, consequently the plaintiff is not entitled to recover damages from the Company.

In the pleadings specific charges of misconduct and insubordination were made by the defendant Company against the plaintiff and the defendants added allegations of misconduct and dishonesty, by a letter which was dated the 10th of January 1924, from the defendant's attorney to the plaintiff's attorneys.

The learned Judge came to the conclusion that the defendant Company's case as regards the allegations of insubordination, misconduct and dishonesty failed and that none of the allegations which the defendant Company put forward was sufficient to justify the action which the Company took on the 14th of August.

It is not necessary for me to deal with any of these points except as regards the costs. It seems to me that the learned Judge with great respect to him ought to have made some provision in the decree with regard to the costs of the issues relating to the particular charges levelled against the plaintiff which had failed. It must be obvious that the length of the trial was considerably increased by those charges being made and by the investigation which was necessary in respect of them.

In fairness to the plaintiff it seems to me that it should be made clear that he was absolved with regard to the charges of misconduct, insubordination and dishonesty, except that it may be said that he may have been indiscreet in assuming in some respects more authority than he was justified without consulting the Directors and in respect of those charges he should get costs from the defendant Company.

As regards the costs of the issue on which the plaintiff succeeded, it has been left to this Court by the learned Counsel appearing for both parties to decide the amount.

We have already expressed our opinion that the plaintiff ought to have some costs in respect of those issues. That would mean the reduction to some extent of the defendants' bill of costs and the awarding of some costs to the plaintiff. After taking all matters into consideration and what the learned Counsel have said, we have arrived at the conclusion that the defendants' taxed bill of costs in the trial Court shall be reduced to five thousand rupees.

The appeal in all other respects is dismissed and the plaintiff-appellant must pay the costs of the defendant Company in the Appeal Court.

Rankin, J.—I agree.

R. L. *Appeal partly dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 9 OF 1924.
October 15, 1925.
Present:—Mr. Justice Phillips and
Mr. Justice Ramesam.
M. C. CHEGGANMULL *Sowcar*—
PLAINTIFF—APPELLANT
versus
DESUR MANICKA MUDALIAR—
DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 59—Appropriation of payment to one of several debts—Uncommunicated appropriation, effect of—Negotiable Instruments Act (XXVI of 1881), ss. 68, 69—"Place", meaning of—Place of presentment, more than one—Failure to present anywhere—Cause of action to sue, whether arises.

A debtor who has more than one debt to pay to the same creditor and makes a payment, is not bound to intimate to the creditor the appropriation he desires along with the payment itself or so soon afterwards as to form part of the same transaction, but may do so after a reasonable interval. [p. 387, col. 2.]

The essence of an appropriation under s. 59, Contract Act, is that it should be known to both parties. [*ibid.*]

An uncommunicated entry in an account-book of the creditor is not effective as between the parties. [p. 388, col. 1.]

If more than one place is mentioned in a negotiable instrument as the place of presentment, there must be presentment at one or other of these places. [p. 389, col. 1.]

The word 'place' in ss. 68 and 69 of the Negotiable Instruments Act must be construed as including "places" as it would be anomalous to require presentment if one place is mentioned but none if two places are mentioned. [*ibid.*]

Appeal against the judgment and decree of Mr. Justice Coutts Trotter (as he then was) passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in O. S. No. 56 of 1923.

Mr. *M. A. Thirunarayanachari*, for the Appellant.

Mr *V. S. Govindachariar*, for the Respondent.

JUDGMENT.

Ramesam, J.—This appeal arises out of a suit to recover money due on two promissory notes. The plaintiff is the appellant before us, the learned Trial Judge having dismissed the suit except as to Rs. 800 admitted to be due by the defendant and deposited by him in Court. The suit was filed on the 24th of January 1923 under the summary procedure. The defendant applied for leave to defend in February. Leave was granted on the 5th of March and the written statement of defendant was filed on 15th of March. The two suit promissory notes are dated 17th December 1921 (Ex. B) and 22nd December 1921 (Ex. A) and carry interest at the rate of Rs. 2-13-0 per cent. per mensem. The plaintiff and defendant ordinarily reside at Tindivanam in the South Arcot District. On the 22nd of April 1922 the plaintiff through his Madras Vakil Mr. Mahadeva Iyer sent a notice demanding the balance due on Ex. B (Ex. V). Two days after, the same Vakil issued another notice, Ex. D, in which he mentions that he was really instructed by his client to demand the amount due on both the pro-notes but that one of them was omitted from the first demand by mistake and the mistake having been detected, the second notice was sent. In the second notice he mentions that two amounts of Rs. 100 each were paid on 3rd February and 16th April. The defendant in his reply notice Ex. VI dated 1st May 1922 and in his written statement pleaded that besides the payments admitted by the plaintiff he made two other payments, *viz.*, a sum of Rs. 1,000 on 5th January 1922 and another sum of Rs. 700 on 22nd April 1924. I shall first deal with the payment of Rs. 700. [On examining the evidence relating thereto, the learned Judge concluded:—] The result is, we must believe the evidence adduced by the defendant and find that this payment of Rs. 700 has been proved. It follows that the plaintiff is not an honest man.

The other payment of Rs. 1,000 is admitted by the plaintiff before us and also in the Court below at the time of trial. But his contention with respect to it is, that it was credited by him towards a third pro-note executed by the defendant to the plaintiff on 5th November 1921 for Rs. 1,000 carrying interest at 2 per cent. The defendant in his affidavit (dated 23rd February 1923) which he filed for obtaining leave to defend mentioned in para. 5: "The account book of the plaintiff himself may, if produced, substantiate the payment of the said sum of Rs. 1,700". In the counter-affidavit of the plaintiff, para. 2, the plaintiff said, "I deny that the defendant paid the sums of Rs. 1,000 and Rs. 700 referred to in paras. 4 and 5 of the affidavit and say that the said payments are absolutely false". This statement of the plaintiff is now sought to be explained by his Advocate as meaning that the payments towards the suit pro-notes were meant to be denied and not the fact of payment itself so far as the payment of Rs. 1,000 is concerned. Even with this explanation, as far as the payment of Rs. 700 is concerned, I have already found that the statement must be false. As to the other payment, seeing that the defendant who sent the amount through his son, who signed in the plaintiff's account book and who must have informed his father of the entry, refers to the fact of entry in the account book in para. 5 of his affidavit and that the plaintiff himself relied on such account-books at the trial to prove the credit towards another pro-note—I find it difficult to believe that the plaintiff, assuming that he is dishonest, meant to deny the payment of Rs. 1,000 of 5th March 1923. It seems to be unlikely that he meant to deny both payments on 5th March and afterwards in August during the time of trial meant to admit one of them. It seems to me that the affidavit of the plaintiff who is a *Marwari* was drafted for him by a careless Pleader or Pleader's clerk and signed by him without realising its full import. I make these remarks not for the purpose of establishing that the plaintiff is an honest man—and with the other finding he cannot be made honest—but merely to know what the probability is. Whatever it may be, we have got the fact that he admits payment of Rs. 1,000 and the only question is, whether there is a legally binding appropriation of the payment towards another pro-note. This other pro-note was mentioned to the defendant in his cross-examination and he was asked to produce his day book of that date. But he said he has not got it. The day book produced by him begins from 21st November but its non-production is immaterial. He admitted the pro-note after he was shown the entry in the plaintiff's book signed by the defendant's son. He said: "This pro-note amount was not borrowed for my business. You may look into my account. The entry is signed by my son Ramalingam. I might have borrowed another amount from the plaintiff on 5th November 1921. (By Court). I did borrow it. I have been keeping separate ledgers. There is a ledger prior to the one I have filed in Court but it belongs to my own business while the one I have filed belongs to the joint business. Prior to November 1921, I have got a day book for my own business. There is also a ledger page maintained for my dealings with the plaintiff for that period. The balance due on that ledger has been brought over to this ledger. It would have been entered in all other ledgers like that. That is paddy business, joint business and this is ground-nut business. In regard to my own business there would have been nothing there prior to November 1921 and so it would not have been brought forward." This deposition shows that the defendant admitted the pro-note of 5th November 1921 after some hesitation but suggests that it is connected with some joint business which is a paddy business. He does not say who the other partner is, nor does he say that the pro-note was signed by himself and the other partner. Nor does he say that the plaintiff knew it was a business joint between defendant and another. I do not suggest by referring to his hesitation that the defendant is dishonest. I am satisfied that he has been honest throughout this case. But he hesitated at first probably because he was afraid that the entry signed by his son may bind him as an appropriation towards the other note. The defendant's son was examined as D. W. No. 5. He was in school in the year 1921. He says his father gave him Rs. 1,000 and he paid it to the plaintiff but did not get any document or pro-note. In cross-examination, he admits his signature under the entry in plaintiff's day-book, Ex. C, which shows that the amount of Rs. 1,000 was credited towards the pro-note of 5th November 1.21. He was then asked: "Q. You told your father what you wrote here? A. No." This question suggests that he wrote the whole entry. It is true that the question is a double question and that double questions are not generally fair to witnesses. But seeing that the question was not objected to either by the witness or by his Vakil Mr. Govindachari and seeing it is a very simple question which is not apt to confuse a witness, I think it is clear to me that neither the witness nor the defendant's Vakil meant to suggest that the entry was not written by the witness. The only other alternatives are that the entry was written by some other person but signed by the defendant's son or there was no entry then but the bare signature of the witness taken then and there was an interpolation afterwards. There is no re-examination of the witness suggesting such interpolation. Nor did Mr. Govindachari seriously suggest before us, though I put the suggestion to him, that the entry was interpolated afterwards. I cannot imagine that the Judge and the practitioners on either side were thinking that they were exhibiting the signature of the witness only as an exhibit, for, such exhibit is of no use in the case. I think all understood in the Court below that the whole entry with the signature was meant to be exhibited and that all were content to take it that it was written by the defendant's son. But this does not advance the case of the plaintiff very much. His clerk who produces the account-books does not prove that the account-books were kept in the course of business, though I think this is immaterial. If the entry is made in a regular account-book or in a mere note-book or in a slip of paper and afterwards communicated to the defendant, it will be equally good as an appropriation. The real difficulty in the way of the plaintiff is that this entry has not been communicated to the defendant. The defendant's son D. W. No. 5 was a young man who had just left school. He was not charged by his father to see the payment entered towards any particular pro-note. Neither the father

D. W. No. 11 nor the son D. W. No. 5 say this. Nor was he charged by the plaintiff to carry back the fact or entry towards a particular pro-note to the defendant. It does not appear that he knew that the defendant executed three pro-notes to the plaintiff. In the absence of clear knowledge on his part it cannot be assumed that the mere entry signed by him, assuming that he wrote the entry or at least that he heard it read or saw it written carried any significance to him and unless the entry was significant to his mind as something done in opposition to his father's wishes it is not likely that he would have reported the entry to the defendant. All that we can infer from the evidence in the case is that he reported the payment and its entry in an account-book to his father (see para. 5 of the defendant's affidavit) but no more. And for aught we know, the defendant might have been still under the impression that the payment was credited towards one of the suit pro-notes. It is clear that was his desire but it was not carried out, but there is nothing to show that he knew it was not carried out. On the other hand, there is nothing to show that the plaintiff knew the defendant's desire.

On these facts the question of law arises, what is the effect of the entry made by the plaintiff but not communicated to the defendant. Mr. Thirunarayanachari, the learned Advocate for the plaintiff, contended that the notice, Ex. D, may be taken to be a notice of appropriation towards the note of 5th November. But this contention cannot be accepted. Exhibit D makes no reference to the pro-note of 5th November. It is true that, in that notice the payment of Rs. 1,000 on 5th January was not mentioned as a payment towards the suit notes. But it cannot be necessarily inferred from this that the amount must have been credited towards the third note. There are other alternatives. The amount might have been kept in suspense or one might imagine that it was a mere piece of omission as Ex. D already shows that the Vakil committed other mistakes. In Ex. VI the defendant mentions to plaintiff that that amount was sent towards the suit pro-notes. This is the first occasion on which an appropriation known to both parties is stated. Mr. Thirunarayanachari contends that a debtor can intimate the appropriation he desires only along with the payment or so immediately after it as to form part of the same transaction and cannot make his appropriation long after the payment. It is true that if the defendant does not intimate his wishes along with the payment, there is a chance of the creditor making an appropriation and intimating to the debtor and thus shutting the mouth of the debtor for ever. But supposing the creditor has not made any appropriation can it be said that the debtor cannot make the appropriation which he wishes, some reasonable time after, say, a week or a month or three months. It may be said that whenever he intimates such a wish after a reasonable interval, it formed part of the same transaction as the payment. But should it be immediately after the payment? I do not see why it should be immediately after the payment. The words "with an intimation" in s. 59, Indian Contract Act, are not inconsistent with an intimation after a reasonable interval. So long as both have not made an appropriation, I do not see why the debtor cannot intimate the appropriation he wishes, to the creditor later on. Mr. Thirunarayanachari, though he had first denied that a debtor cannot do this, practically conceded this in his argument. In such a case he said the creditor leaves it open. If once so much is conceded, it follows that the essence of an appropriation is that it should be known to both parties and if not communicated by the creditor that it is left open, for, if we hold an uncommunicated entry in an account-book effective, an entry in an informal note book or a loose piece of paper or even a piece of paper put in an envelope and secreted or even a bare mental resolution to appropriate in a particular way (sworn to by the creditor) would bind the debtor. In the case of regular account-books generally an extract of the account-book is sent to the opposite party according to the custom in commercial circles. In "*The Mecca*" (1) cited by the appellant Lord Herschell said at page 292* :

"It is clear that if the appellants had merely entered in their own books an account such as was transmitted, it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payment as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise. What, then, was the effect of bringing the items of debt into a single account, and *transmitting it to their debtors* in the manner they did."

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(1) (1897) A. C. 286; 66 L. J. P. 86; 76 L. T. 579; 45 W. R. 667.

*Page of (1897) A. C.- [*Ed.*]

This quotation shows that so long as the appropriation was not communicated to the debtor, the creditor can alter it afterwards, thereby showing that an uncommunicated appropriation is not complete as between both parties. If it is so complete, one cannot alter it. There seems to be an analogy between this and the communication of an acceptance of an offer of a contract or a revocation. The principle seems to be that unless both parties have known the entry it is not complete as between both the parties. It is difficult to see why an uncommunicated appropriation in an account-book should be binding on the debtor but the creditor may be at liberty to alter it. At page 294* Lord Macnaghten says:

"But it has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. Where the election is with the creditor, it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from *a statement of account*, or anything else which *indicates* an *intention* one way or the other and is *communicated to* the debtor, provided there are no circumstances pointing in an opposite direction." The use of the words "expressed, implied or presumed", "communicated" indicates an intention shows that a concealed or secreted entry cannot satisfy the requirements laid down by Lord Macnaghten. In *Simson* v. *Ingham* (2) Bayley, J. observed "If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account;" see also *Friend* v. *Young* (3) and *Smith* v. *Betty* (4) and Chitty on Contracts pages 851 and 852. In the present case up to 1st May 1922 neither party communicated his intention to the other. For the first time in Ex. VI the defendant mentioned that he paid the amount towards the suit notes. Within four months after the payment he repeated this in his affidavit of February 1923. The plaintiff does not contradict it up to the trial. I do not see that we must infer that he accepted the defendant's wishes, for he was pressing his suit, but it seems to be a piece of foolish and meaningless cleverness in not stating his own appropriation up to the trial. Though I am not able to infer that the payment must be taken to be appropriated by the creditor towards the suit notes under the circumstances existing on 5th January 1922 within the meaning of s. 59 of the Contract Act, see *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (5) all the later circumstances up to the trial I think justify me in rejecting the plaintiff's earlier concealed appropriation as ineffective and in holding that the defendant's intimation in Ex. VI was reasonable in the circumstance and binds both the parties. This conclusion is not inconsistent with the expressions of Lord Macnaghten in *The Mecca* (1) or of Vaughan Williams, Romer and Stirling, L. JJ., in *Seymour* v. *Pickett* (6) for the question whether the debtor may intimate if the creditor has left it open, did not arise and was not considered in these cases. At first I thought this conclusion is hard on the plaintiff for the suit on the other note would now be barred. On the other hand Mr. Govindachari pointed out that a suit for contribution by him against his partner will now be barred. The result is I excluded all questions of hardship from my mind in dealing with the case especially as I have no sympathy with the plaintiff. But I may now point out that a suit on the other note by him will not be barred as the defendant's deposition in August 23 is an acknowledgment of that note. Anyhow the plaintiff is not now entitled to recover Rs. 1,000. I have dealt with the case at great length just as the argument also took a little more than the usual time a case of this kind ought to have taken, because I was anxious to deal with the facts and the law only on the merits uninfluenced by the opinion which we have formed about plaintiff's honesty with reference to the other payment. It is admitted that the interest due to the plaintiff is still due. The amount of intrest was admitted also in Ex. VI, in May 1922. No arrangements were made for paying it up to the date of suit and even after the suit defendant deposited only the principal amount of Rs. 800 and not the interest thus necessitating the appeal. But Mr. Govindachari contends for the defendant that the suit does not lie in Madras. He refers to ss. 68 and 69 of the Negotiable Instruments Act, and the suit notes mentioned "In Madras or any place where you have your shop as the place of payment." The only specified place is Madras. But the other clause might cover a number of other places. Mr. Thirunarayanachari argued that ss. 68 and 69 do not apply as more than one place is mentioned. But the word 'place' must be construed as including 'places' as it would be anomalous to require presentment if one place is mentioned but none if two places are mentioned. If more than one place is mentioned there must be presentment at one or other of these places. The demand by Ex. D does not amount to a presentment. The result is strictly the plaintiff has no right of action to sue without presentment but the defendant did not take the point in this shape, namely, that the plaintiff has no right to sue but raised only the question of jurisdiction. I do not see how these sections can help the defendant on the particular plea he has taken. The object of presentment seems to be to give the defendant an opportunity to pay, and until presentment no right to sue arises. But the Negotiable Instruments Act does not provide that after presentation at one of several places that one place to the exclusion of others is the place which determines jurisdiction for a suit. Nor do I find any such provision in the corresponding English Law, s. 87 of the Bills of Exchange Act. The section of the C. P. C. which mentions the place of performance of the contract also as giving jurisdiction stands and is unaffected by ss. 68 and 69 of the Negotiable Instruments Act, an act which has nothing to do with the questions of jurisdiction. I must, therefore, disallow the plea of the defendant, a plea which is important only on the question of costs. If the defendant's plea had been upheld, we would disallow all costs to plaintiff while giving a decree for interest, but as it is by the defendant's waiver of plea of right of suit that the plaintiff is able to get a decree for the balance of principal and interest, I must disallow plaintiff's costs in the Court below. But the defendant's omission to admit interest or deposit has necessitated the appeal. I, therefore, award plaintiff proportionate costs on the amount of interest in appeal only. The result is, the plaintiff will have a decree for the amount of interest due upto the date of deposit of Rs. 800 in Court with further interest on it from the date of the lower Court's decree at 6 per cent. upto date of payment. Plaintiff will have proportionate costs in appeal only on such amount. He will pay defendant's costs on the rest of his claim throughout.

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(2) (1823) 2 B. & C. 65; 107 E. R. 307; 3 D. & R. 249; 1 L. J. K. B. (o. s.) 234; 26 R. R. 273.

*Page of (1897) A. C.—[*Ed.*]

(3) (1897) 2 Ch. 421 at p. 437; 66 L. J. Ch. 737; 77 L. T. 50; 46 W. R. 139.

(4) (1903) 2 K. B. 317 at p. 324; 72 L. J. K. B. 853; 89 L. T. 258; 52 W. R. 137.

(5) 26 C. 39; 25 I. A. 179; 2 C. W. N. 633; 7 Sar. P. C. J. 413; 13 Ind. Dec. (N. S.) 629 (P. C.).

(6) (1905) 1 K. B. 715; 74 L. J. K. B. 413; 92 L. T. 519; 21 T. L. R. 302.

Phillips, J.—I agree. On the question of jurisdiction I entertain some doubt, but I am not prepared to differ from my learned brother's opinion. I accordingly concur in the order proposed by him.

V. N. V. *Decree modified.*
N. H.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1545 OF 1923.
February 25, 1926.
Present:—Mr. Justice Sulaiman.
Lala CHATURI LAL—PLAINTIFF—
APPELLANT
versus
LAKHMI CHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Lambardar—*Suit for profits against* lambardar—*Negligence, what is*—Patwari's *register, reliance on.*

Prima facie when the collection of profits by a *lambardar* is grossly inadequate, there is a presumption of negligence on his part.

A *patwari's* register cannot be safely relied on as a conclusive piece of evidence with regard to amounts collected.

Second appeal against a decree of the District Judge, Agra, dated the 4th May 1923.

Mr. *N. P. Asthana*, for the Appellant.
Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for profits brought against the *lambardar*. The case has not been fully appreciated by the Courts below. The plaintiff alleged that the *lambardar* was most negligent and was guilty of misconduct. In the written statement this assertion was denied, but in para. 6 it was expressly admitted that the defendant sent a notice to the plaintiff asking him to adjust the accounts, but the plaintiff failed to do so. Afterwards a money-order was sent which also was returned. *The profits were sent to the plaintiff with reference to the amounts realised.* The money-order receipt was actually filed by the defendant which shows that a sum of Rs. 73 was sent by money-order to the plaintiff. There can be no doubt that in the written statement it was clearly admitted by the plaintiff that on account of the amount realised by the defendant a sum of money was due to the plaintiff which was actually sent by money order and which was refused. Both the Courts below have held that inspite of the fact that out of Rs. 1,732-8-1, which was the annual rental, the defendant according to the *patwari's* register collected only Rs. 531-8-2 in the year 1325 *Fasli*, the plaintiff had not proved any negligence. The learned Judge has even gone so far as to remark that, the fact that the written statement does not claim that there was a loss, does not entitle the plaintiffs to a decree. *Prima facie* when the collection is grossly inadequate, there is a presumption of negligence. In this case, however, it does appear that in the year 1326 *Fasli* there was a famine which circumstance might have justified the Courts below in coming to the conclusion that negligence is not proved. After some hesitation, therefore, I feel that I must accept the finding that negligence has not been proved, but what the Courts below have done is to accept the entries in the *patwari's* register as to the total amount collected, although the defendant did not produce his accounts as he was bound to do. The liability of the defendant to maintain accounts has been pointed out by Tudball, J. in the case of *Raghubar Charan* v. *Krishen Baldeo* (1). A *patwari's* register very often does not show the amounts of decrees realised and also sometimes does not contain all the collections made, as entries are made on dictation by the *zemindar* or his agents. In the absence of any accounts filed by the defendant it was, therefore, unsatisfactory to accept the *patwari's* register as the conclusive evidence of the total collections. However, no useful purpose is likely to be served by remanding the case and I allow the appeal and modify the decree of the Courts below to this extent that I decree the plaintiff's claim for a sum of Rs. 73 which was admitted to have been offered to the plaintiff.

The Judge has wrongly stated the amount to be Rs. 72 which was the amount sent by the plaintiff. The parties should bear their own costs of this appeal.

R. L. *Appeal allowed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 9 OF 1925.
March 4, 1926.
Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.
RAM CHANDRA NAICK AND OTHERS —JUDGMENT-DEBTORS—APPELLANTS
versus
Syed NAZAR ALI—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (2) —Withdrawal of appeal.

An appeal is withdrawn within the meaning of Art. 182 (2) of Sch. I to the Limitation Act on the date when the order permitting it to be withdrawn is made by the Court and not on the date when the application for permission to withdraw the appeal is filed.

Letters Patent Appeal against a judgment of Mr. Justice Mukerji, dated the 13th November 1924

Messrs. *P. L. Banerjee* and *K. N. Laghate*, for the Appellants.

Mr. *Mukhtar Ahmad*, for the Respondent.

JUDGMENT.—Having heard Counsel for the appellants in this case we are satisfied that the judgment of the learned Judge of this Court is correct.

The question raised is one of limitation. A decree was passed on the 23rd of April 1918 against a number of persons including the appellants here. That was a decree for costs. This decree was afterwards transferred by the decree-holder to one Saiyid Nazar Ali who figures as the respondent here.

An appeal was brought to this Court against the decree of the Subordinate Judge dated the 23rd of April 1918, and on the 10th of February 1920, the Counsel for the appellants filed an application in this Court, saying that he desired to withdraw the appeal. He asked the leave of the Court to withdraw it. Notice was ordered to issue and by reason of failure to secure service of notice the matter did not come up before this Court till the 8th November 1920. On that date an order was passed in the following terms:—

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(1) 26 Ind. Cas. 515.

"On the application of Mr. Muhammad Yusif, this appeal is withdrawn. The appellant is to pay the costs of the respondents, such costs to be calculated up to the date upon which the respondents had notice of the proposed withdrawal of the appeal.

After this an application was made on the 24th September 1923 to execute the decree for costs up to the amount mentioned in the decree of the Subordinate Judge of the 23rd of April 1918. The plea was taken that the application for execution was time-barred having been made more than three years after the date of the decree sought to be executed.

On the other side the contention was that limitation was saved by the proceedings which had taken place in appeal in this Court and it was argued that the true date from which limitation ran was the 8th November 1920 the date on which this Court allowed the appeal to be withdrawn.

The question is to be determined with reference to the language of Art. 182 of the Schedule to the Limitation Act, and the particular clause to which attention has to be directed is cl. 2 in col. 3 of the Schedule corresponding to this Article. It is there laid down that where there has been an appeal, time for execution of decree begins to run from the date of the final decree or order of the Appellate Court or the withdrawal of the appeal.

The learned Judge of this Court held that the appeal was withdrawn on the 8th of November 1920 when this Court passed an order permitting it to be withdrawn. In our opinion the law has been correctly interpreted and we hold with the Judge that in this case limitation did not begin to run till the 8th of November 1920.

We dismiss the appeal accordingly with costs including in this Court fees on the higher scale.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2361 OF 1923.

December 10, 1925.

Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

GADADHAR MANDAL—DEFENDANT No. 3 —APPELLANT

versus

Sreemati MANAKA DASSI—PLAINTIFF AND NAGENDRA NATH SAHA AND ANOTHER —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 10—Forma pauperis—*Suit for maintenance decreed —Government's costs, charge for—Sale of property liable for maintenance for costs—Effect.*

Where a plaintiff's suit for maintenance *in forma pauperis* is decreed and maintenance is made a charge on certain properties of the defendant, the first charge of the Government for costs must be on the subject-matter of the suit so far as the plaintiff succeeds under O. XXXIII, r. 10, C. P. C. But where, however, the Government proceed to sell the properties the effect would be as that of a sale of equity of redemption subject to the charge of maintenance decreed in plaintiff's favour.

Appeal against a decree of the Second Additional District Judge, 24-Pergannas, dated the 14th of June 1923, affirming that of the Subordinate Judge, Second Court, Alipur, dated the 17th of December 1921.

Mr. *Narendra Chandra Bose* and Babu *Satyendra Nath Mitra*, for the Appellants.

Babus *Baranashibasi Mukherjee, Pyari Mohan Chatterjee* and *Krishna Lal Banerjee*, for the Respondents.

JUDGMENT.

Ghose, J.—This appeal by the defendant No. 3 is against the decree of the Second Additional District Judge of Alipur affirming the decree of the Subordinate Judge of that place. The plaintiff sued for a declaration that the properties described in the plaint were subject to the charge of her maintenance which was decreed in Suit No. 23 of 1911. The plaintiff brought that suit *in forma pauperis* for recovery of certain properties and in the alternative for a charge for her maintenance on those properties. She failed in her claim for recovery of the properties, but her right of maintenance was declared as a charge on those properties and costs were decreed in favour of the Government to be recovered from the arrears of maintenance due from the defendant in that case who is the defendant No. 2 in the present suit. The Government, however, proceeded to sell the property in the hands of defendant No. 2 for the realization of the Court-fees and it was purchased by defendant No. 1. Defendant No. 1 subsequently sold the property to defendant No. 3. Defendant No. 3 claims that he got the property by virtue of the sale in execution by the Government free from the charge for maintenance of the plaintiff. Both the Courts below have negatived that plea and declared the property to be subject to the charge claimed by the plaintiff.

It is contended on behalf of the appellant that under O. XXXIII, r. 10, C. P. C., the Government was entitled to a first charge on the subject-matter of the suit and he has contended that the property in question was the subject-matter of the suit and as the Government sold the property in enforcement of the first charge the defendant No. 3 obtained it free from the subsequent incumbrance by way of the maintenance charge of the plaintiff. The short answer to this contention is that under that rule of the Code the first charge of the Government for the costs must be on the subject-matter of the suit, so far as the plaintiff succeeded in the suit, or in other words on the charge declared in favour of the plaintiff for maintenance on the property in question. As a matter of fact, however, the decree directed that the Government should recover the costs out of the arrears of maintenance in the hands of defendant No. 2. Instead of recovering the costs from the arrears of maintenance the Government proceeded to sell the properties in the hands of defendant No. 2. The result of this sale must be held to be the sale of what may be called the equity of redemption in the hands of defendant No. 2 that is the property subject to the charge of maintenance declared in favour of the plaintiff.

The appeal must, therefore, be dismissed with costs.

Cuming, J.—I agree.

R. L. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 354 OF 1924.

March 3, 1926.

Present:—Mr. Justice Misra.

AMIR KHAN—PLAINTIFF—APPELLANT

versus

Musammat HAKUMAT BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift for services—Possession, delivery of.

A deed of gift unsupported by any money consideration but purporting to have been effected for services rendered which cannot be given any monetary valuation is a deed of simple gift and not of *hiba-bil-ewaz* and a delivery of possession is necessary to validate such a gift.

Appeal against the judgment and decree of the First Additional Subordinate Judge, Gonda, dated the 10th May 1924, upholding the decision of the Munsif, Gonda, dated the 9th October 1923.

Mr. *Muhammad Ayub*, for the Appellant.

Mr. *S. M. Ahmad*, for Respondents Nos. 2 and 3.

JUDGMENT.—This is an appeal arising out of a suit brought by the plaintiff-appellant for recovery of possession over a plot of land No. 98, situate in village Firozepur, District Gonda. The suit was brought on the allegation that defendants Nos. 2 and 3 sold the plot in suit to defendant No. 1 for Rs. 150. On the 2nd of December 1920 and that about a year later, that is on the 25th November 1921, defendant No. 2 executed a deed of gift in favour of the plaintiff-appellant. The appellant based his title to recover possession of the plot on the said deed of gift, and stated in his plaint that he had been delivered possession after its execution in his favour, but had subsequently been wrongfully dispossessed in June 1922. The defendants denied the gift and alleged that no possession has been delivered to the plaintiff under it.

The learned Munsif of Gonda who tried the suit found the deed of gift to be genuine but held it inoperative on the ground that possession had not been delivered to the plaintiff under it, and dismissed the plaintiff's suit.

The plaintiff carried the matter further in appeal to the learned First Additional Subordinate Judge of Gonda, who heard the appeal and came to the conclusion that possession had, after the execution of the sale-deed of the 2nd December 1920, remained with defendants Nos. 2 and 3 and that defendant No. 1 had never been in possession of the land sold to him. In consequence he held that no possession could have been delivered by defendant No. 1 to the plaintiff of the property gifted to the latter. He found that neither actual possession nor constructive possession over the land in suit had been delivered to the appellant. On these findings the learned Judge of the Court below dismissed the appeal, and upheld the decree of the learned Munsif, dismissing the plaintiff's suit.

The plaintiff has now come up to this Court in second appeal. Two points have been argued before me. The first is to the effect that the deed of gift executed in favour of the plaintiff being a *hiba-bil-ewaz* deed was valid even without delivery of possession, as it partook of the nature of a transaction by way of sale. The second is to the effect that the donor had given such possession of the property as she was capable of and the gift made by her in favour of the plaintiff was, under the circumstances, valid.

Regarding the first contention it was argued that the transaction evidenced by the deed of the 25th November 1921 partook of the nature of a sale transaction. I am not prepared to accept that view. I am aware that there are cases where it has been held that where a gift is made by a Muhammadan in lieu of something which has a monetary value the transaction may be considered by way of sale. There are also certain cases which lay down the proposition that services of a professional character rendered by the donee to the donor may be considered as a consideration of monetary value. In the deed in suit, however, there is no money consideration nor can the services rendered by the plaintiff to defendant No. 1 be reckoned as having a monetary value. The deed in suit connot, therefore, be considered to bear the character of sale. The deed must be interpreted as a deed of gift and I am of opinion that delivery of possession was necessary to validate the said gift. The Courts below have found that possession did not pass to the appellant under the said gift and consequently the plaintiff-appellant did not derive any title under it.

Regarding the second contention I am of opinion that the matter is concluded by the finding of fact arrived at by the lower Appellate Court. That Court has come to a finding, after going through the evidence on the record, that neither actual nor constructive possession passed to the appellant.

Under the circumstances the plaintiff's suit was rightly dismissed by the Courts below. The appeal, therefore, fails and is dismissed with costs.

R. L. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER
No. 194 OF 1924.
November 20, 1925.
Present:—Mr. Justice Cuming and
Mr. Justice B. B. Ghose.
RAJANI KANTA DEY—PLAINTIFF—
APPELLANT
versus
KHATIR MAHOMED—DEFENDANT
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 27—Inherent power of Court, when to be exercised—Remand—Local inquiry—Order, how to be made.

It is not open to the Court to invoke the inherent powers overriding distinct provisions in the C. P. C.

Where a local enquiry is necessary for proper decision of a case the Appellate Court should either itself order a fresh local enquiry or remand the case to the Primary Court for the purpose to have the result reported to it.

Appeal against an order of the Subordinate Judge, Sylhet, dated the 29th of March 1924, reversing that of the Munsif, Fourth Court, Habiganj, dated the 17th of April 1923.

Babu *Sasadhar Roy* (Sr.), for the Appellant.

Babu *Birendra Kumar Dey*, for the Respondent.

JUDGMENT.

Cuming, J.—The appellant in this appeal brought a suit against the respondent to recover possession of a certain plot of land after establishment of his right to it. The suit was decreed in part. The defendant then appealed to the District Court. The District Court held that the report of the *amin* was unreliable and the learned Judge, therefore, set aside the judgment and decree of the first Court and remanded the case to the Primary Court for trial after making a fresh local investigation, against this order the plaintiff has appealed to this Court; and he contends that the learned Subordinate Judge's order is bad in law. He contends that the order does not come under O. XLI, r. 23 or r. 25 which are the only rules which provide for the remand of a case to the Primary Court.

The respondent contends that although the order does not come under r. 25 or r. 23 the order was made under the inherent powers of the Court.

It seems to me quite clear that the order of the learned Subordinate Judge is wrong. So long as there are distinct provisions in the Code it is not open to the Court to invoke the inherent powers of the Court. In this case the Court should obviously have proceeded under O. XLI, r. 27 and himself ordered a fresh local enquiry or to remand the case to the Primary Court to have a fresh enquiry made and the result reported to his Court.

The order of the learned Subordinate Judge is, therefore, set aside and the appeal is sent back to him for hearing. It would be open to him to order a fresh local enquiry himself or to send the case to the first Court to have a fresh local enquiry made and decide the appeal after considering the result of this fresh local enquiry.

Costs of this appeal will abide the final result. We assess the hearing fee at three gold *mohurs*.

Ghose, J.—I agree

M. B. *Appeal allowed,*
Case remanded.

LAHORE HIGH COURT.

Civil Miscellaneous Petition No. 96 of 1926.

March 29, 1926.

Present:—Mr. Justice Zafar Ali.

Musammat NARAIN DEVI—Plaintiff—Petitioner

versus

SHANKAR DASS and others—Defendants—Respondents.

Civil Procedure Code (Act V of 1908), s. 24—Expression of opinion by Court in another case—Transfer.

Expression of opinion by Court on certain points nvolved in the case in hand in a previous case is no ground for transferring the case from that Court.

Petition, under s. 24, C. P. C., for transfer of the case, from the Court of the District Judge, Jullundur, to some other Court in any of the adjoining districts.

Mr. *Chandar Gupta* for Lala *Fakir Chand*, for the Petitioner.

Lala *Badri Dass*, R. B., for the Respondents.

ORDER.—The petitioner is a widow who has filed an appeal in the Court of the District Judge of Jullundhur against the order of the Trial Court dismissing her suit but she applies for a transfer of the appeal to some other Court on the ground that the District Judge has already expressed his opinion against her on certain points involved in the present appeal which were in issue in a Succession Certificate case decided on appeal by the learned District Judge. I am of opinion that this is no ground for transfer. The District Judge will evidently decide the present appeal on the material that has been brought on the record of this case. I, therefore, dismiss the application.

R. L. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

First Civil Appeal No. 108 of 1924.

March 2, 1926.

Present:—Mr. Hallifax, A. J. C.

Sir BISHESHWARDAS DAGA—Plaintiff—Appellant

versus

ANJOR SINGH and others—Defendants—Respondents.

Hindu Law—Widow—Debts—Charge on estate.

Even the fullest legal necessity cannot make a debt incurred by a Hindu widow a charge on her husband's estate after her death unless she specifically creates that charge. A personal debt of the widow is payable out of the income of the estate until she declares her inability to pay it herself by alienating a part of the estate to pay it.

Ramasami Mudaliar v. *Sellattammal*, 4 M. 375; 1 Ind. Dec. (N. S.) 1097, *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*, 25 C. 565; 2 C. W. N. 425; 13 Ind. Dec. (N. S.) 373 and *Kallu* v. *Faiyaz Ali Khan*, 30 A. 394; 5 A. L. J. 367; A. W. N. (1908) 173, referred to.

Appeal against a decree of the Second Sub-Judge, First Class, Raipur, dated the 16th August 1924, in Civil Suit No. 91 of 1922.

Mr. *W. Y. Deshmukh*, for the Appellant.

Sir *B. K. Bose* and Messrs. *S. N. Bose* and *P. N. Rudra*, for the Respondents.

JUDGMENT.—It has been held in this case that the statement of fact in the award to the effect that there was no separation between Keslal Singh and Anjor Singh is final as between the parties to the arbitration, in the same way as a decision by a Court between them. The correctness of that view is very doubtful, but the question does not arise because there is no such finding in the award. The nearest thing to it is the statement that the villages belonging to them both had not been partitioned. That can mean one thing or the other equally, and the effect of the rest of the award is the same, as it gives Keslal Singh's widow, in respect of the property of the family, a position midway between what she would have had if he had separated from Anjor Singh and what she would have had if they had remained joint.

The case, in these circumstances, would have to be remanded for a trial of the question of jointness if it were otherwise maintainable. But it certainly is not, for two reasons. All the defendants, of whom Anjor Singh has alone contested this appeal, were sued as the legal representatives of the estate of Keslal Singh, not of Bahora Bai who left none. But even the fullest legal necessity cannot make a debt incurred by a Hindu widow a charge on her husband's estate after her death unless she specifically creates that charge. The debt is her own personal debt, payable out of the income of the estate, until she declares her inability to pay it herself by alienating a part of the estate to pay it. The matter is fully explained in the judgments in *Ramasami Mudaliar* v. *Sellattammal*(1), *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee* (2) and *Kallu* v. *Faiyaz Ali Khan* (3).

But there was no necessity of any kind here, even if we accept all the allegations of the plaintiffs. With the exception of the Rs. 48 borrowed for the purchase of the stamp for the deed that was executed, the whole of the Rs. 6,000 was borrowed for the expenses of the litigation in which Bahora Bai was attempting to get from Anjor Singh more of the estate than she was entitled to get. Most of it went in the suit in which she contested the validity of the award which was found to be valid, as it undoubtedly was. It is preposterous to talk of expenditure of that sort being necessary for the preservation of the estate.

The appeal will be dismissed and the appellants must pay all the costs.

G. R. D. *Appeal dismissed.*

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(1) 4 M. 375; 1 Ind. Dec. (N. S.) 1097.

(2) 25 C. 565; 2 C. W. N. 425; 13 Ind. Dec. (N. S.) 373.

(3) 30 A. 394; 5 A. L. J. 367; A. W. N. (1908) 173.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 40 OF 1925.
January 30, 1926.
Present:—Mr. Findlay, Officiating J. C.
ANAND—DEFENDANT—APPELLANT
versus
RAMCHANDRA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, r. 20—Substituted service.

Under O. V, r. 20, C. P. C., the Court has power to order substituted service not only where it has reason to believe that the defendant is keeping out of the way to avoid service but where it is satisfied that for any other reason the summons cannot be served in the ordinary way.

Appeal against a decision of the First Subordinate Judge, First Class, Nagpur, dated the 21st July 1925, in Miscellaneous Judicial Case No. 88 of 1923.

Messrs. *G. L. Subhedar* and *K. V. Deoskar*, for the Appellant.

JUDGMENT.—The vital question in this appeal is whether the order of the Subordinate Judge, dated 21st June 1921, for substituted service being effected on the appellant-defendant was a legal and proper one in the circumstances of the case. In this connection I desire to point out that under O. V, r. 20, C. P. C., the Court has power to order substituted service not only where it has reason to believe that the defendant is keeping out of the way to avoid service but where it is satisfied that for any other reason the summons cannot be served in the usual way. At the first hearing on 15th April 1921 defendant-appellant was not served. The endorsement on the connected summons by Gopinath at whose house he had been living was to the effect that appellant had been living at his house until two months before when he had left for an unknown destination. The summons for the next hearing of 21st June 1921 was to the effect that he had gone to Calcutta 15 days previously from the same house. In these circumstances there seems every reason to believe that in the meantime appellant had returned temporarily at least to the house in question and left without giving an address which would find him. It follows too that the reasonable inference is that the inmates of the house must have told him of the first notice and on the material before it then I think the Subordinate Judge was justified in passing his order for substituted service.

It does not follow, however, that there may not, all the same, on the allegations offered by appellant have been sufficient cause thereafter for holding that the application under O. IX, r. 13 should have succeeded if the appellant had established either ineffective substituted service or that he was prevented by sufficient cause from appearing. For my own part I cannot see that the circumstances of this case bring it within the purview of the decision in *Habibullah* v. *Karanju* (1). Like the lower Court I am not satisfied that the appellant was continuously absent from Benares during the period in question as he alleges. The plaintiff had obtained his address from his cousin defendant No. 3; the endorsements on both summonses showed he had lived there and I find it utterly impossible to accept his story that he lived elsewhere in Benares himself.

Altogether apart from this all the reasonable inferences which arise from the facts set forth in paras. 10 and 11 of the order appealed against lead irresistibly to one inference only *viz.*, that appellant must have notice of the *ex parte* decree passed on 18th February 1922 long before July 1923. Like the lower Court the case seems to me obviously one where the application has been made after a long lapse of time only with a view to harass the respondent-defendant No. 1 and I think the allegations of the appellant are unfounded in point of fact. The appeal is dismissed without notice to respondent.

G. R. D. *Appeal dismissed.*

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(1) 19 Ind. Cas. 425; 9 N. L. R. 35.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 235 OF 1924.
March 18, 1926.
Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.
BACHINT SINGH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
HARNAM SINGH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Discretion, nature of—Second appeal—Interference with refusal to exercise discretion.

Discretion vested in a Court under s. 5 of the Limitation Act is a judicial one and where a refusal of the Court to exercise this discretion is not based on appreciation and consideration of such facts as are relevant and the application of the right principles, the High Court is competent to interfere with it in second appeal.

Letters Patent Appeal against the judgment of Mr. Justice Abdul Raoof, dated the 23rd October 1924, passed in Civil Appeal No. 328 of 1924, reversing that of the District Judge, Lyallpur, dated the 2nd November of 1923.

Dr. *Gokal Chand Narang*, for the Appellants.

Lala *Jagan Nath Aggarwal*, for the Respondent.

JUDGMENT.—The question for determination is whether the learned Judge, who heard the second appeal preferred by the plaintiff, was justified in interfering with the decision of the District Judge declining to exercise his discretion under s. 5 of the Indian Limitation Act and dismissing the appeal as barred by time. There can be no doubt that, when the lower Appellate Court has exercised its judicial discretion in a sound and reasonable manner and after due enquiry and careful consideration of the facts, the High Court as Court of Second Appeal cannot interfere with the exercise of that discretion, even though the High Court itself would have arrived at a different conclusion if it had heard the case as a Court of first appeal. The discretion, however, is a judicial one and the test in each case is whether the discretion has been exercised after appreciation and consideration of such facts as are relevant and after application of the right principles to those facts.

Now, it appears that the learned District Judge overlooked the fact that the value of the suit even after the amendment of the plaint, continued to be Rs. 100 and that no objection to that valuation was raised either by the defendant or by the Court of first instance. In these circumstances the plaintiff's Vakil, finding that the value of the suit as originally fixed for purposes of jurisdiction had not been challenged, preferred the appeal, to the Senior Subordinate Judge and these peculiar facts constituted a sufficient cause under s. 5 of the Indian Limitation Act for extending the period of limitation.

The Court of Second Appeal was accordingly competent to interfere with the decision of the District Judge and to arrive at its own independent finding. We accordingly dismiss the appeal with costs.

R. L. *Appeal dismissed.*

OUDH CHIEF COURT.

Civil Revision No. 21 of 1926.
March 11, 1926.
Present:—Sir Louis Stuart, Kt., Chief Judge.
CHOTKAN and another—Defendants—Appellants
versus
SITA RAM—Plaintiff—Opposite Party.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Civil Procedure Code (Act V of 1908), O. XX, r. 4—Judgment of Small Cause Court containing points for determination—Revision, interference in.

A judgment of the Court of Small Causes which contains points for determination and shows that the Judge has applied his mind to the evidence and has come to a perfectly intelligent finding cannot be upset in revision.

Jai Lal v. Bakhtawar, 8 O. C. 44, not applied.

Application for revision against the judgment and decree of the Sub-Judge, Bara Banki, sitting as Judge, Small Cause Court, Bara Banki, dated the 23rd December 1925.

Mr. *Motilal Saksena*, for the Appellant.

JUDGMENT.—I see no reason to issue notice in this matter. The learned Judge of the Small Cause Court clearly applied his mind to the evidence and has arrived at a perfectly intelligent finding upon it. His judgment is in conformity with the first para. of O. XX, r. 4 for it does contain the points for determination and the decision thereupon. The learned Counsel has referred me to a decision of Mr. Wells, Additional Judicial Commissioner, passed some 21 years ago in *Jai Lal* v. *Bakhtawar* (1). There is nothing in that decision which is of an authoritative nature. Mr. Wells does not discuss in it the provisions of s. 203 of Act XIV of 1882 which correspond word for word with the present O. XX, r. 4, para. (1). Undoubtedly Mr. Wells had a perfect right to set aside the decision of the Judge in that particular Small Cause Court suit to which his mind was directed and order a fresh trial under the provisions of s. 25 of the Provincial Small Cause Courts Act. The superior Court has very wide powers under that section but I think it unfortunate that the decision has been printed as it cannot be considered in any way authoritative or of general value. Mr. Wells was of a certain opinion in that particular case. But it does not in the least follow that that opinion will assist Judges in deciding different cases. I reject this application.

R. L. *Application rejected.*

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(1) 8 O. C. 44.

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 2268 of 1925.
March 12, 1926.
Present:—Mr. Justice Sulaiman and Mr. Justice Banerji.
RANJIT SINGH—Plaintiff—Appellant
versus
BHAGWATI SINGH and another—Defendants—Respondents.

Agra Pre-emption Act (XI of 1922), ss. 14, 15—Sale by co-sharer—Notice—Estoppel.

Sections 14 and 15 of the Agra Pre-emption Act do not imply that unless a notice of a contemplated sale is given by the intending vendor to his co-sharers, they can in no case be estopped from claiming the right of pre-emption. If by taking an active part in the completion of the sale, and by his conduct in other ways, a co-sharer leads the vendee to believe that he (co-sharer) has waived his right of pre-emption, and no notice is, therefore, thought necessary to be issued to him, he would be estopped from claiming his right of pre-emption.

Second appeal against a decree of the Subordinate Judge, Jaunpur, dated the 25th August 1925.

Mr. *Haribans Sahai*, for the Appellant.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption. The lower Appellate Court has found that when this sale-deed was executed the plaintiff was present there all along; that in fact he took an active part in obtaining the sale-deed, and that his own nephew who is a member of a joint Hindu family with him is one of the vendees under this sale-deed. It has further found it impossible to believe that when the sale was advertised in the whole village, and a large number of villagers took steps to raise large sums of money in order to acquire the property, the plaintiff remained uninformed as he professed to be. On these findings it has held that the plaintiff's claim for pre-emption is barred by estoppel. There can be no doubt that having regard to the findings arrived at, there is a clear estoppel against the plaintiff. Having himself taken an active part in procuring the sale-deed covering the property in dispute, he cannot now turn round and claim that he has a right of pre-emption left.

The learned Vakil for the appellant, however, argues that no question of estoppel can arise in this case inasmuch as no notice, as contemplated by s. 14 of the new Pre-emption Act, was given to the plaintiff. His contention is that under the new Act unless a notice has been issued a co-sharer's right of pre-emption can never be extinguished, no matter how much estoppel there may be against him. With this contention we are wholly unable to agree. Section 14 is only permissive which gives a co-sharer a power to give notice by registered post to all persons having a right of pre-emption.

In case such a notice is issued the right of such other co-sharers is extinguished.

But ss. 14 and 15 do not quite mean that in no other case can a co-sharer be estopped from claiming his right of pre-emption. If by his conduct he has led the vendee to believe that he has waived his right of pre-emption, then the estoppel would remain against him, even though under the circumstances it was not thought at all necessary to issue a notice to him.

The appeal has no force and is dismissed.

F. Q. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 735 OF 1922.
March 11, 1926.
Present:—Mr. Justice Harrison
and Mr. Justice Jai Lal.
MOHAMMAD ASLAM KHAN AND OTHERS
—DEFENDANTS—APPELLANTS
versus
JAHAN KHAN AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Custom—Alienation—Gift—Sonless Awan *of Tallagang Tahsil, District Attock—Gift of ancestral property to daughter.*

A sonless *Awan* of Tallagang Tahsil of Attock District has an unrestricted power of gifting his property, ancestral or non-ancestral, to a daughter or her issue.

Lal Khan v. *Nura*, 25 Ind. Cas. 556; 72 P. R. 1914; 233 P. L. R. 1914, *Amir Ali* v. *Baggo*, 15 P. R. 1907; 35 P. W. R. 1907; 4 P. L. R. 1907, *Rakhi* v. *Baza*, 79 Ind. Cas. 743; 5 L. 34; A. I. R. 1924 Lah. 452; 1 L. C. 68, *Yakub Khan* v. *Fateh Khan*, 20 Ind. Cas. 14; 5 P. R. 1914; 253 P. L. R. 1913; 161 P. W. R. 1913, *Nur Ahmad* v. *Ghulam Husain*, 30 Ind. Cas. 90; 56 P. R. 1915; 135 P. W. R. 1915; 51 P. L. R. 1916, *Devi Das* v *Bhakra*, 53 P. R. 1899, *Khuda Bakhsh* v. *Waham Ali*, 10 Ind. Cas. 36; 88 P. R. 1911; 144 P. L. R. 1911; 116 P. W. R. 1911 and *Nur Khan* v. *Sarfaraz*, 16 Ind. Cas. 21; 100 P. R. 1912; 249 P. L. R. 1912; 238 P. W. R. 1912, referred to.

Appeal from a decree of the District Judge, Attock at Campbellpur, dated the 31st January 1922.

Mr. *Nanak Chand*, for the Appellants.

Mr. *H. D. Bhalla*, for the Respondents.

JUDGMENT.—The only question to be decided in these two appeals is whethe a sonless *Awan* of the Tallagang Tahsil of Attock District has an unrestricted power of alienation of his ancestral property in favour of his daughter. The District Judge has decided the point in favour of the contesting reversioners and has reversed the finding of the Trial Court on this point. The authorities have been well-reviewed by the Trial Court and the chief reason given by the District Judge for coming to a different conclusion is that *Lal Khan* v. *Nura* (1), in his opinion, suggests that an *Awan* can only make an alienation of ancestral property with the consent of the reversioners, and it appears to him that the *Riwaj-i-am* compiled by Mr. Talbot when the Tallagang Tahsil was in the Jhelum District supports this view. So far as the *Riwaj-i-am* is concerned support can be found for both views. The concluding para. 105 to the effect that a sonless *Awan* has full power of alienation and in an earlier passage in answer to question No. 89 it is stated that an ancestral property cannot be given without the consent of the reversioners up to the 4th degree. We are of opinion that this *Riwaj-i-am* cannot be relied upon one way or the other, and on going through the authorities we find that the whole position has been most ably and carefully analysed in *Amir Ali* v. *Baggo* (2) by Johnstone, J. He quotes all the authorities up to that time and also the various instances which had occurred and his conclusion is in favour of an unrestricted right of alienation. So also the last authority, *Rakhi* v. *Baza* (3) which decided that an *Awan* of Tallagang had no power of making a Will disposing of his ancestral property recited as a well established proposition that a sonless *Awan* had unrestricted power to make such a gift.

Counsel for the respondent has attached great weight to *Amir Ali* v. *Baggo* (2) a Gujrat case in which a gift to a resident daughter was maintained and that to a non-resident daughter was set aside and he also relied on the general view taken in *Yakub Khan* v. *Fateh Khan* (4) and *Lal Khan* v. *Nura* (1). As against these authorities there appears to us a great weight of authority, in support of the contention of the appellant, and we need only quote *Nur Ahmad* v. *Ghulam Husain* (5), *Devi Das* v. *Bhakra* (6), *Khuda Bakhsh* v. *Waham Ali* (7) and *Nur Khan* v. *Sarfaraz* (8).

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(1) 25 Ind. Cas. 556; 72 P. R. 1914; 233 P. L. R. 1914.

(2) 15 P. R. 1907; 35 P. W. R. 1907; 4 P. L. R 1907.

(3) 79 Ind. Cas. 743; 5 L. 34; A. I. R. 1924 Lah. 452; 1 L. C. 68.

(4) 20 Ind. Cas. 14; 5 P. R. 1914; 253 P. L. R. 1913; 161 P. W. R. 1913.

We find it fully established that a sonless *Awan* of Tallagang Tahsil of Attock District has an unrestricted power of gifting his property, ancestral or non-ancestral, to a daughter or the issue of such daughter.

We accept both appeals with costs.

R. L. *Appeal accepted.*

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(5) 30 Ind. Cas. 90; 56 P. R. 1915; 135 P. W. R. 1915; 51 P. L. R. 1916.

(6) 53 P. R. 1899.

(7) 10 Ind. Cas. 36; 88 P. R. 1911; 144 P. L. R. 1911; 116 P. W. R. 1911.

(8) 16 Ind. Cas. 21; 100 P. R. 1912; 249 P. L. R. 1912; 138 P. W. R. 1912.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 449 OF 1924.
March 3, 1926.
Present:—Mr. Justice Misra.
MAHANT DASS—PLAINTIFF—APPELLANT
versus
RAM GHULAM—DEFENDANT—RESPONDENT.

Landlord and tenant—Village abadi*—Ejectment—House built by tenant—Right of tenant to retain house.*

A tenant cannot be ejected from the house in the *abadi* of the village as long as he retains any interest in the village. [p. 400, col. 1.]

Ram Harakh v. *Ambika Datt Ram*, 38 Ind. Cas. 420; 21 O. C. 257; 5 O. L. J. 642, referred to.

Second appeal against the judgment and decree of the First Subordinate Judge, Bahraich, dated the 4th August 1924, in Civil Appeal No. 26 of 1923, confirming that of the Munsif, Kaiserganj, District Bahraich, dated the 27th July 1923, in Suit No. 127 of 1923.

Mr. *Mahesh Prasad*, for the Appellant.

Mr. *S. M. Ahmad*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal. The suit was brought by the plaintiff-appellant, who is the *taluqdar* of Ranipur, District Bahraich, for a mandatory injunction for removal of 27 trees and a thatched house standing on a plot of land situate in village Dharam Sarai, *Pergana* Fakharpur, District Bahraich, included in his *taluqa*. One Nand Kishore, father of defendant No. 1 was a tenant of the plaintiff in the said village. He was ejected in June 1916 and the land was then let out to another tenant. In a partition of the property of the family of which Nand Kishore was a member the land in suit had fallen into the share of the other defendants who were members of the same family, and the ejectment proceedings were taken against Nand Kishore because his name stood recorded in the village papers as a tenant of the land held by the family. After the ejectment the plaintiff's predecessor-in-title got the trees that existed on the cultivatory holding cut down except the 27 trees now in suit which admittedly were allowed to remain in possession of Nand Kishore and his family. Out of these 27 trees, 26 trees, had been planted by Nand Kishore and the remaining one was an *aunla* tree, self-grown and not planted. The plaintiff claimed that these trees should be removed and that the house in the village in which the defendants lived should be demolished. It had been alleged in the plaint that the trees in suit were only recently planted by the defendants and that the house in dispute was also recently built by them.

The defence was to the effect that the trees and the house in suit were old ones and had been in existence for more than 20 years, and that the suit of the plaintiff was, therefore, barred by limitation.

The learned Munsif of Kaisarganj, District Bahraich, who tried the suit found in favour of the defendants and dismissed the plaintiff's suit. The plaintiff carried the matter further in appeal to the learned First Subordinate Judge of Bahraich, who heard the appeal and by an exhaustive and well-reasoned judgment upheld the decision of the Trial Court and dismissed the plaintiff's appeal.

The plaintiff has now come up to this Court in second appeal and the contentions raised on his behalf are to the effect (1) that the plaintiff should be allowed to eject the defendants from the house occupied by them on the ground that the said house was appurtenant to their tenancy and that they had now no right to retain the site of the said house against the wishes of the landlord when they had ceased to be tenants in the village, and (2) that the defendant has no right to retain the trees because they were allowed to remain in their possession by the plaintiff as a matter of mere favour which the plaintiff was not now willing to extend to them.

In deciding the appeal I should state clearly what are the findings of fact which have been arrived at by the lower Appellate

Court. Regarding the house in suit it has been found that it was built some 20 years ago with the tacit permission of the plaintiff's predecessor-in-title. As to the grove the finding is to the effect that it had been planted by Nand Kishore about the same time when the house was built by him, *viz.*, 20 or 25 years ago. The learned Subordinate Judge has also found that in the year 1916 when Nand Kishore was ejected from his cultivatory holding the then proprietor of the village got about a hundred trees cut down which had been planted by said tenant on his cultivatory holding but had allowed the present trees to stand and the defendants were given a right to enjoy the shade and fruits.

It, therefore, appears to me to be clear on the above evidence that the plaintiff has got no right to dispossess the defendants of the 27 trees which are now in dispute and which were allowed to remain in their possession. The ordinary presumption which would attach to such an action on the part of the plaintiff's predecessor-in-title was that the defendants were allowed to enjoy the produce of the trees as long as they existed. The plaintiff, therefore, cannot now be allowed to turn round and say that he has withdrawn the permission originally granted and has thus became entitled to eject the defendants from those trees. In my opinion, therefore, the Courts below were right in holding that the plaintiff was not entitled to get possession of the trees in suit.

As to the house in suit it is clear that the defendants cannot be ejected from it as long as any interest is retained by them in the village. It is evident that the defendants still possess an interest in the village inasmuch as they are entitled to retain possession of the trees in suit, and under those circumstances the plaintiff is not entitled to eject the defendants from the site of their house in the *abadi* of the village. This principle was clearly laid down by a Bench of the late Court of Judicial Commissioner Oudh in the leading case on the subject reported as *Ram Harakh* v. *Ambika Datt Ram* (1) decided by Lindsay, J. C, and Daniels, A. J. C. The plaintiff is not, therefore, entitled to get a decree for ejectment with regard to the site of the house also.

In my opinion, therefore, the decree passed by the two Courts below was perfectly correct and I dismiss the appeal with costs.

G. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2311 OF 1923.

December 3, 1925.

Present :—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

SIATAJ SHAIKH AND OTHERS—DEFENDANTS —APPELLANTS

versus

BISHNUDAS DHAR AND OTHERS— PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Transfer by tenant—Acceptance of transferee as tenant.

A landlord cannot be taken to have accepted a transferee from his tenant as his own tenant, merely because he brings a suit for possession against the transferee, which suit is not proceeded with and comes to nothing.

Appeal against a decree of the District Judge, Murshidabad, dated the 26th June 1923, affirming that of the Munsif, First Court, Kandi, dated the 6th May 1922.

Babu *Santimoy Majumdar*, for the Appellants.

Babu *Durga Charan Mitra*, for the Respondents.

JUDGMENT.

Ghose, J.—This appeal arises out of a suit for rent which has been decreed by both the Courts below.

The only point argued is that the tenants defendants having transferred their holding and the landlords having presented a plaint previously for possession of the land as against the transferee is precluded from suing the defendants for the rent of the land. The suit of the landlords as against the transferee was not proceeded with and it came to nothing. It is contended that the presentation of the plaint ought to be taken as acceptance of the abandonment of the holding by the recorded tenants, that is, the defendants in the suit. That can hardly be accepted as a correct proposition of law. The landlord is not bound to accept any person as a tenant other than his recorded tenant and he is entitled to bring a suit for rent and obtain a decree as against the recorded tenant.

The appeal must, therefore, be dismissed with costs.

Cuming, J.—I agree.

N. H. *Appeal dismissed.*

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(1) 48 Ind. Cas. 420; 21 O. C. 257; 5 O. L. J. 612.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 958 OF 1925.
December 7, 1925.
Present:—Mr. Justice Addison.
CHET SINGH—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Arms Act (XI of 1878), ss. 19 (f), *20—Concealment, meaning of—Carrying arms in gunny bag—Intention.*

Each case of concealment of arms must be decided on its own merits.

For a conviction to fall under s. 20, Arms Act, there must be some special indication of an intention that the possession of arms was being concealed from a public servant or from a Railway Official. Where the arms are carried through a place where it is not anticipated that a public servant would be met, the intention to conceal is not easy to infer. Consequently when a person carried arms wrapped up in a gunny bag on a horse back to an appointed place for sale where he did not expect any public servant to meet, he could not be said to have had an intention to conceal. [p. 402, cols. 1 & 2.]

[Case-law discussed.]

Appeal from an order of the Magistrate, First Class, Amritsar, dated the 15th August 1925.

Mr. *Muhammad Rafi*, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.—The appellant Chet Singh has been convicted under s. 20 of the Arms Act for being in unlawful possession of two revolvers and ten loaded cartridges in such a manner as to indicate an intention that his possession of them might not be known to any public servant. He has been sentenced to seven years' rigorous imprisonment together with a fine of Rs. 500 and he has appealed.

The case on the merits was not seriously argued and it has been established beyond dispute that he had these articles in his possession. In fact, a trap was laid for him into which he fell. Karam Singh, *lambardar*, informed the Police that the appellant was in the habit of selling revolvers and opium and the Sub-Inspector of Police asked him to let him know whenever he had any to sell. Accordingly the *lambardar* in question settled with the appellant that he would bring some persons to buy revolvers from the appellant at a particular place and time. The appellant went to this place on horse-back, carrying in front of him a gunny bag in which were the revolvers and cartridges in question together with 8¼ seers of Kabul opium. He was seized as they were settling the price. There is not the slightest doubt that he had these two revolvers and ten cartridges and he was properly convicted and the question only remains as to whether the conviction should have been under s. 19 (*f*) or s. 20 of the Arms Act.

It was held by a Single Judge of this Court in *Ibrahim* v. *Emperor* (1), that s. 20 of the Arms Act applied only to cases where the import or export of arms was attempted. This decision was based on *Crown* v. *Azu* (2) and *Ahmed Hossein* v. *Queen-Empress* (3). In *Ahmed Hossein* v. *Queen-Empress* (3), however, what had happened was that the Police searched the appellant's house and found some arms in it. It was held that in a case such as that s. 20 did not apply. It was not held that that section only applied to the import and export of arms. *Crown* v. *Azu* (2) was a similar case. There when the accused's house was searched certain fire-arms were found under a heap of straw where they were concealed in order that visitors should not see them. It was held that this was not a concealment with the intention specified in s. 20. The following words might be quoted:—"The possession was no doubt furtive, but it is not every act of furtive possession that is penal under the first paragraph of s. 20. The possession must be furtive or against public servants, railway servants or public carriers, and such cases would generally occur where arms were being illicitly imported or transported. It is probable that the accused concealed the fire-arms in order that visitors to his house should not see them and give information against him, but such a concealment would not fall under the first part of s. 20. There is no reason to suppose that the accused anticipated a search of his house by a public-servant, and if he had, he would probably have buried the fire-arms, I, therefore, think that the arms were not concealed in such a manner as to indicate the intention stated in the first part of s. 20." These words do not mean that a conviction under s. 20 can only be obtained in cases of import or export of arms. What was said was that such convictions would generally occur where arms were illicitly imported or transported, that is, taken from place to place, as it would usually be on such occasions that the person in possession of them would attempt to conceal them from a public servant or a Railway employee, etc.

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(1) 18 Ind. Cas. 265; 9 P. R. 1912 Cr.; 14 Cr. L. J. 41; 44 P. W. R. 1912 Cr.; 128 P. L. R 1913.

(2) 9 Cr. L. J. 259; 1 S. L. R. 18 (F. B.).

(3) 27 C. 692; 4 C. W. N. 750; 14 Ind. Dec. (N. S.) 455.

In *Khem Singh* v. *Emperor* (4) the view taken in *Ibrahim* v. *Emperor* (1) was not followed and it was held that each case of concealment of arms must be decided on its own facts, that is as to whether it fell under s. 19 or s. 20 of the Arms Act and that the circumstances in that case showed that the concealment was made so that the possession of the weapons should not be known to the Police and the offence, therefore, fell under s. 20. *Faqiria* v *Emperor* (5) is another case of this High Court where the concealment of a *chhavi* was held to fall under s. 20 of the Arms Act and the principle laid down in *Khem Singh* v. *Emperor* (4) was again followed in *Sher Ali* v. *Emperor* (6). The head-note* of *Channan Singh* v. *Emperor* (7) is to the effect that something more than an ordinary concealment should be established in order to bring the illegal possession of arms within the meaning of s. 20 of the Arms Act. It also goes on to add that s. 20 applies only to cases where the import or export of arms is attempted. It would appear, however, from the body of the judgment that it was not necessary for the decision of the case to add what is given in the second part of the head-note.

In my judgment the general principle laid down in *Khem Singh* v. *Emperor* (4) which was decided by a Division Bench of this Court, is correct, namely, that each case of concealment of arms must be decided on its own facts as to whether it falls under s. 19 or s. 20 of the Arms Act. If, however, arms were merely concealed in a house, which, it could not be anticipated, the Police would come and search, s. 20 would not apply. For a conviction to fall under s. 20 there must be some special indication of an intention that the possession of the arms was being concealed from a public servant or from a Railway Official. For example, if arms were carried hidden on a railway journey this special intention might be easy to infer. The same would be the case if arms were carried concealed through a city where numerous Constables were posted or if they were carried past or through a Police Station. It would not be so easy to infer this intention if the arms were carried concealed in the open country where it was not anticipated that any public servant would be met, though even in such cases it might be possible to arrive at a finding that the intention was to conceal them from the Police. In fact the words already quoted from *Crown* v. *Azu* (2) and the principle laid down in *Khem Singh* v. *Emperor* (4) give the correct method of discriminating as to what section the offence does fall under.

In the case now before me it is obvious that it cannot be inferred that the appellant was carrying the arms in question so as to conceal them from the Police. He did not anticipate meeting the Police. He was merely carrying them in a convenient manner to the place arranged for their sale. He wrapped the opium, cartridges and two revolvers in a gunny bag and carried them to that spot in front of him on his horse. It was scarcely possible for him to have carried them exposed. This case, therefore, clearly falls under s. 19 (*f*) of the Arms Act.

I accordingly accept the appeal and alter the conviction to one under s. 19 (*f*), Arms Act. As this is a case of trafficking in arms, I sentence the appellant to the full sentence of three years' rigorous imprisonment, together with a fine of Rs. 250 and in default of its payment, to three months' further rigorous imprisonment.

R. L. *Appeal accepted in part.*

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(4) 28 Ind. Cas. 796; 8 P. R. 1915 Cr.; 76 P. L. R. 1915; 16 Cr. L. J. 412.

(5) 66 Ind. Cas 995; 23 Cr. L. J. 339; 3 L. L. J. 145.

(6) 68 Ind. Cas. 833; 23 Cr. L. J. 609, A. I. R. 1923 Lah. 79.

(7) 86 Ind. Cas. 221; 6 L. 151; 26 P. L. R. 49; 26 Cr. L. J. 733; A. I. R. 1925 Lah. 395; 1 L. L. J. 329

*Head-note of 6 L.—[*Ed.*]

OUDH CHIEF COURT.

CRIMINAL APPEALS NOS. 59 AND 60 OF 1926.
CRIMINAL REVISIONS NOS. 18 AND 19 OF 1926.
March 19, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

EMPEROR—COMPLAINANT—APPLICANT
versus
SAMAI DEEN—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 118, 406, 417—Magistrate directing security to be furnished for good behaviour—Sessions Judge ordering accused to be discharged—Appeal by Local Government to High Court, whether maintainable—High Court's power to interfere on revision.

The order of a Sessions Judge passed on appeal under s. 406, Cr. P. C., discharging an accused ordered by a Magistrate under s. 118, Cr. P. C., to furnish security for good behaviour under s. 110, Cr. P. C., cannot be considered to be an original or an appellate order of acquittal within the meaning of s. 417 of the Cr. P. C., so as to give the Local Government a right of appeal to the High Court.

The Local Government has, however, a right to approach the High Court in revision and where the evidence against the accused is sufficient to justify his being bound over to be of good behaviour, it is open to the High Court to set aside the order of discharge and direct the accused to furnish security.

Queen-Empress v. *Mutsaddi Lal*, 21 A. 107; A. W. N. (1898) 185; 9 Ind. Dec. (N. S.) 778, *Emperor* v. *Fyaz-ud-din*, 24 A. 148; A. W. N. (1901) 206 and *Kharga* v. *Emperor*, 22 Ind. Cas. 183; 36 A. 147; 12 A. L. J. 167; 15 Cr. L. J. 39, relied on.

Application for revision against an order of the Additional Sessions Judge, Bahraich, dated the 7th December 1925, setting aside that of the Magistrate, First Class, Bahraich, dated the 7th November 1925.

Mr. *G. H. Thomas*, Government Advocate, for the Crown.

JUDGMENT.—The circumstances are these. Ram Gulam and Samai Din were called upon by a Sub-Divisional Magistrate under the provisions of s. 110 of the Cr. P. C. to show cause why they should not find security to be of good behaviour for one year on the ground that they were habitual thieves. The Magistrate after inquiry passed an order under s. 118 of the Cr. P. C. directing them to find certain security. They appealed to the learned Sessions Judge under the provisions of s. 406 Cr. P. C. He was not satisfied with the evidence against them to justify their being bound over to be of good behaviour and directed them to be discharged. Against this order the Local Government has filed Criminal Appeals Nos. 59 and 60 of 1926, and, in the alternative, Criminal Revisions Nos. 18 and 19 of 1926. We do not consider that the order of the learned Sessions Judge can be considered to be an original or an appellate order of acquittal within the meaning of s. 417 of the Cr. P. C., so no appeal lies, but we are of opinion that the Local Government has a right to approach us in revision. We base this opinion upon the reasoning contained in *Queen Empress* v. *Mutsaddi Lal* (1), *King-Emperor* v. *Fyaz-ud-din* (2) and *Kharga* v. *Emperor* (3). In revision we have power to reverse those orders.

Upon examination of the merits we have no doubt as to the fact that the evidence against these two persons was sufficient to justify their being bound over to be of good behaviour and we accordingly set aside the order of the learned Judge and restore the order of the Magistrate which directs these two men Ram Gulam and Samai Din to execute each a bond to be of good behaviour for one year, each in his personal recognizance for Rs. 200 with two sureties to each bond, each for Rs. 200, such sureties to be sufficient in the opinion of the Sub-Divisional Officer who passed the order or his successor. In default of finding such sureties each person will be rigorously imprisoned for one year.

G. H. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 604 OF 1925.

December 10, 1925.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Zafar Ali.

Musammat GHULAM JANNAT—
ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 287, 350—Statement by one Magistrate but committal by another—Admissibility of statement in trial before Sessions Judge.

Where a statement of the accused during inquiry is recorded by one Magistrate but the case is committed by his successor, the statement so recorded is admissible in evidence at the trial before the Sessions.

Sessions Judge of Mangalore v. *Malinga*, 31 M. 40; 3 M. L. T. 25; 7 Cr. L. J. 29, followed.

Criminal appeal from an order of the Sessions Judge, Multan, dated the 29th April 1925.

Mr. *Abdul Razak*, for the Appellant.

Mr. *Abdul Rashid*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—On the morning of the 3rd February, 1925, the corpse of a newly born child with a strip of cloth tied round its neck was found in the bath room of a mosque called *Pir* Gauhar Sultan Masjid, situate outside the Delhi Gate of the Multan City. The Civil Surgeon, who conducted the *post mortem* examination, deposes that the child had been born alive and that death was due to asphyxia caused by strangulation. The Sessions Judge of Multan has convicted the appellant *Musammat*

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(1) 21 A. 107; A. W. N. (1898) 185; 9 Ind. Dec. (N. S.) 778.

(2) 24 A. 148; A. W. N. (1901) 206.

(3) 22 Ind. Cas. 183; 36 A. 147; 12 A. L. J. 167; 15 Cr. L. J. 39.

Ghulam Jannat of the murder of the child, and has sentenced her under s. 302, Indian Penal Code, to transportation for life.

Now, the evidence of Miss Shaw, who medically examined *Musammat* Ghulam Jannat, leaves no doubt that the latter had recently given birth to a child; but the question for determination is whether she committed the murder. *Musammat* Ghulam Jannat lives in a small hamlet about 3 or 4 miles from the town of Multan, and there is ample evidence on the record that, on the afternoon of the 2nd of February, 1925, the day before the date of the discovery of the corpse in the bath room, she came to Multan accompanied by her mother *Musammat* Aishan; and that she was seen going towards the mosque. There is also reliable evidence to the effect that on the the 8th February the prisoner produced from a trunk inside her house a *chaddar* from one edge of which a small strip had been torn off, and the strip of cloth found tied round the neck of the child exactly fits that *chaddar*. Moreover, in the statement made by her on the 11th February, 1925, before the Committing Magistrate, she admitted that she had given birth to a child in the bath room of the mosque, and that after tearing off strip of cloth from her *chaddar* she had tied it round the neck of the child in order to stop its cries and thereby to prevent the discovery of the birth. It appears that the Magistrate, who recorded the statement, was subsequently transferred; and that the case was eventually committed to the Court of Session by his successor. In view, however, of s. 350, Cr. P. C., we consider that the statement recorded on the 11th February has been rightly admitted in evidence under s 287, Cr. P. C. [*vide Sessions Judge of Mangalore* v. *Malinga* (1)]

It appears that *Musammat* Ghulam Jannat, who is a young girl of 18 years of age, is married to a boy who is only about 13 years old; and that she contracted an intimacy with one Shahu and became pregnant. There can be little doubt that, when she suddenly gave birth to an illegitimate child in the town of Multan, she was anxious to conceal her shame, and she accordingly tied a strip of cloth round the neck of the child and strangled it.

The confession made by the prisoner before the Committing Magistrate, corroborated as it is by the circumstantial evidence described above, leaves no doubt that she killed the child. She has, therefore, been rightly convicted of murder, and transportation for life is the minimum punishment prescribed by law for the offence of murder We accordingly confirm the conviction and dismiss the appeal.

While we are unable to reduce the sentence inflicted by the Sessions Judge, we consider that this is a fit case in which, in view of the mitigating circumstances, the Local Government should exercise the powers vested in it by s. 401 and 402, Cr. P. C. We accordingly direct that the proceedings be forwarded to the Local Government with a copy of our judgment and our recommendation that the sentence of transportation for life may be commuted to one of rigorous imprisonment for three years.

R. L. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 125 AND 130 OF 1925

October 27, 1925.

Present:—Mr. Kincaid, J. C., and Mr. Kennedy, A. J. C.

HARDAYAL SING AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 225 (b), *332, 333—Arrest by Police Officer—Right to resist illegal arrest—Criminal Procedure Code (Act V of 1898), ss. 55, 110—Arrest of suspected criminal—Powers of Police Officer—Warrant, nature of, when action contemplated under s. 110.*

Even if the action of a Police Officer in arresting a person is wholly illegal, yet the person arrested or the persons who assist the arrested person are not entitled to use more force than is necessary for protection against illegal arrest. [p. 405, col. 2.]

A Police Officer may first arrest any person as is mentioned in s. 55 of the Cr. P. C., and then make up his mind whether to proceed against him for some substantive offence or to put him before a Magistrate in order that proceedings under Ch. VIII may be taken against him. [p. 406, col. 1.]

If it is intended that a Police Officer should arrest a man with a view of taking proceedings under s. 110, Cr. P. C., it is strictly and specifically necessary that he should specify one of the clauses given in s. 55, although it may be for the cause so stated that he intends to proceed under s. 110. [p. 405, col. 2.]

Appeal against the judgment of the Sessions Judge, Hyderabad, Sind, dated the 8th August 1925.

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(1) 31 M. 40; 3 M. L. T. 25; 7 Cr. L J. 29.

Mr. *Harchandrai Vishondas*, for the Appellants.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—In this case two Constables Pandhi Khan and Mahomed Sidik went to the Bazar of Sakrand and arrested accused No. 2 Sukholosing. The allegation against the accused is that on the arrest of Sukholosing, accused No. 1 who is the brother of Sukholosing and accused No. 3 came and made an assault upon the two Constables and released accused No. 2. Accused No. 2 thereupon joined in the assault. One of the Constables Mahomed Sidik became unconscious and the other Constable Pandhi Khan effected his escape. On these facts the accused have been challaned for offences punishable under ss. 332, 333 and 225 (*b*), Indian Penal Code, and sentenced to various terms of imprisonment totalling in all to rigorous imprisonment for three years and a fine of Rs. 500.

There seems very little doubt as to the facts. The Constables have given evidence and there seems no reason why they should tell a wholly untrue story. It is possible that they may have laid excessive stress upon the acts of one or more of the accused but it is not at all probable that they would unnecessarily introduce innocent people and intentionally absolve guilty people. [illegible] is also considerable corroborative evidence by outside witnesses and there seems very little reason to suppose that the facts are not substantially as found by the Sessions Court. The accused are all Sikhs and they seem to be unpopular in the village which might no doubt be a reason for exaggerating matters, against them. But, on the other hand, this fact gives a reasonable explanation why no one interfered to assist the Police. On the whole, therefore, we think, as far as the facts go, the case is made out against the accused. And the only question which remains is the legal question.

It need hardly be said that the Court would be reluctant to support the action of a Police-Officer who without any justification should walk into a man's shop and arrest him fasten him up with a rope and proceed to march him through the Bazar and the Court will not look with great severity on the action of any person who attempts to protect himself from such an illegal invasion of his liberty or on the action of any person taken to assist the arrested person in asserting his rights. But even so, it must be admitted that the defence made by the unlawfully arrested person or the persons who assist the unlawfully arrested person must not be excessive, so that even if the action of the Police Constables is wholly illegal yet the person arrested or the persons who assist the arrested person are not entitled to use more force than is necessary for protection against illegal arrest. Here very excessive force was used.

But we are not convinced that the arrest was illegal. The two Constables were acting under a so-called warrant or rather written instructions or orders issued by the Sub-Inspector of Mehrapur. No doubt this written instruction is informal because the powers given to the Sub-Inspectors are those conferred by ss. 55 and 56 and the Sub-Inspector may arrest persons who fall under certain categories given in s. 55. If he wishes any other Police Constable to arrest such person he must specify the cause for which the arrest is to be made that is to say he must state within which category as given in s. 55 the supposed offender falls.

In the present case the order merely recites that the person to be arrested that is to say the second accused was liable under s. 110 (*d*) and (*e*) of the Cr. P. C. It is clear that the person who can be dealt with under cls. (*d*) and (*e*) of s. 110 is in most cases a person who would fall within one of the categories given in s. 55. But that fact does not make it the less desirable that the orders of the Legislature should be strictly obeyed. If it is intended that the Police Officer should arrest a man with a view of taking proceedings under s. 110 it is strictly and specially necessary that he should specify one of the clauses given in s. 55, although it may be for the cause so stated that he intends to proceed under s. 110, Cr. P. C. It is possible, therefore, that the present warrant may be informal, but it is not illegal and the Constables who were attempting to execute it were no doubt acting in perfect good faith. It would seem, therefore, that the accused had not even that limited right of self-defence, they would have had, had the officers been acting *mala fide*.

Now an attempt was made to convince us that in no case can an officer who intends to proceed against a man under s. 110 cause him to be arrested. But that is not the law and it obviously, if it were the law, would in many cases render proceedings under Ch. VIII useless. If the Police or the Magistrates who are contemplating taking proceedings under the said Chapter against desperate and dangerous characters, or against persons who are taking precautions for concealing their presence with a view of committing an offence are to allow the suspects to remain free until all the formalities of Ch. VIII have been fulfilled and a regular committal order passed against such persons, it would oftentime happen that the offenders would abscond and the proceedings would be wholly infructuous. The Police can arrest a suspected criminal and then proceed against him either for substantive offence or under Ch. VIII and it is for that reason that s. 114, Cr. P. C. contemplates the serving of notice on the suspect while in custody.

It is, we conceive, to be the duty of the Police Officer who is aware that any such person as is mentioned in s. 55 is within the limits of his jurisdiction to arrest him or cause him to be arrested. He then may make up his mind whether to proceed against him for some substantive offence or to put him before a Magistrate in order that proceedings under Ch. VIII may be taken. In short, our opinion is that the mere fact that there is an intention to act under Ch. VIII does not grant to the accused persons immunity from preliminary arrest. There is thus no illegality in the proceedings of the Police and it does not seem they can be legally resisted.

The only question, therefore, is as to the sentence. And we are of the opinion, for the reasons given by the Sessions Judge, we should not interfere.

The result is, that we dismiss these appeals.

P. B. A. *Appeals dismissed.*
R. L.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 865 OF 1923.
December 20, 1923.
Present:—Sir Shadi Lal, KT, Chief Justice, and Mr. Justice LeRossignol.
SHERU AND ANOTHER—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Death caused by beating—Drunkenness—Sentence.

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. [p. 407, col. 2; p. 408, col. 1.]

Director of Public Prosecutions v. *Beard*, (1920) A. C. 479, followed.

Where accused who have beat a man to death, had primed themselves with drink in order to wreak vengeance on the deceased and to beat him mercilessly, they cannot escape the penalty of death on the ground of drunkenness. [p. 408, col. 1.]

Pal Singh v. *'Emperor*, 41 Ind. Cas. 980; 28 P. R. 1917 Cr.; 18 Cr. L. J. 868; 35 P. W. R. 1917 Cr., distinguished.

Criminal appeal from an order of the Sessions Judge, Lyallpur, at Sheikhupura, dated the 22nd June 1923.

Mr. *Ghulam Mohy-ud-din*, for the Appellants.

Mr. *Ram Lal*, for the Government Advocate, for the Respondent.

JUDGMENT.—On the afternoon of the 9th March, 1923, one Sazawar, an *arain* of the village Nawan Kot in the District of Sheikhupura, was subjected to a merciless assault, in the course of which he sustained no less than 34 injuries. To these injuries the victim succumbed within three or four hours. Two persons, namely, Sheru and Gama, have been found guilty of the murder of Sazawar; and have been sentenced under s. 302, Indian Penal Code, to the penalty of transportation for life each. Th[illegible] prisoners have preferred a joint ap[illegible] against their conviction, and we have [illegible] before us an application by the Local [illegible]ernment praying for an enhancement of the sentences imposed upon them.

The evidence for the prosecution le[illegible] no doubt that one *Musammat* Rakhi, [illegible] widow of Maula, a relative of the prisoners, [illegible] contracted a liaison with Shahab Din, the sister's son of the deceased Sazawar. This intrigue caused resentment to Gama and Sheru, with the result that the lovers left the village and migrated to Malakpur where they began to live as husband and wife. The convicts did not, however, like the marriage and were seeking an opportunity to cause injury to Shahab Din and his wife. It is beyond dispute that on the 27th February, 1923, *Musammat* Rakhi made an application under s 107, Cr. P. C., to a Magistrate, alleging that Gama, Sheru and seven other persons named therein were inimically disposed towards her and her husband and intended to assault them, and praying that they should be called upon to furnish security to keep the peace. It is alleged on behalf of the prosecution that the convicts could not find any opportunity to cause harm to Shahab Din or his wife, and that they accordingly decided to assault Sazawar who was not only the maternal uncle of Shahab Din but had also adopted him as his son.

On the day in question a fair was held at a well situate outside the village Nawan Kot, and was attended by a party of pilgrims and the inhabitants of the village including the prisoners, Sheru and Gama. It appears that these two persons had taken liquor and that, in a spirit of bravado, they declared that they were going to the deceased's field in order to kill him. The witness Labh Singh, who overheard them, galloped off on a mare to Sazawar's field, and warned him of the danger. Thereupon Sazawar left the field and ran off towards the west, while his companion Ranjha, who was working with him in the field, went off in another direction. Shortly afterwards, the culprits arrived and, finding Sazawar absent, they followed him to another field where he had concealed himself, attacked him with a *dang* and a hatchet, and inflicted upon him a large number of injuries. Upon hearing the outcry of the victim his cousin Alyas, who was cultivating his land at a short distance, hastened to the spot, and saw both the prisoners beating his relative. He tried to intervene but was himself threatened and was rescued by Labh Singh.

This, in brief, is the story for the prosecution and it is fully established by the evidence of a large number of witnesses. Two of them, namely, Alyas and Barkat, saw the convicts beating the deceased, and there is no reason to suppose that they are not telling the truth Their story receives corroboration from the evidence of Ranjha who saw both the prisoners coming to the field where he was working with the deceased. We have also the testimony of Labh Singh who states that he hastened to the scene on hearing the outcry of Alyas and found Sazawar lying injured on the ground and the two accused grappling with Alyas. It is true that Labh Singh's name was not mentioned in the First Information Report which was recorded by Alyas on that very day; but both the prisoners admit that not only Labh Singh but also Alyas and Barkat were present in the field in which the deceased was lying injured. There can, therefore, be no doubt as to the presence of these witnesses at or near the scene of the occurrence, and we are inclined to think that Labh Singh, when he says that he did not see the actual assault, is trying to favour the prisoners. Be that as it may, there is ample evidence on the record that both of them inflicted upon the deceased a large number of injuries which resulted in his death a few hours afterwards.

The defence put forward by the prisoners does not require any elaborate discussion. They try to make out that the deceased was beaten by some Sikhs belonging to a village called Mangawala, but the learned Vakil for the appellants has not invited our attention to the evidence produced in support of this version. Indeed, he admits that he does not wish to rely upon that evidence, and he has contended himself with criticising the evidence produced by the prosecution. The Assessors and the learned Sessions Judge have concurred in declaring the accused to be guilty, and, after examining the entire material placed before us, we have no hesitation in endorsing that conclusion.

As regards the application for enhancement, we find that the learned Sessions Judge holds that the culprits went to the field of the deceased with "the deliberate purpose of striking down Sazawar," but he has refrained from inflicting the death penalty on the sole ground that the offenders were, at the time of the assault, under the influence of drink. It may be conceded that both the prisoners had taken liquor, but there is no evidence to show that they were in a state of intoxication. Indeed, the evidence leaves no doubt that before they proceeded to the scene of the incident, they had declared their intention of assaulting the deceased, and that they then walked about a mile, pursued their victim, and inflicted upon him a large number of blows but were careful enough not to deal a deadly blow on the head or any other vital part of the body. The attack was a premeditated one, and we are not prepared to hold that the mere fact that they had taken some liquor should be regarded as a sufficient reason for not imposing the penalty of death. As held by the House of Lords in *Director of Public Prosecutions* v. *Beard* (1), evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. The learned Sessions Judge has relied upon the judgment in *Pal Singh* v. *Emperor* (2), but we find that there were peculiar circumstances in that case which led the Court to commute the sentence of death to one of transportation for life. It appears that the convict had no motive to cause the death of his victim and that the attack was a sudden one. These and other circumstances influenced the Court in holding that there was no adequate ground for making a distinction in the matter of punishment between the accused who had been sentenced to death and his comrade who had been sentenced only to transportation for life. In the case before us we are clearly opinion that both the prisoners primed themselves with drink in order to wreak their vengence upon their enemy and beat him mercilessly, and we consider that they deserve the maximum punishment provided by law. We accordingly enhance the sentence in the case of each of the convicts to one of death.

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(1) (1920) A. C. 479

N. H. *Application by the Crown accepted. Sentence enhanced.*

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(2) 41 Ind. Cas. 980; 28 P. R. 1917 Cr.; 18 Cr. L. J. 868; 35 P. W. R. 1917 Cr.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 46 OF 1926.

February 18, 1926.

Present:—Mr. Findlay, Officiating J. C.

BHAGWAN AND ANOTHER—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 263, 342—Scope—Provisions, whether mandatory—Omission to examine accused—Effect—"If any" in s. 263 (g), meaning of.

In every case, whether summons or warrant one, there must be an examination of the accused, under s. 342 of the Cr. P. C. the provisions of which are mandatory.

Mahomed Hossein v. *Emperor*, 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N. 1247, followed.

Ponnusami Odayar v. *Ramasami Thathan*, 74 Ind. Cas. 945; 46 M. 758; 45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 24 Cr. L. J. 833; A. I. R. 1924 Mad. 15, distinguished

Local Government v. *Maria*, 87 Ind. Cas. 427; 20 N. L. R. 174; A. I. R. 1925 Nag. 44; 26 Cr. L. J. 971, referred to.

The words "if any" in cl. (*g*) of s. 263 of the Cr. P. C., do not leave the Magistrate any discretion as the words are intended merely to cover cases in which owing to the admission or plea of the accused or the weakness of the prosecution evidence, the accused can either be convicted on his own plea or can be acquitted on the evidence without an examination of the accused.

Application for revision of an order of the Magistrate, First Class, Kamptee, dated the 5th November 1925, in Criminal Case No. 84 of 1925.

Mr. *V. N. Herlekar*, for the Applicants.

ORDER.—The applicants Bhagwan and Pandurang have been convicted of an offence under s. 323, Indian Penal Code, by the First Class Magistrate, Kamptee, and fined Rs. 20 each in a summary trial.

Admittedly, the Magistrate did not record any examination of either applicant as an accused beyond taking their plea of not guilty, and it is urged on behalf of applicants that this omission is a fatal flaw in the trial: *cf Mahomed Hossein* v. *Emperor* (1). A great many Magistrates seem to be under the impression that the presence of the words "if any" in cl (*g*) of s. 263, Cr. P. C., leaves them a discretion, whether or not to examine the accused, but this is not so: there must be an examination, at least in every warrant case. Clearly the words "if any" occur in the provision referred to, in order merely to cover those cases in which owing to the admission or plea of the accused, or the weakness of the prosecution evidence, the accused can either be convicted on his own plea, or can be acquitted on the evidence, without an examination under s. 342 *idem*, the provisions of which are mandatory. I am aware of the decision in *Ponnusami Odayar* v. *Ramasamy Thathan* (2) but, with all deference, I am unable to agree that s. 342 does not apply to summons cases. The mere fact that this provision occurs in a Chapter dealing with trials generally seems to me to conclude this point and the mere use therein of the phrase "before the accused is called for his defence," a phraseology perhaps primarily more suited to a stage in a warrant rather than a summons case, is insufficient, in my opinion, to limit the applicability of sub-section (1) of s. 342 to warrant cases only. The other argument—which may be termed the utilitarian one—that inconvenience may be caused in summary trial by enforcing the application of s. 342 in summary trials, seems to me beside the point: that may be a good reason for amending the law but, as the Statute stands, I am of opinion that the objection taken in the present revision is a valid one and must succeed: *cf. Local Government* v. *Maria* (3).

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(1) 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N. 1247

(2) 74 Ind. Cas 945; 46 M. 758; 45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 24 Cr. L. J. 833; A. I. R. 1924 Mad. 15.

I do not think any advantage will be gained by ordering the re-trial of the alleged participants in a petty brawl such as this case was concerned with. The conviction and sentence passed on each of the applicants Bhagwan and Pandurang are set aside and they are acquitted. The fines, if paid, will be refunded.

G. R. D. *Conviction set aside.*

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(3) 87 Ind. Cas. 427; 20 N. L. R. 174; A. I. R. 1925 Nag. 44; 26 Cr. L. J. 971.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 2068 OF 1925.
March 12, 1926.
Present:—Sir Shadi Lal, KT., Chief Justice.
SANWALYA—COMPLAINANT—
PETITIONER
versus
BARU—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 250—Complaint, false and vexatious or frivolous—Compensation.

Where there are depositions of some witnesses and a *Zaildar's* report to support a complaint without any rebuttal on the part of the accused, the complaint cannot be said to be false and vexatious or frivolous.

Case reported by the Sessions Judge, Karnal, with his No. 542-J of 16th December 1925.

FACTS.—Sanwalya had filed a complaint under s. 500, Indian Penal Code, against nine persons. The Magistrate sent the case to the *Zaildar* for preliminary inquiry and the *Zaildar* reported that the complaint was well founded and Kanhaya and Baru had really used ill language to the complainant, Kanhaya was not found. The Magistrate tried Baru alone and being not satisfied of the truth of the complaint discharged Baru and directed Sanwalya to pay Rs. 50 as compensation to Baru under s. 250 of the Cr P. C. Against this order the complainant has appealed to this Court. A reference to cl. (3) of s. 250 shows, however, that as the amount of compensation fixed by the Magistrate (of the First Class) is only Rs. 50, the order is not appealable. Appellants' Counsel prays that the appeal may be treated as an application for revision and I have acceded to this request.

GROUNDS.—A perusal of the evidence recorded by the Magistrate in the case shows that the order about the payment of compensation is not right. Complainant produced three witnesses in all. One of them does not know whether Baru was present in the *panchayat* or not but the remaining two state he was there and treated the complainant in an insulting manner. Even Baru accused admits that there was a *panchayat* who outcasted Sanwalya and fined him Rs. 100 but he says that he was not present in the *panchayat* though his brother was. In the presence of this evidence and the absence of all rebuttal by the accused, and in presence of the *Zaildar's* report supporting the complaint it is impossible to hold that the complaint was false and vexatious or frivolous. The order of payment of compensation was, therefore, not justified. The case is submitted to the High Court with a recommendation that the order may be set aside.

Mr. *Shamair Chand*, for the Petitioner.

ORDER.—For the reasons recorded by the learned Sessions Judge I set aside the order of the Magistrate directing the payment of compensation to the accused.

R. L. *Order set aside.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 285 OF 1925.
January 18, 1926.
Present:—Mr. Rupchand Bilaram, A. J. C., and Mr. Tyebji, A. J. C.
EMPEROR—PROSECUTOR
versus
MUSTALI—ACCUSED—RESPONDENT.

Excise cases—Sentence—Imprisonment desirable—Government Circulars—Reference by Magistrates—Practice.

In the case of the crimes such as illicit traffic in drugs where the offender may make great profits by breach of the law the payment of the fine is apt to be considered merely in the nature of a tax which is no deterrent at all.

Where there have been several cases when persons living on the border-land of foreign territory have imported excisable articles in British territory, it is desirable that the Courts should as far as possible inflict a substantive sentence of imprisonment to prevent the recurrence of such crimes.

Per *Tyebji, A. J. C.*—The object of Government in issuing Circulars is to bring to the notice of the Magistrates certain circumstances mentioned therein which when relied upon must be openly stated in Court and the parties allowed to comment thereon.

Nothing can be more deleterious to the administration of criminal justice than a notion that the Magistrate conceives himself to be under orders to pass any particular kind of sentence or that any considerations affect his decision but such as are openly stated in Court and are subject to comment by the prosecution and the defence.

Reference made by the Sub-Divisional Magistrate, Nawabshah.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.

Rupchand Bilaram, A. J. C.—This is a Reference by the District Magistrate, Nawabshah, asking for the enhancement of the sentence of one Mastali, a *fakir*, who has been convicted of having illicitly imported and possessed foreign *bhang* weighing one seer and $36\frac{1}{2}$ *tolas* and *charas* weighing $2\frac{1}{8}$ *totas*. It is said that he lives on the border of the Khairpur State and has surreptitiously brought this quantity from that State. Its value is Rs. 14 in British territory though in Khairpur territory it is considerably less. He has been sentenced to a fine of Rs. 25 only.

There can be no doubt that the circumstances of this case required sufficiently deterent sentence to prevent these *fakirs* living on the border land going to Khairpur territory and importing therefrom excisable articles in British territory. There have been several cases of this kind and it is desirable that in such cases as far as possible substantive sentence of imprisonment should be inflicted to prevent their recurrence.

We accordingly exchange the sentence to one of ten days' rigorous imprisonment and order that the fine of Rs. 25 if paid, be refunded to the accused.

Tyebji, A. J. C.—I agree.

The learned Magistrate has referred to the Circular No. 8325B, dated 13th July 1925 from the Government as being "Orders laying down that the punishment in such excise cases should be deterrent", in such a context as leaves little doubt in my mind that he has failed entirely to appreciate the purport of the Circular. The Government may well take exception to his version. The object of the Circular is to bring to the notice of Magistrates certain circumstances, *viz.*, that the sentences in respect of illicit traffic in intoxicating drugs have in the past had a tendency to be so light, or to be of such a nature, as to fail to act as deterrents against this class of crimes; and that in addition to the normal desire of Government to prevent all crime, there are international obligations undertaken by the Government to suppress such traffic. These circumstances deserve careful consideration by the Magistrates in view of the particular facts of the case under trial. Nothing, on the other hand, can be more deleterious to the administration of criminal justice than a notion that the Magistrate conceives himself to be under orders to pass any kind of sentence except such as the criminal law requires or that any considerations affect his decision but such as are openly stated in Court and are subject to comment by the prosecution and the defence.

The most unexceptionable course would be for the prosecution to mention such and similar circumstances in open Court before the Magistrate has pronounced sentence, and for the Magistrates to hear the Pleaders if there is anything to be urged either on behalf of or against the accused, and in view of all the facts to impose a sentence that serves the object of the administration of criminal justice. That object, it should hardly be necessary to state, is not to be vindictive but to deter the individual who is being tried from committing crimes and to prevent similar crimes from being committed in future. It is obvious that to serve this object the Magistrate must bring his mind to bear on the particular circumstances of each case together with the surrounding facts and conditions. In the case of the crimes such as illicit traffic in drugs where the offender may make great profits by breach of the law the payment of the fine is apt to be considered merely in the nature of a tax which is no deterrent at all.

On a consideration of the facts of this case the proper punishment appears to be not a fine of Rs. 25 (which it is stated to us has been paid by the accused and should, in our opinion, be refunded to the accused), but a sentence of ten days' rigorous imprisonment. If the accused has been habitually carrying on an illicit traffic, then the fine would be no punishment to him. If he has not been doing so, then the fine would be a severer penalty than imprisonment. The fine would, in either case, be either unnecessarily severe or ineffectually light. There may, of course, be other cases where both a fine and imprisonment may be imposed or even a fine alone may be the appropriate sentence, though for the reasons I have stated a fine by itself seems to me on general grounds to be ordinarily less suitable.

P. B. A. *Answered accordingly.*
N. H.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 503 OF 1925.
(CRIMINAL REVISION PETITION No. 419 OF 1925).
January 20, 1926.
Present:—Mr. Justice Devadoss and Mr. Justice Waller.
MADURA MUNICIPALITY—COMPLAINANT—PETITIONER
versus
P. M. MUTHUBALU CHETTY—ACCUSED—RESPONDENT.

Madras District Municipalities Act (V of 1920), ss. 249, 250, 338, Sch. V, cl. (q)—*Factory, construction of, permitted by Council—Annual license, failure to take out—Prosecution—Machinery under Sch. V* (q), *what is.*

Where permission has been granted by a Municipal Council under s. 250 of the Madras District Municipalities Act for the construction and establishment of a factory to work a rice hulling machine, annual license is not necessary to be taken from the Chairman under s. 249 and where a person uses a 22 horse power gas engine in the factory without taking such license, he is not liable to be prosecuted under s. 338 of the Act.

The Madras District Municipalities Act clearly intends to draw a distinction between what is described as "industries" and 'factories'. The former are dealt with in s. 249 and the latter in s. 250.

The machinery referred to in Sch. V of the Act is machinery of a kind that is propelled by means other than those described in s. 250 which contemplates some sort of mechanical motive power and must be such as is likely to be dangerous to human life, health or property, the object of the clause being to bring under control the storing, manufacturing, and using of things which are dangerous to human life, health or property.

The last clause in Sch. V, cl. (q), namely, "which is likely to be dangerous to human life or health or property" governs that part of cl. (q) which begins with the words "using for any industrial purposes" and not the whole of cl. (q).

In re Ram Chandra Rao, 75 Ind. Cas. 691; 45 M. L. [illegible] 555; (1923) M. W. N. 767; 18 L. W. 618; 33 M. L. T. [illegible] 25 Cr. L. J. 3; A. I. R. 1924 Mad. 375, referred to.

Petition under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Second Class Magistrate, Madura Town, in Calendar Case No. 335 of 1924.

Messrs. *F. S. Vaz* and *T. S. Viswanatha Iyer*, for the Petitioner.

Messrs. *T. Rangachariar* and *S. T Srinivasa Gopalachariar*, for the Respondent.

ORDER.

Waller, J.—This petition has been filed by the Municipal Council of Madura against the decision of the Sub-Magistrate of Madura Town. Respondent was charged under ss 249 and 338 of the Madras District Municipalities Act with having failed to take out a license for using a 22 horse power gas engine to work a rice hulling machine. The Sub-Magistrate refused to convict. He found that the case was governed by s. 250 and not by s. 249 of the Act. He was further of opinion that the machinery used for rice hulling was not the kind of machinery contemplated by Sch. V (*q*).

It is argued on behalf of the Municipal Council that all that is required by s. 250 is permission for the original construction or establishment of a factory and that for the actual working of the factory an annual license is necessary under s. 249. I agree with the Sub-Magistrate that the argument is unsound. The Act clearly intends to draw a distinction between what is described as "industries" and "factories" The former are dealt with in s. 249 and the latter in s. 250. The industries included in s. 249 and Sch. V are licensed by the Chairman subject to the control of the Council. The power factories referred to in s. 250 are regulated by the Council itself subject to the orders of the Governor in Council. It would, I think, be completely anomalous to hold that, after the Council had granted permission for the erection of a machanical power factory, it is open to the Chairman to refuse a license for its being worked or to impose impracticable conditions on its working.

I think that the Magistrate was right in holding that a license under s. 249 of the Act was not necessary in this case. I am also of opinion that the machinery referred to in Sch. V is machinery of a kind that is propelled by means other than those described in s. 250, which contemplates some sort of mechanical motive power. A decision of Krishnan, J., has been cited in *In re Ram Chandra Rao* (1) which deals with cl. (*q*) of Sch. V. As I consider that s. 249 and Sch. V do not apply to this case at all, that decision does not really call for any discussion. All that I need say in regard to it is that I agree with Krishnan, J., that the machinery referred to in cl. (*q*) of Sch. V must be such as is likely to be dangerous to human life, health or property. The object of the clause is, as he says, to bring under control the storing, manufacturing, and using of things which are dangerous to human life, or health or property. The "fuel or machinery" referred to in the clause must, I think, be of a sort that comes within that category. At the same time, I do not agree with him that the whole clause is governed by the words "which is likely to be dangerous to human life, or health or property." The first two parts of it cannot be so governed. The words "manufacturing anything from which offensive or unwholesome smell arise" cannot grammatically be subject to a clause which begins "which is likely." Nor is it necessary to hold that the first two clauses are governed by the last. It is sufficiently obvious that the storing of explosives or combustibles and the manufacturing of things from which offensive or unwholesome smells arise are likely to be dangerous to human life, or health, or property and no further qualification of them as such appears to be necessary. In my opinion the last clause governs that part of cl. (q) which begins with the words "using for any industrial purpose . . ."

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(1) 75 Ind. Cas. 691; 45 M. L. J. 555; (1923) M. W. N. 767; 18 L. W. 618; 33 M. L. T. 234; 25 Cr. L. J. 3; A. I. R. 1921 Mad. 375.

In the result I must dismiss the revision petition.

Devadoss, J.—I agree.

V. N. V.
R. L. *Petition dismissed.*

RANGOON HIGH COURT.

CRIMINAL REVISION NO. 20-B OF 1925.
October 13, 1925.
Present:—Mr. Justice Brown.
EMPEROR—PROSECUTOR
versus
MAUNG BA THAUNG—ACCUSED—
OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 79, 88, 89—School-master punishing pupil—Offence.

A school-master may for purposes of discipline inflict moderate punishment and such punishment may be inflicted for offences committed not only within the school limits but also outside the school walls except when the school is closed for any length of time for a period of regular holidays. [p. 413, col. 2.]

R. v. *Hopley*, (1861) 2 F. & F. 202 and *Cleary* v. *Booth*, (1893) 1 Q. B. D. 465; 62 L. J. M. C. 87; 5 R. 263; 68 L. T. 349; 41 W. R. 391; 17 Cox C. C. 611; 57 J. P. 375, referred to.

Criminal revision from an order of the Sub-Divisional Magistrate, Zigon, in Criminal Ragular Trial No. 126 of 1924.

JUDGMENT.—The petitioner, a school-master, has been convicted and fined for caning a school boy under his charge under the provisions of s. 323 of the Indian Penal Code. It appears that when the school was closed a pupil of the school was assaulted by other boys. The school re-opened two days later, and on complaint by the mother of the boy who was assaulted the petitioner held an enquiry, and finding that a boy named Hoke Sein had taken part in the assault, gave him some eight or nine strokes with a cane. Hoke Sein was a pupil of the school. The evidence is conflicting as to whether he did actually take part in the assault on the boy, but there is no reason for doubting the good faith of the petitioner in the matter. There is no suggestion that he was actuated by improper motives, or that he was not acting *bona fide* in the interests of school discipline. Nor does it appear that the punishment was unduly excessive or conducted in other than a humane manner. The question for decision, therefore, is whether a school-master in such circumstances is justified in inflicting corporeal punishment by way of school discipline. There is no doubt that school-masters have such rights within limits under English Law. It was held by Cookburn, J., in the case of *R.* v. *Hopley* (1) that "a parent, or a school-master who for this purpose represents the parent, may for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporeal punishment, always, however, with this condition, that it is moderate and reasonable." There is no specific provision in the Indian Penal Code dealing with this point. It would appear, however, to have been incorporated into the Code, by the provisions of s. 79 under which nothing is an offence which is done by a person who is justified in law in doing it, and of s. 89. Section 89 lays down "that nothing whic[illegible] is done in good faith for the benefit of [illegible] person under twelve years of age.......................by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or to be known by the doer to be likely to cause." There are certain provisos to this section but they are not relevant to the present case. The infliction of chastisement by way of parental discipline by the parent or guardian would come within the scope of this section provided it was inflicted in good faith for the benefit of the child. And when a child is sent by its parent or guardian to a school, the parent or guardian must, in my opinion, be held to have given an implied consent to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline. In the case of boys of over twelve years of age the same principle would probably be applicable under the provisions of s. 88 of the Code though as the boy in this case was aged ten years it is not necessary to decide this point. The general principles of the English Law as to infliction of corporeal punishment by way of school discipline are to my mind applicable to the circumstances of the present case, and the question is the extent to which this right to punish goes. If the offence of which the boy had been found guilty had been committed in school there would be no difficulty. Nor would there be any difficulty if it were committed whilst the boy was on the way to or from school. In the present case, however, the school was actually closed at the time the offence was alleged to have been committed. It is not quite clear to me from the record whether the school had been open on the day on which the assault is alleged to have taken place. But it is clear that it was closed for a period of two days only. It appears from the evidence of the boy Maung Ngoat Yin who was assaulted and of Maung Ba Chit, one of the boys who assaulted him, that Ngoat Yin was called out of his house by Ba Chit on the ground that the school-master wanted him and was then assaulted on the road. It also appears that the boys were in the habit of going to night classes, and that in the ordinary course of events they would have gone to such a class that night. Hoke Sein says that he did not go that night because the teacher had gone to play football. Ngoat Yin says that the reason the boys did not go on that night was that there was a confinement in the house of the teacher. A number of boys from the school were engaged in the assault which took place on the road and apparently in fairly close proximity to the school. Other boys who were caned in connection with the same matter have stated that they were rightly punished, and Hoke Sein's grievance appears to be rather that the finding that he took part in the assault was mistaken than that the master had no authority over the boys at the time. The petitioner took action on the complaint of Ngoat Yin's mother who made a complaint immediately.

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(1) (1861) 2 F. & F. 202.

I have found no Indian authorities on the point, and I have been able to find no authority precisely bearing on the facts of the present case in English Law. In Halsbury's Laws of England, Volume XII at page 124, it is stated that for the purposes of correction the school-master may inflict moderate punishment, and that such punishment may be inflicted for offences committed not only within the school limits but also on the way to or from school. This was the decision come to in the case of *Cleary* v. *Booth* (2). In the course of his judgment in that case, Collins, J., remarked: "In my opinion the purpose with which the parental authority is delegated to the school-master, who is entrusted with the bringing up and discipline of the child, must to some extent include an authority over the child when he is outside the four walls. It may be a question of fact in each case whether the conduct of the master in inflicting corporal punishment is right." And Lawrence, J., says: "It is difficult to express in words the extent of the school master's authority in respect of the punishment of his pupils; but, in my opinion, the authority extends, not only to acts done in school, but also to cases where a complaint of acts done out of school, at any rate while going to and from school, is made to the school-master." Neither of the learned Judges definitely lays down the limits within which the power of the school-master extends to inflict punishment for offences committed out of school. But it would appear to depend largely on the facts of each case whether the school master had authority to act. The questions for decision appear to me. "In the circumstances of the case is it a reasonable inference that the boy was at the time the offence was committed under the authority of the school-master and was the punishment *bona fide* reasonably considered necessary for the purposes of school discipline?" I think it clear that if the school were closed for any length of time for a period of regular holidays, the boy would have to be held to have returned to the charge of his parents and the authority of the school-master would cease. But in the present case, although the school was closed for two days, it was not closed for a long holiday. The boys but for an accident would have actually been attending night school at the time the assault was committed, and the boy who was assaulted was on the scene because he had been called by another boy to visit his master. An assault by a number of boys of the school on another boy of the school may reasonably be held to be a matter seriously affecting the discipline of the school. Ngoat Yin at least thought at the time that he was under the authority of the school-master, and the other boys appear to have been of the same opinion. It was presumably as pupils of the school that the boys had collected together on the road, and a direct complaint was made to school-master by the mother of the boy who was assaulted. If the school-master were bound in such cases to refuse to take action it is difficult to see how he could be expected to maintain proper control over the boys under his charge and as pointed out by the learned Sessions Judge in his order of reference he would probably incur opprobrium if his boys misbehaved themselves in such places. In all these circumstances I think it is a reasonable inference that the implied consent of the parents of the boy to his being under the discipline and control of the school-master extended to the alleged offence for which the school-master found it necessary to punish him, and that the boy must be held at the time to have been under the authority of the school-master. It may be that the school-master made a mistake and that Hoke Sein was not actually guilty of taking part in the assault. But as I have said there is no suggestion that the action of the school-master was not *bona fide* and that he did not honestly believe that the boy deserved punishment. A proper inquiry was made, and the view that the punishment was necessary in the interests of school discipline was a reasonable one. I am of opinion that in this case the school-master was acting within the implied authority delegated to him by the parents or guardians of the boy Maung Hoke Sein, and that he must be held to have inflicted the punishment *bona fide* for the good of the boy and in the interests of school discipline. In this view of the case he committed no offence under the provisions of s. 323 of the Indian Penal Code.

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(2) (1893) 1 Q. B. D. 465; 62 L. J. M. C. 87; 5 R. 263; 68 L. T. 349; 41 W. R. 391; 17 Cox C. C. 611; 57 J. P. 375.

The punishment inflicted in the present case was little more than nominal but the principle involved is an important one and does, in my opinion, justify interference in revision. I set aside the conviction of Maung Ba Thaung and direct that the fine and costs paid by him be refunded.

R. L. *Conviction set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1729 OF 1924.
December 23, 1925.
Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Zafar Ali.
BHIKA RAM—CONVICT—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 489-B, object of —"As genuine", effect of—Person selling forged note—Offence.

The object of Legislature in enacting s. 489-B, Penal Code, is to stop the circulation of the forged notes by punishing all persons who knowing or having reason to believe them to be forged, do any act which would lead to their circulation.

A person who knowingly sells a forged note to a person who also knows it to be forged is guilty under s. 489-B, Penal Code.

The words "as genuine" in s. 489-B, Penal Code, govern only the verb 'uses' and not any other verb.

Criminal revision against an order of the Subordinate Judge, Ferozepore, dated the 3rd December 1924.

Mr. *J. G. Sethi*, for the Petitioner.

Mr. *C. H. Carden Noad*, for the Crown.

JUDGMENT.—There is ample evidence in support of the finding of the learned Sessions Judge that the petitioner Bhika Ram sold a forged currency-note of Rs. 50 to one Jas Karan for a sum of Rs. 25; and that at the time of the sale both the parties knew that the note was, not a genuine note but a forged one. The question for co[illegible]sideration is whether Bhika Ram is guilt[illegible] of an offence described in s. 489 B of the Indian Penal Code.

Now, the aforesaid section runs as follows:

> "Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Mr. Sethi for the applicant contends that in order to satisfy the requirements of the section it is necessary to prove that the accused sold the forged currency-note as a genuine one, and that, as this essential ingredient of the offence has not been established, the accused is entitled to an acquittal. This contention is based upon the assumption that the words " as genuine " in the section go, not only with the verb "uses" which immediately precedes them, but also with all other verbs used in the opening portion of the section. The interpretation sought to be placed upon the section would reduce the law to an absurdity. The section, if construed in the manner suggested by the learned Connsel for the applicant, would punish the following persons:

(1) Whoever sells to any other person as genuine any forged or counterfeit currency-note ar bank note, knowing or having reason to believe the same to be forged or counterfeit.

(2) Whoever buys from any other person as genuine any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit.

(3) Whoever receives from any other person as genuine any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit.

(4) Whoever traffics in, any forged or counterfeit currency-note or bank-note, as genuine, knowing or having reason to believe the same to be forged or counterfeit.

(5) Whoever uses as genuine any forged or counterfeit currency-note or bank-note knowing or having reason to believe the same to be forged or counterfeit.

Now, we fail to understand how a person can buy or receive as genuine a forged currency-note knowing the same to be forged. This is obviously a contradiction in terms.

There is no decided case on the subject but we are clear that the words "as genuine" govern only the verb " uses " and not any other verb. It is true that when a person sells a forged note as a forged note, he practises no deception upon the buyer who enters into the transaction with his eyes open; and such a seller should not be subjected to any criminal liability. It appears, however, that the object of the Legislature in enacting this section was to stop the circulation of forged notes by punishing all persons who knowing or having reason to believe them to be forged, do any act which would lead to their circulation. Judged by this test the sale of a forged note as a forged note is as reprehensible as a sale of a forged note as a genuine one. A person, who purchases for value a forged note knowing it to be forged, is ordinarily expected to make money out of the transaction by circulating the note as a genuine one. It is possible that a perfectly honest man, such as a mere collector of curios who does not intend to put the instrument into circulation, may come within the ambit of the section, but such exceptional cases cannot furnish any argument for modifying the plain meaning of the enactment.

We consider that the petitioner, who knowingly sold a forged note to a person who also knew it be forged, is guilty under s. 489-B of the Indian Penal Code. It appears, however, that he was released on bail by this Court in December 1924; and that the punishment imposed upon him includes a fine of Rs. 500. Having regard to these facts we reduce the term of imprisonment to the period already undergone. The application for revision is accepted *pro tanto*, and the order of the Sessions Judge modified accordingly.

R. L. *Order modified.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1499 OF 1925.

February 13, 1926.

Present:—Mr. Justice Harrison.

EMPEROR—PETITIONER

versus

SALIG RAM AND ANOTHER—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 262, 263, 264, 265—Summary trial—Charge, necessity of—Record, what consists of.

In a summary trial, whether it be appealable or otherwise, a formal charge in writing need not be framed.

Natabar Khan v. *Emperor,* 82 Ind. Cas. 278; A. I. R. 1924 Cal. 63; 27 C. W. N. 923; 25 Cr. L. J. 1270, dissented from.

Queen-Empress v. *Keru,* Rat. Un. Cr. C. 768; Cr. Rg. No. 31 of 1895 *Tittu Sahu* v. *Emperor,* 57 Ind. Cas 454; (1920) Pat. 283; 21 Cr. L. J. 630; 1 P. L. T. 652 and *Kuchi* v. *Emperor,* 2 Cr. L. J. 375; 3 L. B. R. 3, referred to.

In a summary trial judgment and judgment alone, embodying as it does the substance of the evidence, and the particulars mentioned in s. 263, Cr. P. C., is the self-contained record of the case and apart from this record there is no other and, what is more, there is no document which can be defined or described as a portion of a record.

Petition for revision of an order of the Sessions Judge, Amritsar, dated the 8th July 1925, reversing that of the Additional District Magistrate, Amritsar, dated the 14th May 1925.

Diwan *Ram Lal*, Assistant Legal Remembrancer, for the Petitioner.

JUDGMENT.—Although this case is of small importance in itself, the question involved as to the procedure affects a very large number of Courts exercising summary powers in this Province. The accused was found guilty after a summary trial under s. 381 and sentenced to three months' imprisonment—an appealable sentence. No written charge was drawn up. He appealed to the Sessions Judge, who followed *Natabar Khan* v. *Emperor* (1) and ordered a re-trial.

Against this order the Crown has presented a petition for revision, and Diwan Ram Lal has drawn my attention to the wording of ss. 262, 263, 264 and 265 of the Cr. P. C., and also to certain rulings. *Queen-Empress* v. *Keru* (2), *Tittu Sahu* v. *Emperor* (3), *Kuchi* v. *Emperor* (4) and also to Vol. II, page 180 of the Rules and Orders of this Court in which it is stated that the framing of a formal written charge is not necessary. The Calcutta ruling, which has been followed by the Sessions Judge is very clear, and it lays down that whereas in regard to non-appealable cases it is stated in so many words in s. 263, that no charge need be framed, in s. 264, which deals with appealable cases, there are no words to this effect, and this omission when coupled with s. 262 is tantamount to a clear direction that the ordinary procedure in warrant cases is to be followed and a formal charge is to be framed. The *ratio decidendi* I understand to be the silence of s. 264, but this section is also silent regarding the preparation of a record of evidence except in so far that sub s. (2) states that the judgment shall be the only record in such cases In order to reconcile the words of s. 264 (2), with *Natabar Khan* v. *Emperor* (1) it appears to me to be necessary to hold that the charge is not part of the record—or that what is usually called the record of the evidence is no part of "the record" in the sense in which the words are used in s. 264 (2), or that, in spite of the wording of s. 264 (2) the silence of s. 264 (1) regarding the charge and the record of the evidence necessitates the preparation of both while s. 264 (2) forbids their incorporation into the record of the case. In my opinion, sub-s. (2), especially when read with the opening words of s. 265, makes it clear that the judgment and the judgment alone, embodying, as it does, the substance of the evidence and the particulars mentioned in s. 263, is the self-contained record of the case, and apart from this record, there is no other, and what is more, there is no document, which can be defined or described as a portion of a record.

It is clear from the unreported Division Bench judgment of the Bombay High Court that the contrary view to that contained in *Natabar Khan* v. *Emperor* (1) was taken by two Judges of that Court, and in *Tittu Sahu* v. *Emperor* (3) a Judge of the Patna Court did the same. *Kuchi* v. *Emperor* (4) which is a judgment of the Burma Chief Court deals with a kindred question of the record of evidence, and in our own Rules and Orders emphasis is laid on the necessity of charging the accused in an appealable summary case but it is explained that the charge need not be reduced to writing. With all respect to the Judges of the Calcutta High Court who gave the decision, which has been followed by the Sessions Judge of Amritsar, I find that the language of ss 264 and 265 when read with ss. 262 and 263 makes it clear, although this is nowhere said in so many words, that in no summary trial, whether it be appealable or non-appealable, need a formal charge in writing be framed.

I, therefore, set aside the order of the Sessions Judge in this case and direct that the appeal be heard on the merits.

R. L. *Order set aside.*

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(1) 82 Ind. Cas. 278; A. I. R. 1924 Cal. 63; 27 C. W. N. 923; 25 Cr. L. J. 1270.

(2) Rat. Un Cr. C. 768; Cr. Rg. 31 of 1895.

(3) 57 Ind. Cas. 454; (1920) Pat. 283; 21 Cr. L. J. 630; 1 P. L. T. 652.

(4) 2 Cr. C. J. 375; 3 L. B. R. 3.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2408 OF 1925.
March 12, 1926.
Present:—Mr. Justice Zafar Ali.
RAHMAT ULLAH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
MAWAB—DEFENDANT AND ANOTHER—PLAINTIFF—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Suit for possession—Land under cultivation—Burden of proof—Landlord and tenant—Rent, non-payment of, in Revenue Records—Relation between parties.

In a suit for possession of land under cultivation plaintiff, in order to succeed, must prove his possession and dispossession within twelve years.

Mohima Chunder Mozoomdar v. *Mohesh Chunder Neoghi*, 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.), followed.

Where, though the plaintiffs and defendants are shown in the Revenue Records as landlords and tenants, those very records show that the defendants never paid any rent and were in possession as trespassers, the relationship of landlord and tenant is not established between the parties.

Second appeal from a decree of the District Judge, Ludhiana, dated the 4th February 1925, affirming that of the Additional Subordinate Judge, Fourth Class, Ambala, dated the 7th July 1924.

Mirza *Jalal-ud-Din*, for the Appellants.

Mr. *Devi Dayal*, for the Respondent.

JUDGMENT.—This was a boundary encroachment or *banna shikni* case and an encroachment to the extent of 3 *biswas* 1 *biswansi* was established, but the Courts below have held that the suit was time-barred as the plaintiffs had failed to prove that they had been in possession within 12 years before suit. One of the plaintiffs, [illegible]mely, Faiz Bakhsh, died while the suit [illegible] pending in the Trial Court and as his [illegible]esentatives were not brought on the [illegible]rd within the period prescribed by the Law of Limitation, that Court held that the suit had abated with regard to his share in the land. This is not contested.

The oral evidence produced by the plaintiffs has been disbelieved and the documentary evidence consisting of entries in the Revenue Records is undoubtedly adverse to them. The entry in the last Settlement of 1915-1916 was that the defendant was in possession by means of *dual shikni, i. e.,* boundary encroachment; but there was no knowing when this *dual shikni* took place. No copy of the relevant entries in the previous *jamabandis* was produced and presumably the encroachment was already in existence when the Settlement Record of 1915-1916 was prepared. As the land was under cultivation and not waste, the plaintiffs were decidedly out of possession and according to the ruling of their Lordships of the Privy Council in the case reported as *Mahima Chunder Mozomdar* v. *Mohesh Chunder Neoghi* (1) the plaintiffs could not succeed without proving possession and dispossession within twelve years. The onus of proving this was rightly placed on them but they failed to discharge it. Counsel for the plaintiffs-appellants argues that as in the Revenue Records the plaintiffs are shown to be owners and the defendants, tenants, the possession of the latter as tenants cannot be adverse to their landlords, but it appears from those records that the defendants never paid any rent and were in possession as trespassers. So the relation of landlord and tenant never existed between the parties and it was not even alleged that the defendants had entered into possession as tenants. According to the general rule which the Revenue Authorities follow the name of a person, who is not the owner of the land of which he is in possession, is entered in the column of tenants.

The appeal fails and I dismiss it with costs.

R. L. *Appeal dismissed.*

(1) 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2414 OF 1923.
December 11, 1925.
Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.
SHIB NARAIN KAIBARTA DAS AND OTHERS—PLAINTIFFS—APPELLANTS
versus
Sheikh ABDUL GANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Matters of procedure, if can be questioned.

Matters of procedure dependent upon certain facts cannot be raised for the first time in second appeal.

Appeal against a decree of the Subordinate Judge, Sylhet, dated the 25th September 1923, reversing that of the Munsif, Second Court, Habiganj, dated the 6th November 1922.

Babu *Jatindra Nath Sanyal*, for the Appellants.

Mr. *Gopal Chandra Das* and Babu *Satyendra Kishore Ghose*, for the Respondent.

JUDGMENT.

Ghose, J.—This appeal is by the plaintiffs and it arises out of a suit for redemption of an alleged usufructuary mortgage. The defence was that the property never belonged to the plaintiffs and that there was no mortgage but the property belonged to the defendants.

The Trial Court accepted the story of the plaintiffs and made a decree in their favour. On appeal by one of the defendants the Subordinate Judge has reversed that decree on the finding that the property has not been proved to have ever belonged to the plaintiffs or that there was any mortgage on that property by the plaintiffs to the defendant. On that finding he dismissed the suit.

No question of law arises upon this finding. But it is contended by the learned Vakil for the appellants that the appeal to the lower Appellate Court was incompetent as all the parties were not joined in the appeal; and secondly, the appeal was preferred only against the preliminary decree on the mortgage after the final decree had been made, and so it was not maintainable. Neither of these two points was raised in the lower Appellate Court. As these are matters of procedure dependent upon certain facts the appellants are not entitled to raise these questions for the first time in second appeal.

The appeal is, therefore, dismissed with costs.

Cuming, J.—I agree.

M. B. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES
NOS. 2256 TO 2258 OF 1923.
December 2, 1925.
Present:—Mr. Justice Cuming and
Mr. Justice B. B. Ghose.
BISESWAR SARKAR—DEFENDANT—
APPELLANT
versus
KALI CHARAN ASH AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Eviction, what is—Suspension of rent

Eviction is not a mere trespass but is something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises. [p. 419, col. 2.]

Upton v. *Townend*, (1855) 17 C. B. 30 at p. 61; 25 L. J. C. P. 44; 1 Jur. (N. S.) 1089; 139 E. R. 976; 104 R. R. 562 and *Dhunput Singh* v. *Mahomed Kazim Ispahani*, 24 C. 296; 12 Ind. Dec. (N. S.) 864, relied on.

The facts necessary to cause suspension of rent must be distinctly found in order to bring into operation the rule of suspension of rent which has been applied as a punishment to the landlord for his illegal acts. [p. 419, col. 2.]

Mere mistake of landlord in including in a previous decree lands not forming the subject-matter of the suit in consequence of which they were sold, would not entitle the tenant to suspension of rent as the error could have been rectified by the tenant. [p. 420, col. 1.]

Appeals against the decrees of the District Judge, Jessore, dated the 21st of April 1923, modifying those of the Munsif, First Court, Jhenidah, dated the 5th of September 1922.

Dr. *Jadu Nath Kanjilal*, Babus *Purna Chandra* and *Subodh Chandra Dutt*, for the Appellant.

Babu *Patit Paban Chatterji*, for Babu *Panna Lal Chatterji*, for the Respondents.

JUDGMENT.

Ghose, J.—These three appeals arise out of three suits for rent. The plea of the defendants mainly was that the plaintiffs having dispossessed them from certain portions of their holdings they were entitled to have the entire rent suspended for the years in suit.

There were previous suits for rent in 1915 for these very holdings. It appears tha[illegible] the defendants in those cases also rais[illegible] the plea that they had been dispossesse[illegible] those very lands which are now in dis[illegible] and consequently there should be su[illegible]sion of rent. The question of suspension of rent was decided against the defendants and it was found in those cases that there had been no dispossession by the landlords.

The learned Munsif held that the question of suspension of the rent was *res judicata*. He also held upon the facts that it was not satisfactorily proved that the defendants had been dispossessed from any of the lands. Upon that finding the Munsif passed a decree for the entire amount claimed by the plaintiffs. On appeal by the defendants the learned Judge approached the question of *res judicata* from the point of view as to whether the defendants were entitled to a proportionate reduction of rent on account of dispossession from portions of the holdings. His view was, following the case of *Nil Madhab Sarkar* v. *Brojo Nath Singha* (1), that the question of the amount of rent payable for a particular period in a suit for rent cannot be held to be *res judicata* on account of a previous decision as to the amount of rent for a different period. The learned Judge then proceeded to apportion the rent in a certain proportion.

Defendant No. 1 appeals to this Court and his contention is that the whole of the rent should be suspended with regard to these *jamas*.

The decision of the lower Appellate Court on the question of *res judicata* considered from the point of view taken may be right. But he did not approach the question of *res judicata* with regard to the plea of suspension of rent on account of the dispossession alleged by the defendants to have occurred before the previous suits for rent in the year 1915. The learned Judge also does not mention in his judgment what were the issues in those rent suits. As the Munsif has pointed out the question of suspension of rent on account of dispossession was distinctly raised in those previous suits. As the decisions in the previous suits are not before us and we are not aware what the issues were in the previous rent suits it is not possible to say whether the decisions in the previous rent suits operated as *res judicata* with regard to the question of suspension of rent. For the purpose of the present appeal it may be taken that this question was not *res judicata*. It appears, however, from the judgment of the learned Judge that the question of suspension of rent was not taken before him at all But the statement of the learned Advocate for the appellants may be accepted that this question was raised before the District Judge.

Taking now the facts found by the District Judge on which the suspension of rent is claimed it will be observed that the learned Judge has found that the defendants were dispossessed of two plots measuring 2⅓ *bighas* and 2 *bighas* out of 87 *bighas* of land and of one plot of 2¾ *bighas* out of an area of 150 *bighas* of land by the plaintiffs by accepting *kabuliyats* from different tenants with regard to these small portions of land. The learned Judge does not say distinctly under what circumstances these *kabuliyats* were taken by the plaintiffs. But it has been found by the Munsif on the admission of the defendants' *gomashta* that these plots of land were sold as appertaining to some other *jamas* belonging to these defendants in a suit for rent brought by the plaintiffs for those other *jamas*. It would thus appear that this dispossession took place by virtue of a decree of a Court against these very defendants under which these plots were sold as appertaining to some other *jamas*.

It is true the rule of suspension of rent on account of eviction by the landlord of the tenant from a portion of the demised premises has been adopted in this Court in a series of cases and it is too late to question the adoption of that rule in our Court now. But the facts necessary to cause suspension of rent on account of an alleged eviction by the landlord must be distinctly found in order to bring into operation this rule which has been applied as a punishment to the landlord for his illegal acts. It is unnecessary for me to state in detail what findings are necessary to support the proposition that the entire rent should be suspended for the eviction of a tenant from any part of the demised premises, however, small it may be. The facts which would bring into operation the rule may be found in the observations made in the case of *Upton* v. *Townend* (2) by Jervis, C. J., which has been quoted and followed in the case of *Dhunput Singh* v. *Mahomed Kazim Ispahain* (3) which may be considered as the leading case on the subject in our Court. Jervis, C. J., states what the modern meaning of the word eviction is. He says it is "not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of enjoyment of the demised premises". Then he goes on to abserve. "If that may in law amount to an eviction, the Jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character and done with that intention". In all the cases in our Court where suspension of rent has been allowed on this ground it has been found that the landlord had done such an act with the intention of depriving the tenant of the enjoyment of the demised premises. Or as I have already stated it is a punishment awarded to the landlord for his illegal act or highhandedness. In the present case there is no such finding. The facts only amount to this, that in a previous rent suit against these very defendants a portion of the land appertaining to these *jamas* in question were included in the decree for rent of the other *jamas* and sold along with other lands. It was open to the defendants in that case to point out that the lands now in question did not appertain to the other *jamas*. They refrained from doing so. It must be either through inadvertence or for some other cause that the lands which have been found now to appertain to the *jamas* in suit was stated as appertaining to some other *jamas*. That can hardly be construed as an act done by the landlord with the intention of depriving the tenants of the enjoyment of the demised premises. It has not been so found by the learned Judge who considered it to be only a case of apportionment. It seems to me that as the rule of law as regards suspension of rent has been introduced in this country as a rule of equity, justice and good conscience, or as it is said in some of the cases a rule of policy, we must look to the circumstances of each case in order to apply that rule. Having regard to the fact that the defendants have been deprived under the circumstances stated above of only a very small fraction of the land comprised within their *jamas* as equitable decision seems to have been arrived at by the learned Judge by apportioning the rent in the proportion he has done, that is deducting the rent of 2 *bighas* and 2½ *bighas* out of 87 *bighas* and of 2¾ *bighas* out of 150 *bighas* of the holdings. Otherwise it would have the effect of making the defendants practically the owners of the properties as they would be entitled to hold the lands in perpetuity without paying any rent whatsoever.

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(1) 21 C. 236; 10 Ind. Dec. (N. S.) 789.

(2) (1855) 17 C. B. 30 at p 64; 25 L. J. C. P. 44; 1 Jur. (N. S.) 1089; 139 E. R 976; 104 R. R. 562.

(3) 24 C. 296; 12 Ind. Dec. (N. S.) 864.

On these grounds I am of opinion that the appeals should be dismissed with costs.

Cuming, J.—I agree.

M. B. *Appeals dismissed.*

MADRAS HIGH COURT.

Civil Revision Petition No. 745 of 1924.
February 19, 1925.
Present :—Mr. Justice Wallace.

R. DURAISWAMY IYER—Plaintiff—Petitioner
versus
C. S. BALASUNDARAM IYER AND ANOTHER—Defendants Nos. 2 and 3—Respondents.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Limitation Act (IX of 1908), Sch. I, Art. 164—Ex parte *decree, setting aside of—Service of summons, finding as to.*

For setting aside an *ex parte* decree it is not enough to find that the judgment-debtor was ignorant of the decree, the Court must also decide whether the summons was not duly served.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the District Munsif, Pali, dated the 4th August 1924, in I. A. No. 346 of 1924, in O. S. No. 5 of 1923.

Mr. *N. Sivaramakrishna Iyer*, for the Petitioner.

Mr. *A. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.—The District Munsif has not decided whether "summons was not duly served" as he was bound to do under Art. 164 of the Indian Limitation Act. A mere assertion of his ignorance of the decree by the petitioner and acceptance of that by the Court will not give the Court jurisdiction to set aside the *ex parte* decree. It has to decide also whether the summons was not duly served. This order was, therefore, made without jurisdiction and is hereby set aside and the case sent back for fresh decision.

Costs upto date will abide the result. Refund of Court-fee on the civil revision petition is allowed.

V. N. V. *Petition allowed.*
R. L.

OUDH CHIEF COURT.

Second Civil Appeal No. 446 of 1924.
March 5, 1926.
Present :—Mr. Justice Raza.

RAM CHARAN—Defendant—Appellant
versus
RAGHO SINGH—Plaintiff and others—Defendants—Respondents.

Transfer of Property Act (IV of 1882), s. 53, proviso—Simple money-decree against judgment-debtor—Mortgage of property by judgment-debtor—Mortgagee unaware of execution proceedings—Intent to defeat creditors—Deed, validity of.

Where a judgment-debtor executes a mortgage of his property on a date prior to the service of notice under O. XXI, r. 54, C. P. C., on him, with a view to defeat the creditor who has obtained a simple money-decree against him, but the mortgagee has no notice of the execution proceedings, the mortgage-deed cannot be declared void under s. 53 of the Transfer of Property Act.

Hassan Abbas Ali Khan v. *Razia Begam*, 12 Ind. Cas. 401, followed.

Narmal Das v. *Chet Ram*, 11 O. C. 197, distinguished.

Appeal against the judgment and decree of the Additional Subordinate Judge, Sitapur, dated the 29th July 1924, in Civil Appeal No. 54 of 1924, upholding that of the Additional Munsif, Sitapur.

Mr. *S. M. Ahmad*, for the Appellant.

Mr. *Ghulam Hasan*, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the Additional Subordinate Judge, Sitapur, dated the 29th July 1924, affirming a decree of Munsif, Sitapur, dated the 20th November 1923.

The facts of this case so far as it is necessary to state them for the purpose of disposing of this appeal are as follows:—

Ram Charan (appellant) obtained a simple money-decree against Bachchu Singh and Durga Singh (respondents Nos. 2 and 3) for Rs. 966-11-0 on the 18th April 1921. He applied for execution of the decree on the 30th November 1922. The necessary notices were issued by the Court but service was not effected on the judgment-debtors before the 17th December 1922. The prohibitory order issued under O. XXI, r. 54, Sch. I, of the C. P. C. was affixed on the court-house on 6th December 1922, though it had not been proclaimed till then at some place on or adjacent to the property as required by the said rule. On the 13th December 1922 the respondents Nos. 2 and 3 executed a mortgage-deed in respect of the property in question in favour of Raghu Singh respondent No. 1 for Rs. 500 Raghu Singh filed an objection in the Execution Court on the basis of this mortgage after the attachment of the property but his objection was disallowed on the 10th February 1923. He then filed the present suit out of which this appeal arises on the 27th February 1923.

Both the lower Courts have held that the deed was executed for consideration and that the transferee had no knowledge of the execution proceedings. They have, therefore, decreed the plaintiff's claim. Ram Charan decree-holder has now come to this Court in second appeal.

I have examined the record and heard the learned Counsel for the appellant. So far as I see there is no force in this appeal. The appellant's learned Counsel has argued that the mortgage was executed by the judgment-debtors to defeat the decree-holder. He has referred to the ruling in *Narmal Das* v. *Chet Ram* (1). So far as I see that ruling does not help the appellant in this case. It has been found by the lower Courts that the deed was executed for consideration and the transferee had no knowledge of the execution proceedings. This finding is based upon admissible evidence and must be accepted in second appeal.

The appellant's learned Counsel has referred to s. 53 of Act IV of 1882, but that section itself provides that "nothing contained in this section shall impair the rights of any transferee in good faith and for consideration." The contention of the appllant's learned Counsel that the transaction should be presumed to be invalid cannot be accepted. He contends that the transaction appears to be highly suspicious. However the Courts' decision must rest not upon suspicion but upon legal grounds established by legal testimony.

The respondent's learned Pleader has referred to the ruling in *Hassan Abbas Ali Khan* v. *Razia Begam* (2). In that case the evidence showed a fraudulent intention on the part of the judgment-debtor to defeat his creditors but there was no proof that the transferee was aware of or participated in the fraudulent intention. It was held that in the circumstances the deed could not be declared to be void. That case was decided by a Judge of the late Court of the Judicial Commissioner of Oudh on the 3rd March 1911.

Under these circumstances the appeal fails and must be dismissed. I dismiss the appeal with costs and order that the appellant should pay the costs of the contesting respondent. The decree of the lower Appellate Court is confirmed in all respects.

G. H. *Appeal dismissed.*

(1) 11 O. C. 197.
(2) 12 Ind. Cas. 401.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 224 OF 1925.

(CIVIL APPEAL NO. 533 OF 1921.)

October 30, 1925.

Present:—Mr. Justice Harrison and Mr. Justice Campbell.

QAIM—DEFENDANT—PETITIONER

versus

NURA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9 (2)—Abatement—Automatic proceeding.

Abatement takes place automatically after the expiration of 90 days from the death of a deceased party and unless the abatement is set aside on an application presented within 60 days or a period further extended in virtue of s. 5 of the Limitation Act, the suit or appeal is dead. [p. 423, col. 1.]

Gujarati v. *Sitai Misir*, 66 Ind. Cas. 554; 44 A. 459; A. I. R. 1922 All. 209, dissented from.

Sarat Chandra Sarkar v. *Mihar Stone & Lime Co. Ltd.*, 67 Ind. Cas. 917; 49 C. 62; A. I. R. 1922 Cal. 335, *Raghbir Saran* v. *Sohan Devi*, 86 Ind. Cas. 1; 6 L. 233; 26 P. L. R. 100; A. I. R. 1925 Lah. 381; 7 L. L. J. 149, and *Ram Gopal* v. *Harkishen*, 88 Ind. Cas. 478; 7 L. L. J. 517; A. I. R. 1925 Lah. 598, referred to and followed.

Application, under O. XXII, r. 9, s. 151 and O. I, r. 10, C. P. C., praying that the time for making the petition for bringing the legal representative on the record be extended under s. 5 of the Limitation Act, and that the abatement be set aside.

Mr. *M. S. Bhagat*, for the Petitioner.

Diwan *Mehr Chand*, for the Respondents.

JUDGMENT.—The facts of the case are as follows. The suit of Samail and others was decreed on 21st December 1920. An appeal was lodged by the defendant and admitted on 10th March 1921. Samail, plaintiff-respondent, died on 22nd January 1924, and on the 24th of April 1924 the appellant applied to have his representatives brought on the record, alleging that Samail had died two months previous to the date of the application. This application was granted "subject to all just exceptions" and at the hearing of the appeal on the 11th of February 1925 it came to light that Samail had actually died on the 22nd of January and the application had been made more than ninety days after that date. The order passed was that the appeal was shown to have abated as against one of the respondents, and this being so it had abated against all and was dismissed with costs.

On the 2nd of April 1925 a petition was presented purporting to be under O. XXII, r. 9, s. 151 and O. I, r. 10, C. P. C., applying that the abatement and dismissal be set aside, and that the representatives be brought on the record; and, as an alternative; that the representatives be impleaded under s. 151 and O. I, r. 10. Counsel relied on *Gujrati* v. *Sitai Misir* (1) while respondent has urged that in *Sarat Chandra Sarkar* v. *Mihar Stone and Lime Co. Ltd.* (2) precisely contrary view was taken, and that that view had been generally followed by this Court. He quoted *Raghbir Saran* v. *Sohan Devi* (3) and *Ram Gopal* v. *Har Kishen* (4). The views taken by the Allahabad and Calcutta High Courts are diametrically opposed to each other, the latter being that after 90 days have expired from the date of a man's death, no application having been made in the interval, the appeal automatically abates or dies; from that moment time begins to run and, unless within 60 days an application be made under O. XXII, r. 9, the matter ends. On the other hand, the view of the Allahabad Court is that before there can be an abatement, there must be an order, and it is from the date of the order that limitation begins to run, and that 60 days are allowed for the making of an application to have that order set aside. In *Ram Gopal* v *Har Kishen* (4) the lower Appellate Court had followed the view taken by Allahabad; on appeal a Division Bench of this Court took the same view as Calcutta, and this has indeed always been the view of this Court, where applications made beyond time are treated as equivalent to applications under O. XXII, r. 9. Counsel for the petitioner urges that in *Raghbir Saran* v. *Sohan Devi* (3) that matter was not fully argued, but it must have been so argued in *Ram Gopal* v. *Har Kishen* (4) and anyhow we are of opinion that the view of the Calcutta High Court is correct, and must prevail. The Code speaks nowhere of an order of abatement; O. XXII, r. 4, has not been dealt with in so many words in *Gujrati* v. *Sitai Misir* (1), and the only contention which impresses us at all is that in ordinary English a fact is not "set aside" but an order is. Where O. XXII, r. 9, speaks of setting aside an abatement or dismissal, it would possibly be more correct to use some other word and to reserve the use of the words "set aside" for the cancellation of an order as opposed to the ignoring of an event. We are, however, of opinion that as soon as 90 days have expired the appeal abates. No reference to that abatement gives a fresh starting point and such reference is merely the recital of an event. Where, therefore, the appeal is dismissed with costs as in this case as having abated *in toto*, it would no doubt be more correct to say: "The appeal has abated against one of the respondents. It cannot, therefore, proceed against the remaining respondents and is dismissed against them with costs." It is unnecessary to dismiss it against the respondent against whom it has already abated. Where O. XXII, r. 9 speaks of an abatement or dismissal, the word "dismissal" refers back to the only form of dismissal dealt with in O. XXII, namely, the dismissal of a suit on the ground of a plaintiff's insolvency. Where the suit or appeal is dismissed against certain defendants or respondents as a consequence of a previous abatement, it is dismissed in exactly the same way as if the plaintiff or the appellant had failed to implead an essential party and such failure necessitated such dismissal. We find, therefore, that abatement is automatic after the 90 days have expired, and, unless that abatement be set aside on an application presented within 60 days or a period further extended in virtue of s. 5 of the Limitation Act, the suit or appeal is dead. No reason has been shown in this case why there should be any extension of time and in fact Counsel has not even addressed us on this point.

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(1) 66 Ind. Cas. 554; 44 A. 459; A. I. R. 1922 All. 209

(2) 67 Ind. Cas. 917; 49 C. 62; A. I. R. 1922 Cal. 335.

(3) 86 Ind. Cas. 1; 6 L. 233; 26 P. L. R. 100; A. I. R. 1925 Lah. 381; 7 L. L. J. 149.

(4) 88 Ind. Cas. 478; 7 L. L. J. 517; A. I. R. 1925 Lah. 598.

We dismiss the application with costs.

R. L. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 12 OF 1923.
February 22, 1926.
Present:—Mr. Kennedy, A. J. C., and
Mr. Rupchand Bilaram, A. J. C.
VELJI DAYALJI—PLAINTIFF—
APPLICANT
versus
FIRM OF NANDLAL AND OTHERS—
DEFENDANTS—OPPONENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata, *plea of—Court of concurrent jurisdiction—Judgment, whether operates as bar—Subsequent suit—S. 11, whether exhaustive.*

The plea of *res judicata* is not limited to the provisions of s. 11 of the C. P. C., nor is it limited to a judgment of a Court of concurrent jurisdiction being pleaded as bar to the subsequent suit which is dealt with in the said section but it extends also to a judgment of a Court of exclusive jurisdiction. [p. 424, col. 1.]

Dutchess of Kingston's case, (1776) 2 Sm. L. C. 754, *Poyser* v. *Minors*, (1881) 7 Q. B. D. 329; 50 L. J. Q. B. 555; 45 L. T. 33; 29 W. R. 773; 46 J. P. 84, *Pease* v. *Chaytor*, (1863) 3 B. & S. 620; 32 L. J. M. C. 121; 8 L. T. 613; 9 Jur. (N. S.) 664; 11 W. R 563; 122 E. R. 233; 129 R. R 483, *Flitters* v. *Allfrey*, (1875) 10 C. B. 29; 44 L. J. C. P. 73; 31 L. T. 878; 23 W. R. 412, relied upon.

Ram Kirpal Shukul v. *Rup Kuari*, 11 I. A. 37; 6 A. 269; 4 Sar. P. C J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.), and *George Henry Hook* v. *Administrator General of Bengal*, 60 Ind. Cas, 631; 48 I. A. 187; 19 A. L. J. 366; 40 M. L J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 221; 48 C. 499 (P. C.), referred to.

Dulare Lal v. *Hazari Lal*, 26 Ind. Cas. 56; 12 A. L. J. 853, distinguished.

Application to revise the judgment and decree of the Small Cause Court Judge, Karachi.

Mr. *Hiranand Bulchand*, for the Applicant.

JUDGMENT.—This is an application under s. 25 of the Small Cause Courts Act against the order passed by the learned Small Cause Court Judge, Karachi, dismissing the plaintiff's suit.

It appears that the plaintiff who is a local merchant agreed to sell a bale of piecegoods to the defendant who resides and carries on business at Amritsar. There were disputes between the parties as to the delivery of the bale and each party claimed damages from the other for breach of contract. The defendant, however, forestalled the plaintiff by instituting a suit in the Small Cause Court at Amritsar for recovery of Rs. 20 paid as earnest-money and Rs. 64 as damages for failure by the plaintiff to deliver the bale to him, stating that the cause of action arose at Amritsar where the bale was to be delivered. The plaintiff failed to appear in the Amritsar Court and permitted an *ex parte* decree being passed against him. Subsequently he brought the present suit in the Small Cause Court, Karachi, for recovery of Rs. 900 and odd as the loss suffered by him for failure of the defendant to take delivery of the bale. The defendant pleaded the judgment and decree of the Amritsar Court as a bar to the present suit.

It was urged on behalf of the plaintiff that as the Small Cause Court, Amritsar, has jurisdiction to try suits upto Rs. 500 and as the Small Cause Court, Karachi, has jurisdiction to try suit upto Rs. 1,000 and as the present suit was one exceeding Rs. 500 and as such not cognizable by the Amritsar Court, the judgment and decree of that Court could not be pleaded as a bar to the present suit.

Now, the plea of *res judicata* is not limited to a judgment of a Court of a concurrent jurisdiction being pleaded as a bar to the subsequent suit which is dealt with in s. 11 of the C. P. C. but it extends also to a judgment of a Court of exclusive jurisdiction. This was laid down in England as early as 1776 in the celebrated case of *The Dutchess of Kingston's case* (1) where the joint opinion of the Judges delivered in answer to the questions put by House of Lords was as follows:—

"From the variety of cases relating to judgments being given in evidence in civil suits these two deductions seem to follow as generally true.

First that the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court: Secondly that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner conclusive upon the same matter, between the same parties, coming incidently in question in another Court for a different purpose.

But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question though within their jurisdiction, nor of any matter incidently cognizable, nor of any matter to be inferred by argument from the judgment." In England a judgment of a County Court corresponding to the Court of Small Causes if not appealed against or set aside has been held to be a bar to proceedings in respect of the same matter in the High Court, *cf.* the case of *Poyser* v. *Minors* (2), *Pease* v. *Chaytor* (3) and *Flitters* v. *Allfrey* (4).

The same principles would indubitably apply to a decision of the Small Cause Court. Section 16 of the Provincial Small Causes Courts Act gives exclusive jurisdiction to the Small Cause Court over certain suits for small amounts and s. 27 declares that the decree or order made under the provisions of that Act shall be final. It was faintly suggested that s. 11, C. P. C., was exhaustive and whatever may be the law in England the present suit being outside the competence of the Amritsar Small Cause Court was not barred by *res judicata*. But as held in *Ram Kirpal Shukul* v. *Rup Kuari* (5) and again pointed out in the more recent case of *George Henry Hook* v. *Administrator-General of Bengal* (6), the plea of *res judicata* still remains apart from the limited provisions of the Code. If the plea of *res judicata* were not to prevail in suits of this nature the vary object of the Legislature in providing for a speedy and summary remedy by conferring exclusive jurisdiction on the Court of Small Causes in India would, in our opinion, be frustrated.

We are aware of a Single Judge judgment of the Allahabad High Court in the case of *Dulare Lal* v. *Hazari Lal* (7) where the suit filed in the Small Cause Court had been transferred to the Court of the Munsif to be tried along with the cross-claim and on the claim in the Small Cause Court suit being decreed the cross-claim was dismissed by the same Judge. On appeal against the decree dismissing the cross-claim the Appellate Court decreed the cross-claim after allowing credit for the claim in the Small Cause Court suit and the plea, that the decision in the Small Cause Court suit which had not been appealed against operated as *res judicata* to the maintainability of the appeal, was not allowed to prevail. The circumstances of that case were peculiar and were such as not to invite the application of the maxim *nemo debet bis vexari pro una et eadem causa* which is the basis of the plea of *res judicata*. The two suits were tried together and the cross-claim which was appealable may well have been tried as the principal suit and the Small Cause Court suit made to follow the result thereof. The appeal was a continuation of the same suit and the opposite party was not being twice vexed for the same cause of action.

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(1) (1776) 2 Sm. L. C. 754.

(2) (1881) 7 Q B D. 329; 50 L. J. Q. B. 555; 45 L. T. 33; 29 W. R. 773; 46 J. P. 84.

(3) (1863) 3 B. & S. 620; 32 L J. M. C. 121; 8 L T. 613; 9 Jur. (N. S.) 664; 11 W. R. 563; 122 E. R. 233; 129 R. R. 483.

(4) (1875) 10 C. P. 29; 44 L. J. C. P. 73; 31 L. T. 878; 23 W. R. 442.

(5) 11 I. A. 37; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.).

(6) 60 Ind. Cas. 631; 48 I. A. 187; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R 648; 25 C. W. N. 915; 14 L. W. 221; 48 C. 499 (P. C.).

(7) 26 Ind. Cas. 56; 12 A. L. J. 853.

The defendants' case as laid was triable by the Small Cause Court, Amritsar. That Court had exclusive jurisdiction to try that suit and the question directly in issue in that suit was, whether the present plaintiff was guilty of a breach of contract. The decree of that Court is, therefore, final in respect of the matter which was directly in issue. It was the duty of the plaintiff to appear there and to have defended that suit. If he treated that Court with contempt and failed to appear relying upon the fact that he would be able to bring down the defendant who was the plaintiff in that suit to Karachi and finds now that his suit cannot proceed on the plea of *res judicata*, he was to thank himself.

We think that the learned Judge of the Small Cause Court was right in dismissing the plaintiff's suit.

This application, therefore, fails and is dismissed with costs.

P. B. A. *Application dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 211 OF 1922.

February 22, 1926.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.

FIRM MUL CHAND-NEMI-CHAND—DEFENDANT—APPELLANT

versus

FIRM BASDEO-RAM SARUP—PLAINTIFF—RESPONDENT.

Landlord and tenant—Premises damaged by combustion of cotton stored—Liability of tenant.

In Agra, on 25th March 1920, defendants hired a room on the ground floor of the plaintiff's house and stored therein 388 bales of cotton. The cotton was of 1919 season and remained in that room throughout the hot weather of April, May and June 1920. There were three doors to the room but no ventilation and when the doors were shut the whole room was a sealed chamber. Some days prior to 28th July rain had been falling. At 4 P. M. that day the cotton was found to be on fire and the fire was not got under until great damage had been done to the upper portion of the house:

Held, that the defendants were liable for damages on the ground that the fire which occured would not have happened had the defendants exercised proper watchfulness and control over the cotton. They had the exclusive control and custody of the cotton and must be presumed to know the degree of care required by persons who store cotton in India in bulk in unventilated rooms during months of April, May, June and July. [p. 427, col. 1.]

First appeal against a decree of the Additional Subordinate Judge, Agra, dated the 25th April 1922.

Sir Dr. *Tej Bahadur Sapru*, Dr. *S. N. Sen*, Messrs. *B. Malik*, *Baleshwari Prasad* and *Ajudhia Nath*, for the Appellant.

Mr. *B. E. O'Conor*, Dr. *K. N. Katju* and Mr. *N. P. Ashthana*, for the Respondent.

JUDGMENT.—This is an appeal from the judgment of the Additional Sessions Judge of Agra who on the 25th of April 1922 gave the plaintiffs a decree for Rs. 12,800 damages on account of the destruction by fire of the major portion of a house owned by them on the ground that such fire originated through the negligence of the defendants.

The defendants are Bankers at Ajmere. They also carry on the business of cotton commission agents at Agra and elsewhere and are a firm of high financial repute.

On the 25th of March 1920 they had occasion to require premises at Agra to store some 388 bales of cotton of which 363 were the property of a firm Sukar Nand-Sham Lal. They hired on monthly rent a big room on the ground floor of the plaintiff's house at Belanganj, Agra. There they deposited the cotton. This cotton was of the 1919 season and remained in that room throughout the hot weather of April, May and June 1920.

There were three doors to the room but no ventilation and when the doors were shut the whole room was a sealed chamber. The rainy season in 1920 commenced in this Province on or about July 8th, and for some days or parts of days prior to the 28th July, rain had been falling at Agra. At about 4 P. M. on that day smoke was seen issuing from the room, the alarm was raised, the doors were eventually opened or broken open and the cotton was found to be on fire. The fire was not got under until great damage had been done to upper portion of the house.

The plaintiffs launched a claim against the defendants, basing it, unfortunately, upon a very unwise ground and one which they would have ascertained to have no reasonable foundation had they taken the least trouble to consider the position of the defendants and the circumstances of the case. They alleged and principally relied upon incendiarism. They alleged that the defendants in consequence of a fall in the price of cotton deliberately set fire to the bales.

They further sought to prove, and alleged it as a circumstance supporting incendiarism, that the defendants, when they were informed of the fire, refrained from taking proper measures to extinguish it.

The evidence to support incendiarism was given by Bhagwat Prasad who was undoubtedly untrustworthy. We can have no doubt that in respect of one important matter, namely, an allegation that he received compensation from the defendants (see pages 67 and 68), he was telling falsehoods. Mr. Prag Narain's evidence, supporting the suggestion of incendiarism, was, in our opinion, ill-considered. Mr. Prag Narain was engaged at one time in this very case as a Vakil, he gave evidence as a witness to the fire and in speaking of the firm of Sham Lal Sukar Nand said "I believe they have lost heavily and have failed." My belief is based on *bazar* reports. "The rumour, if there was one as to their failure was entirely untrue".

We regret that a Vakil should have aspersed the financial solvency of a firm in this way in support of a theory of incendiarism or of any other theory and that the Judge should have permitted it. He even adopted it in his judgment saying that there was nothing on record to show that the Vakil was in any way interested in giving a false deposition or that the rumour was not afloat. He evidently, therefore, attached weight to the rumour.

It is impossible to understand from the judgment whether Mr. Harihar Prasad really thought it a case of incendiarism or that the cotton was ignited by fire, brought negligently into contract with it, by the servants of the defendants, or, whether liability should fall on the defendants upon the ground that admittedly a fire broke out on premises occupied by them and under their control under circumstances which put the burden of proving that they had acted in all respects with reasonable care.

In the result he gave the plaintiffs a decree for Rs. 12,800 based not upon a calculation of the amount which it would cost to make good the damage done but on the capital value of the destroyed portion of the house, regarded from the letting point of view. The plaintiff called only one witness on the question of the cost of making good and we agree with the Judge in regarding his evidence as unreliable and his figures extravagant and exorbitant. The plaintiff, who could have given the Court enlightenment on the proper amount of damages, deliberately refrained from furnishing figures f alleged enlargements, repairs and rebuilding to the original house and all that is known is that he spent Rs. 6,400 in the purchase of the house in 1917 and made additions to it. He produced no books and gave no details. He is apparently aggrieved at the amount of damages awarded to him but he should have produced evidence of his actual expenditure and reliable witnesses with fair figures to prove the cost of rebuilding.

On the question as to liability we have already indicated our view as to incendiarism. We do not believe for one moment the evidence of Bhagwat Prasad who says he saw men of the defendants on the premises at 3 in the afternoon with a lamp or candle.

The defendants set up a story that they had complained that the students who lived on the upper floor used to throw cigarettes and fore on the balcony and that Chaturbhuj had asked them not to do so. "lest sparks should enter by the sky lights." The defendants alleged that ventilation was given to the room by 3 square skylights placed over the doors. It is obvious from the photographs and plans that no such sky-lights ever existed. From the evidence of Nathu Lal (page 84) it is clear that the cotton once it was stored in the room was left to itself and all that happenned was that a servant on the 2nd or 4th day would go and see it. By going to see it the witness explained that he went to the locked doors without the key and looked through to see if it was all right. It was only when a customer wanted to see bales that the room was opened and there was evidence showing that cotton had slumped so badly that there was no buyers. No evidence was given to show that the room was ever opened during the tremendous heat of April, May and June, or the rains of July. At page 130 of his judgment the learned Subordinate Judge assumed, because it had been raining, that, therefore, it could not be a case of spontaneous combustion. A great deal of argument in this Court was addressed to us on the negligence in leaving cotton on the ground floor of a residential house unwatched for months and in an unventilated room. The cotton must have become bone-dry by the end of June and in a condition in which it would eagerly absorb moisture during the rains and the pressure of one damp bale upon another is exactly the very circumstance which gives rise to spontaneous combustion and which has to be guarded against by adequate ventilation, the moving to and fro of the bales, temperature tests and daily watchfulness

The plaintiffs were so set upon running the case of incendiarism that they overlooked the importance of getting expert evidence on the liability of cotton to self-ignition, but we are at liberty to, and do, disagree with the Judge that the fact of wet weather precludes the theory of spontaneous combustion. On the other hand, it indicates the likelihood of it.

We think that the judgment, unsatisfactory as it is on the issues propounded, may yet be supported by his finding at page 132 lines 30 to 40.

We confirm his decision on the ground that the fire which undoubtedly occurred would not have happened had the defendants exercised proper watchfulness and control over the cotton. They had the exclusive control and custody of the cotton and must be presumed to know the degree of care required by persons, who store cotton in India in bulk in unventilated rooms during the months of April, May, June and July.

The principle of liability is set out in the cases of *Scott* v. *London Dock Co.* (1), *Byrne* v. *Boadle* (2) and the Indian case of the *River Steam Navigation Co.* v. *Choutmul Doogar* (3).

Now as regards the damages. The learned Subordinate Judge was, as we have said, unable to accept the evidence of Janki Prasad, the plaintiff gave the Court no help. Mr. Prag Narain, who expounded theories on the way cotton burns when an incendiary has been at work also gave expert evidence as to the price houses fetch in the locality based upon a rental calculation. We are of opinion that if the plaintiff had disclosed his books and given the Court a straightforward calculation of the total cost of the house at the date of the fire and also produced two or three reliable quantity surveyors and builders he might have shown a greater loss than Rs. 12,800. However, he failed to do so, and we propose to leave the damages at the amount awarded by the learned Subordinate Judge.

In view of the manner in which this case was conducted in the lower Court we deprive the plaintiff of his costs in that Court and whilst dismissing this appeal do so also without awarding any costs to the plaintiff-respondent.

R. L. *Appeal dismissed.*

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(1) (1865) 34 L. J. Ex. 220; 3 H. & C 593; 11 Jur. (N. S.) 204; 13 L. T. 148; 13 W. R. 410; 159 E. R. 665; 140 R. R. 627.

(2) (1863) 33 L. J. Ex. 13; 2 H. & C. 722; 9 L. T. 450; 12 W. R. 279; 159 E. R. 299; 133 R. R. 761.

(3) 26 C. 398; 26 I. A. 1; 3 C. W. N. 145; 13 Ind. Dec. (N. S.) 857 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 785 OF 1925.

October 23, 1925.

Present:—Mr. Justice Devadoss.

N. V. NAGESWARA IYER—PLAINTIFF—APPELLANT

versus

ALAGU SRINIVASA IYENGAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Registration Act (XVI of 1908), s. 49—Equitable mortgage—Deposit of title-deeds—Document reciting terms of mortgage, admissibility of, without registration—Mortgage-deed, whether document of title.

A mortgage-deed executed by the owner of a property in favour of a third person cannot be deemed to be a title-deed within the meaning of s. 59, Transfer of Property Act, though it may be evidence of the fact that the mortgagor dealt with the property as his. [p. 428, col. 1.]

An equitable mortgage by deposit of title-deeds is created by the borrower depositing with the lender his title-deeds, the gist of the transaction being the intention that it should be held as security. [p. 428, col. 2.]

Shaw v. *Foster*, (1872) 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907, and *Pranjivandas Jagjivandas Mehta* v. *Chan Mah Phee*, 35 Ind. Cas. 190; 43 C. 895 at p. 901; (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 24 C. L. J. 314; 8 L. B. R. 458; 43 I. A. 122 (P. C.), referred to.

A document evidencing an equitable mortgage by deposit of title-deeds is compulsorily registrable. [p. 428, col. 2.]

Where contemporaneously with the execution of a pro-note, the lender wrote a letter stating, "please retain the title-deeds of the undermentioned property as equitable mortgage of title-deeds for the amount of pro-note of this day":

Held, that the document contained the terms of the arrangement under which the loan was made and was inadmissible in evidence without registration to create a valid mortgage. [p. 429, col. 1.]

Velamakanya Krishnaiya v. *Ponnuswamy Aiyar*, 84 Ind. Cas. 629; 47 M. 398; 46 M. L. J. 295; 19 L. W. 384; A. I. R. 1924 Mad. 547, distinguished.

Second appeal against a decree of the Court of the Subordinate Judge, Chingleput, in A. S. No. 50 of 1921. (A. S. No 368 of 1920, District Court, Chingleput), preferred against that of the Court of the Additional District Munsif, Chingleput, in O. S. No. 231 of 1919.

Mr. *K. Jagannatha Iyer*, for the Appellant.

Mr. *K. Bhashyam Iyengar*, for the Respondents.

JUDGMENT.—The plaintiff sues upon an alleged equitable mortgage in his favour by defendants Nos. 1 and 2. The other defendants are alienees from defendants Nos. 1 and 2. The District Munsif gave a personal decree and declined to give a mortgage decree against the property covered by the equitable mortgage. The Subordinate Judge dismissed the suit on the ground that the equitable mortgage was not proved and that in consequence the suit was barred by limitation. The contention of Mr. Jagannatha Iyer for the appellant is that the loans given by the plaintiff's father were covered by the deposit of title-deeds. Exhibit C is a usufructuary mortgage-deed executed by the defendant in favour of one Desikachariar for Rs. 400 on 13th July 1903. This document was deposited to cover the loan. Mr. Jagannatha Iyer's contention is that this is a title-deed. I am unable to see how a mortgage deed executed by the owner of a property in favour of a third person can ever be deemed to be a title-deed. A mortgage-deed may be evidence of the fact that the mortgagor dealt with the property as his: but in no circumstances can it be considered that a mortgage-deed is the title-deed of the mortgagor. I, therefore, hold that there was no equitable mortgage created by Ex. C.

Exhibit D is no doubt a title-deed and the evidence of P. W. No. 2 is that it was deposited on 15th January 1910. He has not been cross-examined on the point and the Subordinate Judge was not right in considering that the evidence did not make out a deposit of title-deed. An entry in the plaintiff's book, Ex. A (5), shows that the two loans of Rs. 350 were covered by the deposit of title-deeds. From this evidence it is quite clear that Ex. D was deposited for the purpose of creating an equitable mortgage in respect of the loans already advanced. The contention of Mr. Bhashyam Iyengar for the respondents is that there is no evidence as to under what circumstances Ex. D was deposited. But from the evidence and the circumstances it is clear that Ex. D was deposited to cover the loan already advanced. An equitable mortgage by deposit of title-deeds is created by the borrower depositing with the lender his title-deeds. All that is required to create an equitable mortgage is depositing the title deeds with the lender, the intention of the lender being to hold them as security and the intention of the borrower to leave them as security with the lender. If there is any writing to evidence the transaction that would require registration: in the absence of registration any writing which embodies the transaction cannot be proved. Lord Cairns observes in *Shaw* v. *Foster* (1): "It is a well-established rule of equity that a deposit of a document of title, without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to."

This passage is quoted with approval by their Lordships of the Privy Council in *Pranjivandas Jagjivandas Mehta* v. *Chan Mah Phee* (2). The gist of the transaction, therefore, consists in depositing the title deed with the intention that it should be held as security. From the evidence of P. W. No. 2 it is quite clear that Ex. D was deposited with the plaintiff's father to cover the loan already advanced.

The next question is whether the loan of Rs 50 evidenced by the promissory-note dated 2nd June 1910 Ex. G is covered by the equitable mortgage. Exhibit H is a letter written by defendants Nos. 1 and 2 to the plaintiff's father on 22nd June 1910. In that they say :

"Please retain the title-deeds of our undermentioned property in Koluthur North, Chingleput District as equitable mortgage of title-deeds for the amount of pro-note of this day Rs. 50." I consider that this document contains the terms of the arrangement under which the loan was made and, therefore, this as rightly held by the Subordinate Judge, requires registration and in the absence of registration is not admissible in evidence. Mr. Jagannadha Iyer relies upon a recent decision of this Court in *Velamakanya Krishnaiya* v. *Ponnuswamy Aiyer* (3) as supporting his contention that

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(1) (1872) 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907.

(2) 35 Ind. Cas. 190; 43 C. 895 at p 901; (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 24 C. L. J. 314; 8 L. B. R. 458; 43 I. A. 122 (P. C.).

(3) 84 Ind. Cas. 629; 47 M. 398; 46 M. L. J. 295; 19 L. W. 384; A. I. R. 1924 Mad. 547.

Ex. H does not require registration. In that case the expression used was

"Let it be known that for that I have retained with you as collateral security my document of the collector's Certificate No. 815 in respect of my house bearing door No. 11, Tiruvateswaranpet Madras".

There the letter refers to a past transaction. If a person writes a letter to another to the effect that he had already left with him certain documents as security for loans already made that letter does not require registration. But Ex. H is not such a letter. It contains the terms on which the loan was advanced and says that the document should be kept with him as security. Therefore, as regarde the loan of Rs 50 the plaintiff is not entitled to get a decree as equitable mortgagee.

The Subordinate Judge's decree is set aside and the plaintiff will have interest in respect of the property covered by Ex. D. The appellant will pay and receive proportionate costs throughout.

Time for redemption will be three months from to-day.

V. N. V. *Decree set aside.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 38 OF 1925.
March 2, 1926.
Present:—Mr. Justice Sulaiman and
Mr. Justice Mukerji.
HARI CHAND RAI—APPLICANT—
APPELLANT
versus
Babu MOTI RAM—RECEIVER—
RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 4, 53—Insolvency Court, powers of, to go into question of title—Two years' limitation under s. 53, starting point of—Transfer of Property Act (IV of 1882), s. 53, scope of.

By the Court--Under s. 4, Provincial Insolvency Act, full power is given to the Insolvency Court to decide not only all questions of title or priority, but also of any nature, whatsoever, whether they involve matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice. Therefore, there is nothing to prevent the Insolvency Court from declaring, even though it be at the instance of the Receiver, that certain property belongs to the insolvent and that any other person who is putting forward a claim to it is not really entitled to it. [p. 431, col. 1.]

Shikri Prasad v. *Aziz Ali*, 63 Ind. Cas. 601; 44 A. 71; 19 A. L. J. 862; 3 U. P. L. R. (A.) 195; A. I. R. 1922 All. 196, *Bansidhar* v. *Kharagjit*, 26 Ind. Cas. 926; 37 A. 65; 12 A. L. J. 1273, and *Mahrana Kunwar* v. *David*, 77 Ind. Cas. 57; 46 A. 16 at p. 21; 21 A. L. J. 737; A. I. R. 1924 All. 40, referred to.

The limitation of two years prescribed under s. 53, Provincial Insolvency Act, is applicable to all cases where the transfer when originally made was a good transfer of property though it was subject to an option of avoiding it to be exercised by the receiver, that is to say, to a transfer which is only voidable and not void. [*ibid.*]

Where an alienation has been effected by a registered deed the period of two years under s. 53, Provincial Insolvency Act, is to be counted from the date of execution and not of registration of the deed. [p. 430, col. 1.]

Documents which are voidable under s. 53, Transfer of Property Act, are good in law so long as the option to avoid them is not exercised by the creditors who are defrauded. [p. 430, col. 2.]

Per *Mukerji, J.* contra.--An Insolvency Court has no jurisdiction to entertain an application of the Receiver to declare an ostensible transfer void if the transaction took place more than two years before the adjudication. [p. 431. col. 2.]

Shikri Prasad v. *Aziz Ali*, 63 Ind. Cas. 601; 44 A. 71; 19 A. L. J. 862; 3 U. P. L. R. (A.) 195; A. I. R. 1922 All. 196, distinguished.

Gaura v. *Muhammad Abdul Majid*, 64 Ind. Cas. 523; A. I. R. 1922 All. 443, relied on.

First appeal from an order of the District Judge, Saharanpur, dated the 6th November 1924.

Mr. *N. Upadhiya*, for the Appellant.

Dr. *K. N. Katju* and Mr. *Durga Prasad*, for the Respondent.

JUDGMENT.

Sulaiman, J.—This is an appeal by Hari Chand Rai who holds a lease, dated the 27th February 1922, and registered in June following, from the insolvent Lachhman Das, who executed it for himself and as guardian of his minor nephew. So far the interest of the minor is concerned, that does not at all arise in these insolvency proceedings. We have to confine our attention to the interest of the insolvent in the property covered by the lease. Originally the Receiver moved the Court under s. 53 of the Provincial Insolvency Act, for the annulment of this lease. In the petition however, he alleged that the insolvent, in order to defeat and delay his creditors had executed a fictitious *thekanama* of a major portion of his property for a nominal sum in favour of his brother-in-law for a period of 20 years. He further alleged that this *thekanama* was only a paper transaction and was fraudulently executed. The original prayer asked for was its annulment. The lessee, however, objected that no such *theka* could be annulled under s. 53 of the Provincial Insolvency Act, inasmuch as it was executed more than two years prior to the application for adjudication. The Receiver had taken up the position that the two years were to be counted from the date of its registration. This was not accepted by the learned Judge, and I have no doubt rightly so. He has held that the *theka* could not be annulled as a voidable document under s. 53 of the Provincial Insolvency Act. At the request of the Receiver he treated the application as one under s. 53 of the Transfer of Property Act for avoiding a transfer, which had been effected with a view to defeat or delay creditors. He, however, went into the question of fact raised by the insolvent, *viz.*, whether the document was really fictitious and a paper transaction, and has recorded a finding that the transaction was a fictitious one. He further found that, although mutation of names had been effected in Revenue papers in favour of Hari Chand Rai, this was a purely fictitious transaction and Lachhman Das himself continued to collect the rents as before. Perhaps it would be convenient to mention a few facts in connection with this lease. It is not disputed that two decrees for a sum aggregating to nearly Rs. 25,000 were in execution against the debtor Lachhman Das, and proceedings taken up to the High Court resulted adversely to Lachhman Das. This lease was executed soon after the termination of these proceedings, while the decrees for the above mentioned amount were still in execution. The lease was in favour of his own brother-in-law and no premium, whatsoever, was paid. It does not appear what urgency or pressure there was for executing this document. The statements of the *Patwaris* for the three villages covered by the lease show that even subsequent to the execution of this document Lachhman Das continued to realise the rents from tenants and was in effective possession. The gross profits of the property covered by this lease came to about Rs. 1,300; but the net rent reserved was only Rs. 600, out of which Rs. 370 had to be paid as Government Revenue to the *lambardar*. Neither the lessee, Hari Chand, nor the debtor Lachhman Das has gone into the witness-box to explain under what circumstances this lease had been executed. No account books have been produced by the lessee to indicate that he has been in effective possession of these properties. No doubt, one or two decrees for rent against tenants obtained through the Revenue Court have been produced. But they by themselves would not be conclusive. Having considered the case on the merits, I am satisfied that there is no good reason for differing from the finding of the learned District Judge that this lease was in reality purely fictitious and a paper transaction and did not pass title to the lessee, Hari Chand Rai.

The learned Advocate for the appellant contends before us that it was not open to the Insolvency Court to go into this matter at all. If the petition of the Receiver were to be construed strictly and he were pinned down to the section under which it was made, there may be something to be said in support of this contention; but there is no doubt that allegations made in the petition, although the wrong section was quoted, amounted to an assertion that the transaction was wholly fictitious one and was in no way binding on the insolvent. In view of this circumstance, I am of opinion that the finding of fact arrived at by the District Judge was not improper.

The question remains whether it was open to the Insolvency Court to go into this matter at the instance of the Receiver. The learned Vakil for the respondent has strongly relied on the case of this Court reported as *Shikri Prasad* v. *Aziz Ali* (1), where two learned Judges expressed the view that the Insolvency Court has to apply and decide all questions of general law, including such questions as are raised by s. 53 of the Transfer of Property Act. After expressing this opinion, the learned Judges remanded the case for disposal of the question that was raised. It may, however, be pointed out that documents, which are voidable under s. 53 of the Transfer of Property Act, are good in law so long as the option to avoid them is not exercised by the creditors who are defrauded. A prayer to avoid such voidable documents does not necessarily raise a question of title or of priority mentioned in s. 4 of the Provincial Insolvency Act of 1920 As to whether it is covered by the wider expression "of any nature whatsoever" I would require further consideration before expressing any final opinion. It, however, seems to me that there is nothing to prevent an Insolvency Court from going into the question of title and holding that a certain document executed by the insolvent is not only voidable but really void, being fictitious. If a document which is never intended to take effect and which in law does not pass title, is void *ab initio*, the property remains vested in the insolvent and belongs to him. Any person, who puts forward a claim to such property is a claimant to it and raises a question of title. I am, therefore, unable to hold that the Receiver cannot at his own instance have such a question of title decided by an Insolvency Court. Even prior to Act V of 1920, when there was no provision corresponding to s. 4 of the new Act, a Bench of this Court held that, even if a case did not fall under s. 36 of the old Provincial Insolvency Act, the Court had power to inquire whether a disputed property was the property of the insolvent or not; *vide Bansidhar* v. *Kharagjit* (2). As pointed out by me in the case of *Mahrana Kunwar* v. *David* (3), there was a conflict of opinion between this Court and the Calcutta High Court, the view prevailing in the latter Court being that a question of title could be disposed of by a regular suit only. The enactment of s. 4 gives effect to the view which prevailed in this Court. Under that section, full power is given to the Insolvency Court to decide not only all questions of title or priority, but also of any nature, whatsoever, whether they involve matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice. It seems therefore, that the Insolvency Court has full power to declare, even though it be at the instance of the Receiver, that certain property belongs to the insolvent and that any other person, who is putting forward a claim to it, is not really entitled to it. This by no means implies an annulment of a voidable transfer within the meaning of s. 53 of the Provincial Insolvency Act. The limitation of two years, prescribed under s. 53 is applicable to all cases where the transfer when originally made was a good transfer of property though it was subject to an option of avoiding it to be exercised by the Receiver. But such a transfer is only voidable and not void and remains good so long as it is not annulled by the Court. On the other hand, a transfer which is wholly fictitious from the very beginning, is of no effect and does not require to be annulled. All that the Court has to do in such a case is to decide that it is void, which decision will bind the claimant to the property as if it were by an ordinary Civil Court. In this view of the matter, I am unable to hold that the Court below has acted without jurisdiction in recording its finding that the transfer is wholly fictitious and not binding on the insolvent or the Receiver.

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(1) 63 Ind. Cas. 601; 44 A. 71; 19 A. L. J. 862; 3 U. P. L. R. (A.) 195; A. I. R. 1922 All. 196.

I would, therefore, dismiss the appeal.

Mukerjee, J.—While I agree entirely with my learned brother on the question of fact, I have the misfortune to disagree with him on the question of law. I agree that the transaction in the present case was a fictitious one and was only a cloak to protect the insolvent Lachhman Dass's property from being taken in execution of decrees. But the matter does not end there.

The Receiver sought the aid of the Insolvency Court by a petition setting forth that the transaction was voidable as against him and asking that under s. 53 of the Insolvency Act it might be avoided. It was pointed out on behalf of the transferee, the lessee, that the transaction had taken place more than two years prior to the adjudication of the insolvent and that therefore, it was beyond the jurisdiction of the Insolvency Court to touch the transfer. The learned Judge was of the same opinion. But he allowed the petition of the Receiver to be treated as a suit under s. 53 of the Transfer of Property Act. He accordingly took cognisance of the petition and having heard the case, came to the conclusion already stated.

I have given the point raised my best consideration and I am clearly of opinion that an Insolvency Court has no jurisdiction to entertain an application of the Receiver to declare an ostensible transfer void within the meaning of s. 53 of the Insolvency Act if the transaction took place more than two years before the adjudication.

It is clear that s. 4 of the Insolvency Act is controlled by the opening words subject to the provisions of this Act. The question is whether an adjudication of a question of title is or is not controlled by the provisions of s. 53 of the Insolvency Act. It has been urged on behalf of the respondent that s. 53 would apply to the case of a transfer which would be good enough, unless challenged by the Receiver but would not apply where the transfer is void *ab*

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(2) 26 Ind. Cas. 926; 37 A. 65; 12 A. L. J. 1273.

(3) 77 Ind. Cas. 57; 46 A. 16 at p. 21; 21 A. L. J. 737; A. I. R. 1924 All. 40.

initio and in fact is fictitious giving no title to the ostensible transferee.

This alleged distinction, in my opinion, does not exist so far as s. 53 of the Insolvency Act is concerned. All that it lays down is this that a Receiver can ask the Insolvency Court to declare as of no effect certain transactions which appear to be on the face of them transfers. The section has nothing to do with the distinction between a transaction which is void *ab initio* and a transaction which is voidable at the option of a party. Indeed, in the case of transfers by debtors, either they are meant to operate *bona fide* or they are meant to be mere cloaks for the protection of debtor's property. So far as I am aware there is no third class. Either the property is to be protected from the creditors or the property is to be taken by the ostensible transferee as under a real transfer. Where a transfer is meant to be good and is *bona fide* no title whatever remains in the transferor, the debtor, and the property passes beyond the control of the debtor and also of the Receiver in insolvency. Where the transfer is a mere cloak for the protection of the debtor's property, the creditors and also the Receiver can seek proper remedy for a declaration of the character of the transfer. The question is as to the forum where the creditor or the Receiver will seek his remedy. In my opinion s. 53 of the Insolvency Act declares that so far as the Receiver is concerned he can seek the relief in the Insolvency Court, provided the transaction is within two years as already mentioned. If the transaction is beyond two years he must seek his remedy by an ordinary civil suit instituted under s. 53 of the Transfer of Property Act.

As for authority. The only authority that has been produced before us by the learned Counsel for the Receiver is the case of *Shikri Prasad* v. *Aziz Ali* (1). In that case no distinction, as has been sought to be drawn on behalf of the respondent, was drawn. The case decided that it was open to an Insolvency Court to try question raised under s. 53 of the Transfer of Property Act. The Court was not called upon to decide what would be the effect of s. 53 of the Insolvency Act in particular cases. In my opinion this case is no authority on the question which we have now to decide. On the other hand in the case of *Gaura* v. *Muhammad Abdul Majid* (4) two learned Judges of this Court [one of whom composed the Bench which decided the case in *Shikri Prasad* v. *Aziz Ali* (1)], held that where the transaction was more than two years' old, it was not open to the Insolvency Court to scrutinise it under the provisions of s. 53 of the Transfer of Property Act. It is true that the learned Judges considered the provisions of s. 36 of the Insolvency Act of 1907 and they had not to construe the present Act. But, in my opinion, that is no distinction, because s. 53 of the present Insolvency Act is a pure re-production of the old s. 36 of Act of 1907 and s. 4 of the present Act is subject to the provisions of s. 53.

I may point out that if the question of limitation and jurisdiction that has been raised in this case has to be determined after a trial on the merits of the question raised, no utility will be left for a section like s. 53 of the Insolvency Act. One party, the Receiver, would assert that the transfer is fictitious, pure and simple, and that it did not pass any title to the transferee, and that, therefore, a declaration to that effect should be made by the Court. The other party, the ostensible transferee, would assert that it is a good transfer, and that he has been holding the property for more than two years in good faith. The preliminary question of limitation and jurisdiction cannot be decided without the Court going entirely into the merits of the case and finding whether the transaction is a good one or a bad one. This, I think, could not have been contemplated by the framers of s. 53 of the Insolvency Act.

I would, therefore, allow the appeal, set aside the decree of the Court below and dismiss the Receiver's application with costs.

By the Court.—The appeal is accordingly dismissed, but as it raised a difficult question of law we direct that the parties should bear their own costs of this appeal.

R. L. *Appeal dismissed.*

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(4) 64 Ind. Cas. 523; A. I. R. 1922 All. 443.

PATNA HIGH COURT.

TITLE SUIT NO. 1 OF 1923.
February 9, 1926.
Present:—Mr. Justice Das and
Mr. Justice Ross.

Musammat KHURSAIDI BEGUM—
PLAINTIFF
versus
THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—DEFENDANT.

Muhammadan Law—Inheritance—Shia Law—Last owner dying heirless—Imam, rights of—Escheat, law of—Sovereign act—Right of suit—Trust in favour of poor Shias—Community, right of, to sue for declaration—Civil Procedure Code (Act V of 1908), s. 92, scope of.

Even if a trust be in favour of poor men of Shia community, the entire community is interested to have the trust declared. [p. 436, col. 2.]

According to Shia Law proper where a Shia dies without leaving any heir his property goes to Imam to be dealt with by him as he pleases. But the practice of the Imam had established a rule which was binding upon the Mujtahids who took the property during the absence of Imam Mehdi on his behalf, and under that practice property was to be distributed among the poor and the indigent. But this rule of inheritance is not in force in British India. In British India any question touching inheritance is determinable in a manner personal to the last owner. But when it is made out clearly that by the law applicable to the last owner there is a total failure of heirs, then the claim to the property ceases to be subject to any personal law, the law of escheat intervenes and prevails. Private ownership not existing, the State must be owner as ultimate Lord. [p. 439, col. 1; p. 440, col. 1.]

Collector of Masulipatam v. *Cavely Vencata Narainapah*, 8 M. I. A. 500; 2 W. R. P. C. 59; 1 Suth. P. C. J. 417; 1 Sar. P. C. J. 752; 19 E. R. 620, followed.

There is a great and clear distinction between acts done in the exercise of what are usually termed Sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them. [p. 437, col. 1.]

If the Secretary of State takes the property by an act of Sovereignty then no suit lies, but if on the other hand he takes it under the colour of a legal title then his act will be within the jurisdiction of the Courts. When the Secretary of State takes property under a decree of Court, the acquisition is one under the colour of a legal title and not by an act of Sovereignty. [p. 437, col. 2.]

Section 92, C. P. C., regulates suits where there is a breach of an express or constructive trust created for public purpose of a charitable and religious nature but a suit to establish the existence of the trust itself is beyond its ambit. [p. 438, col. 1.]

Sir *Ali Imam*, Messrs. *Siveshwar Dayal*, Syed *Ali Khan*, *Khurshaid Husain*, Syed *Nooruddin*, *S. N. Bose*, *Ahmad Reza* and *A. H. Fakhruddin*, for the Plaintiff.

Messrs. *P. C. Manuk*, Government Pleader, *Noorul Hussain*, *C. M. Agarwala* and *A. T. Sen*, for the Defendant.

JUDGMENT.

Ross, J.—The first plaintiff was the President of the Anjuman Imamia of the town of Gaya. After his death his widow has been substituted for him. The 2nd plaintiff is the Mufti of the said Anjuman. The plaintiffs sue on their own behalf and on behalf of the Shia community. The defendant is the Secretary of State for India in Council.

The case of the plaintiffs is that one Raja Mode Narain Singh of Tikari in the District of Gaya had a Muhammadan mistress named Barati Begum to whom he granted large moveable and immoveable properties. Barati Begum had four children, Mirza Himmat Bahadur, Mirza Ekbal Bahadur, Bismillah Begum and Sharf-un-nissa Begam. She died on the 16th of February 1860, leaving her surviving the first three of the aforesaid children who belonged to the Shia sect of Muhammadans and succeeded to her property. In respect of one *mahal* called *Taluka* Belkhara she had executed a deed of *taksimnama* in favour of her children. Mirza Ekbal Bahadur was in possession of properties yielding an income of more than a lakh of rupees. He married Sahebzadi Begum, a lady of Benares, and died childless in 1867, his properties passing to his widow. He had brought up as his own son the son of his sister named Mirza Jalal-ud-din Bakht Bahadur, and Sahebzadi Begum executed a deed of gift of all her properties in his favour in 1872. She died in Karbala in 1875. In 1878 a suit was insituted by the Secretary of State for India in Council against Mirza Jalal-ud-din Bakht Bahadur in the Court of the Subordinate Judge of Gaya for the recovery of the entire estate of Mirza Ekbal Bahadur and of Sahebzadi Begum on the ground that Mirza Ekbal Bahadur being the son of a Hindu Raja could not succeed under the Shia Law to the estate of his mother Barati Begum; and that, as he died childless under the Shia Law his widow could not succeed to his estate; and, therefore, the deed of gift in favour of Mirza Jalal-ud din Bakht Bahadur was invalid. On the 7th of May 1879 the suit was decreed for possession of the immoveable properties and dismissed as regards the moveables. The plaintiff in that suit obtained possession of the immoveable properties. The judgment in that suit is made part of the plaint and it is pleaded that no regard has been paid to the finding recited in the plaint. Immediately after the decision of the case the Secretary of State got possession over all the immoveable properties. The plaintiffs contend that while they have no objection to the right of the Government to hold possession of the estate, the escheated estate is a trust property for the benefit of the Shia community and that the Government is bound to apply the income to pious and religious purposes as enjoined by the Shia Law. It is alleged that under the Muhammadan Law of the Shia sect no Shia dies heirless for the last Imam named Hazrat Imam Mehdi is the heir when there is no natural heir, and that this position was admitted by the Secretary of State for India in the aforesaid litigation. It is further alleged that the Anjuman Imamia of Gaya exists from 1892 and represents the whole Shia community in the district and the Anjuman and the plaintiffs as beneficiaries under the trust. It is also stated that a memorial was submitted to the Governor of Bihar and Orissa in Council for a grant for religious purposes out of the income of the trust estate and that the memorial was rejected and that at a meeting of the Anjuman Imamia held on the 10th of December 1922 the plaintiffs have been authorised to institute this suit. The cause of action is the disregard of the defendant to spend the income of the trust estate according to the Shia Law and it is a recurring cause of action. The date of the refusal of the Government to entertain the memorial of the Anjuman, namely, the 12th of August 1922, is stated as the date of the cause of action. The bulk of the trust estate, namely, the *Mahal* Belkhara is situated in the District of Gaya. The plaintiffs pray for a declaration that the escheated estate described in the schedules to the plaint is a trust property for the benefit of the Shias in general and of the Shia community of Gaya in particular; for an injunction restraining the defendant and his Government from using the income of the trust estate for any purpose other than that enjoined by the Shia Law: for costs and for general relief.

The defence is that the plaint is insufficiently stamped; that the suit is barred by limitation; that the defendant has been in possession of the properties in suit as full owner for upwards of 40 years; and that no Shia ever put forth any claim on any ground to the same. It is denied that the estate is a trust estate and that the plaintiffs or other Shias have any interest of any sort in the properties in suit or have any cause of action against the defendant. It is alleged that the defendant is not a trustee and is incapable of being a trustee; that he did not get the properties in suit under the Shia Law, but under the law of escheat and that he has been in possession of the escheated estate as absolute owner and not as trustee; that Barati Begum, Sharaf-un-nissa Begum and Mirza Ekbal Bahadur died heirless and their properties escheated to the Crown; that the properties were claimed in 1878 in suits against Jalal-ud-din Bakht Bahadur and Bismillah Begum and Mirza Himmat Bahadur not on the strength of the Shia Law but on the law of escheat and that the title of the Crown under the law of escheat was declared and possession was decreed and that the Court rejected the plea that the Imam Mehdi was the heir and that the Mujtahids were entitled to possession. It is pleaded that the plaintiffs' interpretation of the judgment is not correct. It is further pleaded that the religious and moral injunctions and directions of the Shia Law are not binding on and enforceable against the defendant; that the income of the properties cannot be spent according to the Shia Law; and that the Anjuman and the plaintiffs and other Shias are not beneficiaries and are not interested in the properties in suit. In a supplementary written statement it is pleaded that the suit is not maintainable without compliance with the provisions of s. 92 of the C. P. C. and that it is barred as *res judicata*. In a further supplementary written statement it is pleaded that five properties specified therein had been transferred to other persons who were necessary parties and that the defendant has no interest in them and the suit is barred in respect thereof by general and special limitation.

The following issues were framed:—

1. Has the claim been undervalued? Is the Court-fee insufficient?
2. If the cause of action recurrent? If so, to what extent? Is the suit barred by limitation?
3. Is the suit barred by the principle of *res judicata?*
4. Are the plaintiffs entitled to maintain the suit?
5. Does the suit lie against the Secretary of State for India in Council as agent of the Sovereign?
6. Does the suit infringe the provisions of s. 92 of the C. P. C.?
7. Is the Imam Mehdi the legal heir, under the Shia Law, of a Shia dying with-

out natural heirs? Was this not found in the judgment of the 7th May 1879 annexed to the plaint? Was this not admitted by the plaintiff in the suit?

8. If so, does the defendant hold the property in suit to the use of the Shia community until the Imam Mehdi appears?

9. Has the defendant obtained the said property under the general law of escheat, free from the restrictions of the Shia Law, by the aforesaid judgment or otherwise?

10. Is the defendant capable of being a trustee? If not, is the suit maintainable against him?

11. To what relief are the plaintiffs entitled?

Before discussing the issues it may be mentioned here that by an order, dated the 16th of January 1924, an application under O. I, r. 8 for permission to sue on behalf of the Shias generally who are interested in the subject-matter of the suit and also for notice of the institution of the suit being given to all the persons interested was granted and notice was duly given in the usual way.

Issue No. 1.—This issue has been decided in favour of the plaintiffs by order, dated the 6th February 1924 which is to be read as part of this judgment.

Issue No. 2.—From the plaint in the present suit it would appear that *Taluka* Belkhara was the subject of a deed of *taksimnama* executed by Barati Begum. This is stated in para. 4. In para. 18 of the written statement while certain of the allegations of para. 4 of the plaint were traversed, there was no denial of this *taksimnama*; and for the purposes of this suit the allegation in the plaint must be accepted, although no document has been produced and, so far as I can discover in the litigation of 1878 there was no reference to any such instrument. Barati Begum died in 1860. As no trust was set up, time began to run from that date; and, as regards the estate other than *Taluka* Belkhara which was the subject of the *taksimnama*, the title of the Shia community, if any, became barred long before the suits of 1878 gave the property to the Secretary of State. As regards *Taluka* Belkhara time began to run as to the share of Ekbal Bahadur from the 15th of August 1867 when he died. The property became vested in the Secretary of State on the 7th of May 1879. It was stated in the argument by the learned Vakil for the defendant that possession was not taken until the year 1881, but this does not appear to be correct. On the contrary the plaintiffs said in their present plaint that immediately after the decision of the case the decree was executed and the Secretary of State for India in Council got possession over all the immoveable properties claimed by him. The original record has been sent for from the record room of the Calcutta High Court and it appears from the petitions of compromise filed in the appeal from the decree of the Subordinate Judge, dated the 8th of June 1880, that the Secretary of State had already executed the decree and obtained possession. There is, therefore, no material for holding that possession was not obtained until more than twelve years had expired from the date of the death of Ekbal Bahadur; and as regards the interests of Himmat Bahadur and Bismillah Begum in the *taksimnama* properties it is clear that, as they were alive when the suits of 1878 were decided, time had not begun to run in respect of their interests when the Secretary of State entered into possession. With regard to the *taksimnama* properties, therefore the question of limitation must be decided with reference to s. 10 of the Limitation Act. The argument of the plaintiffs is that as to this part of the property they are protected by s. 10 of the Limitation Act: (s. 23 was also referred to, but that has obviously no application.) Now by pleading limitation the defendant admits that the Shias once had title, but it has been lost by lapse of time. The plea, therefore, is in this form that the property was trust property but not property held in trust for a specific purpose. In *Burdick* v. *Garrick* (1) Giffard, L. J., said "I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it." In *Lyell* v. *Kennedy* (2). Lord Macnaghten in adopting that *dictum* said "Nor do I think it can make any difference whether the duty arises from contract or is so connected with some previous request, or whether it is self-imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken and that property has been received by a person assuming to act in a fiduciary character, the same consequences must, I think, in every case follow." The determination of this question will, therefore, depend upon (1) whether the Shia Law impressed a definite trust upon this property; and (2) whether under the judgment of 1879 the Secretary of State took the property with notice of that trust. The result, therefore, is that with regard to the property in suit except *Taluka* Belkhara the suit is barred by limitation and, whether as regards *Taluka* Belkhara it is also barred, will depend upon the decision of the issues on the merits.

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(1) (1870) 5 Ch. 233 at p. 243; 39 L. J. Ch. 369; 18 W. R. 387.

(2) (1889) 14 A. C. 437 at p. 463; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353.

Issue No. 3.—The suit is not barred by the principle of *res judicata* as it is not between the same parties in the suits of 1878.

Issue No. 4—The plaintiffs sue on behalf of the entire Shia community. In order to conduct the action the plaintiffs must represent the class. They have been permitted to sue as representing the class. They must also give an opportunity to the class to say whether the class wants to be represented by them. This has been done by the notice under O. I, r. 8. But learned Counsel for the defendant contends that as representing the entire Shia community the plaintiffs cannot be said to represent the Shia poor in particular (who are the true *cestuis que trustent*) and that the Shia poor have a hostile right to the general Shia community. It is contended that a claim on behalf of the Shia in general cannot be joined with a claim on behalf of the Shia poor because their interests are necessarily conflicting. The principle governing representative actions is thus stated by Lord Macnaghten in *Duke of Bedford* v. *Ellis* (3) "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." Now while it is true that community of interest is the essence of a representative action, and an order appointing a person to represent a class does not affect one of the class who has a distinct and independent right in another capacity [*In re Lart* (4) and Daniel's Chancery Practice, 8th Edition, 869] yet it seems to me that so far as the present suit is concerned it is a suit for a declaration of trust and in this matter the interests of all Shias are identical. It may be that if there is a trust it is the poor Shias who are the beneficiaries, but the entire Shia community is interested to have the trust declared even if it be a trust in favour of the Shia poor, and in this matter it seems to me impossible to distinguish, or to infer a conflicting interest, between those who are actually poor and those who are only potentially so. I would, therefore, decide this issue in favour of the plaintiffs.

Issue No. 5.—The statutory provisions relevant to this issue are s. 79 of the C. P. C. and s. 32 of the Government of India Act. Section 32 provides that every person shall have the same remedies against the Secretary of State for India in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed, and that the property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company if the Government of India Act, 1858, and this Act had not been passed. The question of the liability of the Secretary of State for India in Council to an action in the Municipal Courts was discussed in the *Peninsular & Oriental Steam Navigation Company* v. *Secretary of State for India* (5) where Barnes Peacock, C. J., said: "In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English Law that the King can do no wrong, would have no force. We concur entirely in the opinion expressed by Chief Justice Grey in the case of *Bank of Bengal* v. *East India Company* (6) which was cited in the argument, that the fact of the Company's having been invested with powers usually called Sovereign powers did not constitute them Sovereigns." We are further of opinion that the East India Company were not Sovereigns, and, therefore, could not claim all the exemptions of a Sovereign, and that they were not the public servants of Government, and, therefore, did not fall under the principle of the cases with regard to the liabilities of such persons, but they were a Company to whom Sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of the Government and partly on their own account, which without any delegation of Sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed Sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them *Moodaley* v. *East India Company* (7). But the Master of the Rolls, afterwards Lord Kenyon, said: "I admit that no suit will lie in this Court against a Sovereign power for anything done in that capacity but I do not think the East India Company is within the rule. They have rights as a Sovereign power, they have also duties as individuals"......But where the act is done or a contract is entered into in the exercise of powers usually called Sovereign powers, by which we mean powers which cannot be lawfully exercised except by Sovereign or private individuals delegated by a Sovereign to exercise them, no action will lie." The same principle was laid down in the [*Raja of Tanjore's case*] *Secretary of State for India* v. *Kamachee Boye Sahaba* (8) where the question was put thus: "The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal Law? Or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore in trust for those who, by law, might be entitled to it on the death of the last possessor?" Similarly in *Forester* v. *Secretary of State for India in Council* (9) it was held that the resumption was not an act of State. It was the "resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under colour of a legal title, that title being the undoubted right of the Sovereign power to resume, and retain or assess to the public revenue, all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent-free. If by means of the continuance of the tenure or for other cause a right be claimed in derogation of this title of the Government that claim, like any other arising between the Government and its subjects would *prima facie* be cognizable by the Municipal Courts of India" *Sirdar Bhagwan Singh* v. *Secretary of State for India* (10) was a case where the act of Government was done in accordance with the notions of the Government of what was just and reasonable and not according to any rules of law to be enforced against them by their own Courts.

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(3) (1901) A. C. 1; 70 L. J. Ch. 102; 83 L. T. 686.

(4) (1896) 2 Ch. 788; 65 L. J. Ch. 846; 75 L. T. 175; 48 W. R. 27.

(5) 5 B. H. C. R. App. 1.

(6) Bignell Rep. p. 120.

These decisions make it clear that if the Secretary of State took the property in suit in this case by an act of Sovereignty, then no suit will lie, but if, on the other hand, he took it under the colour of a legal title, then his acts will be within the jurisdiction of the Courts. As the property came to the Secretary of State by a decree of the Court it would seem that it was not taken by an act of Sovereignty, but under the colour of a legal title. It was said, however, that the property came by escheat, that is by the prerogative of the Crown and, therefore, by an act of Sovereignty. This argument, however, involves the question which arises on the merits as to the nature of the estate taken by the Secretary of State under the judgment of 1879. It was futher contended on behalf of the defendant that no suit could have been brought against the East India Company in respect of property taken by escheat and referenc was made to Regulation No. XIX of 1910 which deals with the custody and disposal of escheat. By that Regulation a right of suit is reserved in respect of lands and buildings of the nature described therein and it is said that no right of suit is reserved with regard to escheats. But this merely repeats the former argument and the answer to this contention depends upon the merits of the case. Reference was aslo made on behalf of the defence to s. 20 of the Government of India Act which provides that the revenues of India shall be received for and in the name of His Majesty and shall be applied for the purposes of the Government of India alone, and the expression "revenues of India" is defined as including all moveable and immoveable properties of British India escheating or lapsing for want of an heir or successor and of property in British India devolving as *bona vacantia* for want of a rightful owner. This argument does not advance the matter further as its validity also involves the question of the nature of the estate taken by the Secretary of State in the property in suit. The answer to this issue, therefore, depends upon the decision on the merits of the case.

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(7) (1785) 1 Bro. C. C. 469; 28 E. R. 1245.

(8) 7 M. I. A. 476; 13 Moo. P. C. 22; 7 W. R (Eng.) 722; 4 W. R. P. C. 42; 1 Suth. P. C. J. 373; 1 Sar. P. C. J. 634; 15 E. R. 9; 19 E. R. 388; 132 R. R. 7.

(9) I. A. Sup. Vol. 10; 18 W. R. 349; 12 B. L. R. 120; 3 Sar. P. C. J. 1; 1 P. R. 1872 (P. C.).

(10) 2 I. A. 38; 3 Sar. P. C. J. 413; 1. P. R. 1875 (P. C.).

Issue No. 6—In my opinion s. 92 of the C. P. C. is not applicable to the present suit. Section 92 regulates suits where there is a breach of an express or constructive trust created for public purpose of a charitable and religious nature; but here the suit is to establish the existence of the trust itself and the whole question involved is whether such a trust exists or not. In my opinion, a suit of this nature is not within the purview of s. 92 of the Code. This issue is decided in favour of the plaintiffs.

Issues Nos. 7, 8 and 9—In dealing with these issues it will be convenient in the first place to ascertain what the law of the Shias is with regard to the heirship of the Imam. The principal modern authorities are as follows: In Baillie's Digest of Muhammadan Law, Imameea, at page 261 the scheme of inheritance under the Shia Law is set forth "Inheritance is founded on *nusub* or consanguinity and on *subub* or special connection." One of the forms of *subub* is *wula* or dominion and the last form of *wula* is the *wula* of Imamut or headship of the Musalman community. At page 301 the rule is laid down that where there is no surety for offences (that is the second form of *wula*) the Imam is the heir of a person who has no other heirs, and this is the third kind of *wula*. If then the Imam be present, the property belongs to him to do with it as he pleases. Aly, on whom the peace, was accustomed in such cases to give the property to the poor and indigent of the deceased's city and the weak and infirm among his neighbours gratuitously. And if the Imam is absent, the property is to be divided among the poor and indigent, and not be given up or surrendered to any other but a righteous Sultan or ruler, except under fear or actual compulsion. It may be explained here that by all the followers of the twelve Imams Imam Mehdi their twelfth and last spiritual as well as temporal leader, is believed to be still living, but to have retired from human observation since his last appearance on earth (*ib* page 272 foot-note). The *wula* of the Imam or Doctrine of escheat to the Public Treasury is more fully explained at pages 362 and 363 where the authorities are cited which prescribe the partition of the property among the poor and indigent of the Shia sect in the same manner as they enjoy the fifth of the spoils taken in battle. Mr. Shamma Churun Sircar in his Tagore Law Lectures, 1874 at page 264, discusses the *wula* of Imamat and lays down, quoting the authorities that if the Imam be present the property goes to him to do with it as he pleases and that the most approved opinion is that the property thus vested in the Imam should, while he is absent, be distributed among the Sayyids who are his descendants, preference, nevertheless being given to such of them as are poor and indigent. Several authorities are quoted, including the Sharaya-ul-Islam, to show that the property should be distributed among the poor and indigent. Mr. Ameer Ali in Volume II of his Muhammadan Law 4th Edition, at pages 132 to 134 discusses the Walaul Imam. In his view the right of the Imam is not in the nature of an escheat to the Sovereign, but the property goes to him as the spiritual head of the Shia Commonwealth to be distributed among the poor and indigent of the locality where the intestate lived, or where he was born, and in the absence of the Imam the property goes to his representative the Mujtahid, the chief expounder of the law, to be distributed by him equitably and properly among the poor and indigent of the place where the intestate lived or for such charitable and religious purposes as may seem consonant to his last wishes. The right of the Imam is not *qua* Sovereign, but *qua* Spiritual Leader, and is, therefore, subject to the ordinary bar of the Statute of Limitation. The learned Author, after quoting a *Fatwa* pronounced by a leading Mujtahid of Iran, goes on to say.

"In Shia countries not subject to foreign control the Mujtahid who is the chief expounder of the law, is also frequently vested with the power of the Kazi. When this is the case no difficulty occurs in the application of the principle of Shia Law. But in India, where the Shias are subject to a non-Moslem power, the question may arise under whose directon the distribution contemplated by the Shia Law should take place? These questions it seems to me are answered by the *dictum* quoted from the Jama-ush-Shittat. The Civil Court, representing the Hakim mentioned in the *Fatwa*, would assume the charge of the property and make it over to the Mujtahid, if there be any, to be distributed among the poor and indigent of the deceased's village, or native city under the Court's own control and supervision so as to leave no room for doubt as to its proper application. If there be no Mujtahid, some Shia officer should be appointed for the purpose of distribution. It must also be remembered that the law does not necessarily contemplate application of the proceeds in the shape of alms. If the object of the law which has in view the benefit of the poor and the indigent, who are always in need of help, can be attained by establishing an institution by which regular assistance can be rendered to them, it would be valid." Sir Roland Wilson in his Anglo Muhammadan Law (First Edition, page 378) deals with the difference in the Shia Law of inheritance from the Hanifi Law by which the property of Muhammadan dying without heirs devolves upon the Government and says that "the surplus does not return to the wife even where there are no other heirs but passes by escheat, in Shia theory to the Imam, and according to Anglo Mahammadan Law, to the British Government." It is noteworthy, however, that in the last Edition (that is, the 5th Edition) of this work which has been revised by Mr. Yusuf Ali, this qualification is omitted. It is simply stated at page 451 that "there is no final escheat to a *bait-ul-mal*." Where a deceased person leaves no possible heir, his property is liquidated by the Mujtahid as representing the Imam, the proceeds to be distributed among the poor of the city in which the deceased was born (or presumably, where that is impracticable, where he died).

The learned Subordinate Judge of Gaya in his judgment in the suits of 1878 cited numerous original authorities, Shurra-al-Islam, Mustanid-ul Sheea, Mansubood, Mussalik-ul-efham and Zeinul-ul-ehakam ; and on a review of these authorities he came to the conclusion that the majority of the traditions concur and agree that the property of a Shia should be received by Sayyids, the poor and the indigent especially of Shia sect.

Learned Counsel for the plaintiffs cited also the following passages from texts of authority (1) Mustanad Shia, on Jurisprudence by Ahmad *b.* Muhammad *b.* Mahdi *b.* Abi Darr, Vol. II, Juzv, 26, the Book of Inheritance, Chapter IV, Edited in Tehran Rajab A. H. 1273. (2) Sharai-ul-Islam, page 267 by Abu'l Qasim Najm-ud-Din Jafar *b.* Muhammad *b.* Yahya *b*, Said-al-Hilli, also known as alMuhaqquiq (the Scholar), who died in A. H. 676=A. D. 1275. (3) Jawahir-ul Kalam-fi-Sharh-i-Sharai-ul-Islam by Muhammad Hasan *b.* Baquir an Najafi. Book of Inheritance Vol. VI; (4) Najat-ul-Ibad, page 400 on the heirship of the Imam and (1) Copy of an Istifa (Precept) in connection with the property of one who has no heir, taken from the book entitled Jami's Shattah by Abdul Qasim Alib Abdul Hamid-al-Quami; (2) Jawahir-ul-Kalam Vol. VI. The Book of Inheritance; (3) Najat-ul-Ibad by the Author of Jawahir-ul-Kalam. Edition of A. H. 1318 page 404, (4) Ar-Rahdat-ul-Bahiyah by Zainud-Din *b.* Ali Al-Amili, who died, A. H. 966-A. D. 1558 and (5) Mustanadush-Shia Vol. II on the mode of dealing with property left without heirs.

These authorities make it clear that the last heir of a Shia leaving no other heirs is the Imam; and that the Imam being infallible could dispose of the property as he pleased. But the practice of the Imams had established a rule which was binding upon the Mujtahids who took the property during the absence of the Imam Mehdi on his behalf; and under that practice the property was to be distributed among the poor and indigent. There is some difference of opinion as to whether the beneficiaries were to be Sayyids, especially poor Sayyids or whether they were to be the poor and indigent, whether Sayyids or not, and whether they were to be the poor of the native town of the deceased or the poor of the place where he resided or the poor of the place where he died, or of all these places, or whether they were to be poor Shias generally. While, therefore, it is clearly the intention of the Shia Law that the property should be devoted to the poor and indigent, there is some vagueness as to the persons who are intended to be benefited; and in some of the authorities the matter is left to the discretion of the Vicegerent of the Imam.

I now turn to consider the judgment of the Subordinate Judge of Gaya in the suits of 1878; and, in order to ascertain the effect of his decision on Issue No. 2 in these suits, it will be convenient first to deal with the decision of the Judicial Committee in *Collector of Masulipatam* v. *Cavely Vencata Narrainapah* (11). That was a case dealing with the estate of a Brahmin dying without heirs and the matter which called for consideration was the effect of the prohibition in the Hindu Law "If there be no heir of a Brahmin's wealth, on his demise it must be given to a Brahmin, otherwise the King is tainted with sin". The Judicial Committee first of all discussed the question as one to be determined merely by Hindu Law; and it was held that according to Hindu Law the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against any claimant who could not show a better title, and that the only question that arose upon the authorities was whether Brahmanical property, so taken, was, in the hands of the King, subject to a trust in favour of Brahmins. Their Lordships then proceeded to say that they were not satisfied that the Suddar Court was not in error when it treated the appellant's claim as wholly or merely determinable by Hindu Law. They conceived that the title which he set up might rest upon grounds of general or universal law. They pointed out that any question touching inheritance is determinable in a manner personal to the last owner; but when it is made out clearly that by the law applicable to the last owner there is a total failure of heirs, then the claim to the land ceases, they apprehend, to be subject to any such personal law. And as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails and is adopted generally in all the Courts of the country alike. Private ownership not existing, the State must be owner as ultimate Lord.

Their Lordships, further, held that the Suddar Court was in error in applying the actual or supposed Hindu Law (which negatives the King's right to Brahmanical property) in derogation of the general right of the British Sovereignty, and they came to the conclusion in favour of the general right to the Crown to take by escheat the land of a Hindu subject, though a Brahmin, dying without heirs and they thought that the claim of the appellant to the *zemindari* in question (subject or not subject to a trust) ought to prevail.

There are, therefore, three grounds for the decision; in the first place, supposing the case to be governed by Hindu Law, then the King must take as, at least, intermediate holder of the property, in the second place, where there is no heir under the personal law, the personal law ceases to govern the case and the King takes by the general law of escheat; and, in the third place, the personal law cannot be applied in derogation of the general right of the British Sovereignty.

Now it seems to me that the learned Subordinate Judge has followed closely the line of reasoning in that case. He first of all sets forth the Shia Law on the heirship of the Imam. During the absence of the Imam the property is to be held by his deputy, the Mujtahid. There is no Mujtahid in British India with the powers required. "On the contrary, as regards this estate, in the absence of the Imam the most influential, honest and faithful person is the Sovereign for the time being, that is, the Queen-Empress. It is most likely that she on receipt of possession of this estate, shall use it for good purposes in the way that she thinks best". This line of reasoning seems to correspond with the first part of the decision of the Privy Council. Then he goes on to say that this line of reasoning is inapplicable because the defendants in these suits were not entitled to raise objections for or on behalf of the Imam or Mujtahid and they, at all events, had no title. He then holds that, apart from this, in this matter the plaintiff, that is, the Secretary of State, is not bound by the religious books of the Shia sect. When the defendants had no right, there was no heir to the estate. That being so the Sovereign for the time being is under the general law of escheat entitled to take possession. He then points out the analogy between this case and the case of a Brahmin dying without heirs, and as the principle of the Hindu Law could not prevent the Government for the time being from taking the estate under the general law of escheat, in like manner the doctrine of the Muhammadan Law could not bar the plaintiff's claim. "In this age the Government should, in my opinion, be held as the last heir just in the same way as the Imam has been declared the last heir in the Shurra". That this is the scheme of the judgment is apparent also from the form of the issue framed. "According to the general law and the law of the Shias (Kanunan o'Sharan) who is entitled to take the estate of a Musalman of the Shia sect who has no issue nor relation entitled to the estate?"

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(11) 8 M. I. A. 500; 2 W. R. P. C. 59; 1 Suth. P. C. J. 417; 1 Sar. P. C. J. 752; 19 E. R. 620.

The argument of the learned Counsel for the plaintiffs is that the Subordinate Judge found title to be in the Imam. He then looked for some one to hold the property and that must mean some one to hold it with the obligation of a Mujtahid. The Crown was selected because it was honest and the Crown must, therefore, take the property with the conditions of the Shia law attached and has freedom only within the ambit of Shia purposes. The estate had vested in a heir who could not take possession; he was not present to perform his obligations; the deficiency was to be made up by the Sovereign. The Subordinate Judge did not hold that title went to the Secretary of State, but he got the estate in accordance with the principles of the Shia Law. The Secretary of State in the plaint had based his claim to the property explicitly on the Shia Law, and that in two respects: "By the Imamia Code of Muhammadan Law an illegitimate child has no *nusub* or parentage and is not an heir of his mother. By this law, therefore, neither Himmat Bahadur, Ekbal Bahadur or Bismillah Begum were the heirs of Barratee and as Barati Begum left no other heirs her surviving the properties possessed by her at the time of her death passed in default of other heirs by escheat to the Crown" (para. 8) "Under the Imamia Code of Muhammadan Law by which the family of Ekbal Bahadur was governed, Sahebzadee Begum being a childless widow was not entitled to inherit any portion of the immoveable property of her late husband and as Ekbal Bahadur was himself an illegitimate child and had no issue of his body the whole of his immoveable property and 12 annas of his moveable property escheated on his death to the Crown "(para. 12). It is clear that whatever claim the Secretary of State may have had on principles of general or universal law to the property other than the *taksimnama* property, he had no such claim to the *taksimnama* property and his claim to that property so far as Ekbal Bahadur's share was concerned was based wholly on the peculiar provision of the Shia Law that a childless widow is not a heir. There is, therefore, great force in the argument of the plaintiffs that inasmuch as the Secretary of State took the property, or at least the *taksimnama* property, under the peculiar provisions of the Shia Law, he should hold it under that law. But the argument is not conclusive. By the personal law governing the parties the estate was strictly heirless (apart from the claim of the Imam), the persons holding it had no title to it. The Crown was, therefore, entitled to come in under the general law and to hold the estate. As regards the heirship of the Imam, there was, in the words of the Privy Council, no person in the nature of an heir capable of succeeding," and on this ground also the Crown was entitled to come in. It is clear that no trust was imposed upon the Secretary of State by the judgment of the Subordinate Judge. The question of the heirship of the Imam was discussed only as a theoretical question, because it was definitely held that the defendants in these suits were not entitled to raise it. No trust, therefore, could have been imposed by the judgment because there was no one to set up any trust.

It was also argued that the second ground of decision in *Collector of Muslipatam* v. *Cavaly Venkata Narrainapah* (11) cannot apply to the present case, because in fact there is an heir and consequently there can be no escheat under the general law. But the question is whether there was anyone in the nature of an heir capable of holding the property; and the answer to this question must be in the negative. And the analogy with *Collector of Masulipatam* v. *Cavaly Venkata Narrainapah*(11) is complete because in the case of a Brahmin dying without heirs the Mitakshara repeatedly describes the other Brahmins as his "heirs." Consequently a Brahmin dying without natural heirs is no more heirless than a Shia.

Then apart from the judgment, does the Secretary of State hold this property impressed with a trust? This raises the questions, who is the trustee? And who is the *cestuique* trust? If there is substance in the plaintiffs' contention, then the Secretary of State occupies the position of the Mujtahid. But the Mujtahid is not a trustee for the poor and indigent; he is agent of the Imam. If it be assumed that the Imam could give directions, and by law has given directions, to his deputy to distribute the estate, which is in the nature of spoils, this would not establish the relation of trustee and *cestuiqui* trust between the deputy and the poor. The law binding upon the deputy would not create a trust enforceable by the Court for the benefit of the poor [see *Kinloch* v. *Secretary of State for India* (12).] There was no means of enforcing the law against the Mujtahid and there is, in my opinion, no ground in the Shia Law for holding that the present claim can be enforced against the Secretary of State. On these grounds, therefore, I think that these issues must be decided against the plaintiffs (1) the trust set up is, on the texts, vague and not enforceable, (2) no trust was imposed by the judgment and decree of the Subordinate Judge awarding possession of the property to the Secretary of State; and (3) no relation of trustee and *cestui que trust* exists between the parties.

Reference was made in the argument to the practice of the Crown in England in the matter of re-granting escheated lands. "Property which has escheated to the Crown may in certain cases be granted to the family of, or to persons adopted as part of the family of, the person whose estates the same have been" (Halsbury's Laws of England, Vol. II, page 27). This is a matter, however, which rests in the discretion of the Government alone.

Issue No. 10. That the Secretary of State is capable of being a trustee is indisputable. In the *Secretary of State for India* v. *Guru Proshad Dhur* (13), Piggot, J., said "It need not be discussed whether or not the East India Company could be a trustee. It is certain that it could be and often was." See also *Secretary of State for India* v. *Radhika Prasad Bapuli* (14). This issue is decided in favour of the plaintiffs.

Issue No. 11. No injunction could in any view be granted as the effect would merely be to hold up the property without imposing any duty. On the findings on the above Issues Nos. 7 to 9, the plaintiffs are not entitled to any declaration and, therefore, to no relief.

The suit must, therefore, be dismissed; but, in view of the importance of the question that has been raised and of the fact that the plaintiffs did not raise it for their own benefit, I think that the costs of both parties should come out of the estate; hearing-fee Rs. 1,000 per diem, for seven days.

Das, J.—I agree.

R. L. *Suit dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1379 OF 1923.

February 23, 1926.

Present:—Mr. Justice Mukerji.

GAURI AND OTHERS—DEFENDANTS —APPELLANTS

versus

MANGLA AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 76 (e)—Mortgagee's duty to mortgagor—Suit for redemption—Mortgagee setting up occupancy rights—Estoppel.

A mortgagee is precluded from doing anything which might put a hinderance to the redemption of the property. Therefore, in a suit for redemption a mortgagee cannot be allowed to set up occupancy rights even if his mortgagee rights have passed to third parties under an auction-sale.

Second appeal against a decree of the Subordinate Judge, Muzaffarnagar, dated the 6th August 1923.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *K. C. Mital*, for the Respondents.

JUDGMENT.—This appeal raises a nice question of law and on the point there does not appear to be any clear authority. The respondent No. 1 brought the suit, out of which this appeal has arisen, for recovery of a certain plot of land over which there is a grove by way of redemption. He alleged an ancient mortgage said to have been made by his father Kallu in the year 1863 for a sum of Rs. 500 in favour of three persons, Dewan, Yad Ram and Kanhaiya, being the ancestors of the defendants Nos. 3 to 7. It is common ground that out of the entire area mortgaged the mortgagees made a sub-mortgage, in favour of certain persons, of all but the plot in suit, for a sum of Rs. 400. The sub-mortgage has been redeemed by the plaintiff and only the plot in suit remained unredeemed. The mortgagee interest of the defendants Nos. 3 to 7 was sold by auction on the 21st of January 1878 to the father of the defendants Nos. 1 and 2. The plaintiff impleaded all the seven persons in his suit, *viz.*, defendants Nos. 1 and 2 as the auction-purchasers of the rights of the descendants of the original mortgagees and also the descendants of the original mortgagees themselves. The defendants Nos. 1 and 2 and the defendants Nos. 3 to 7 contested the suit separately. The common defence was that there was no mortgage and the special defence of the defendants Nos. 3 to 7, some of whom are the appellants before me, was that they were occupancy tenants of the plot in suit and even in the case of redemption they could not be ousted.

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(12) (1882) 7 A. C. 619; 51 L. J. Ch. 885; 47 L. T. 133; 30 W. R. 845.

(13) 20 C. 51 at p. 65; 10 Ind. Dec. (N. S.) 35.

(14) 74 Ind. Cas. 785; 46 M. 259; 44 M. L. J. 685; 18 L. W. 210; A. I. R. 1923 Mad. 667.

The suit has succeeded in both the Courts below. They both found the mortgage established and subsisting.

In this Court the learned Counsel for the appellants has taken virtually two points, *viz.*, (1) the mortgage has not been established, and (2) in any case the defendants Nos. 3 to 7 were tenants and could not be ousted in spite of their redemption. As an argument relating to the second point it was urged that the Courts below ought to have taken proceedings under s. 202 of the Agra Tenancy Act.

Taking the first point first. The ground No. 2, *viz.*, the evidence of Bhagwan is not legally sufficient to prove the mortgage was taken because of the rather meagre grounds given by the lower Appellate Court for coming to the conclusion that the mortgage had been proved. The Court of first instance deals with the entire evidence in full and it shows that there was sufficient material from which the existence of the mortgage could be inferred lawfully. It appears that there is a village record of the year 1254*F*. (corresponding to 1848 and not 1833) and it does not mention any mortgage by Kallu although it does mention another mortgage by a different person. In the Settlement Record of 1863 the mortgage in question is mentioned in all its details. It would be a reasonable inference to draw that between these two dates, *viz.*, 1848 and 1863 the mortgage in question was made. Then comes the acknowledgment of 1876 in the deed of sub-mortgage. I hold that there was sufficient material before the Courts below for the purpose of holding that there was a mortgage of 1863 and that it did subsist at the date of the suit. The next question is whether the lower Courts should have directed the defendants Nos. 3 to 7 to institute a suit in the Revenue Court to obtain a declaration that they are occupancy tenants of the land in suit. The Courts below have not gone into this question, they being of opinion that the defendants Nos. 3 to 7 were estopped from raising any plea which would disentitle the plaintiff from recovering what is his own. I think the Courts were right. The position taken up by the learned Counsel for the appellants before me, was this. He alleged that after the mortgagee interest of the ancestors of the defendants Nos. 3 to 7 passed to the father of the defendants Nos. 1 and 2 on the 21st of January 1878, the ancestors of the defendants Nos. 3 to 7 (the mortgagees) took the land from the auction-purchaser as a tenant, cultivated the same, acquired an occupancy tenancy and then planted the grove. It is said that it was a pure accident that the original mortgagees themselves took the land for cultivation instead of some other person. The argument is that if instead of the original mortgagees themselves somebody else had obtained a letting of the land and had acquired an occupancy right in the land it could not be said that he was a necessary party to the suit and that he should be ejected. The argument no doubt has some force, but in my opinion it ought not to be allowed to prevail. The mortgagees were bound by their contract to hand over the property to the mortgagor intact and without any diminution in its value or in the income to be derived from it. It is immaterial whether they sold the mortgagee interest by a private treaty or whether the same was sold at an auction sale in execution of a decree against them. They were precluded by their contract with the mortgagor from themselves doing anything which might put a hindrance to the redemption of the property. It is true that by the auction-sale the mortgagee rights in the property passed to the father of the defendants Nos. 1 and 2. The auction-purchaser became a privy to the contract on account of the property and not on account of any personal covenant entered into between himself and the original mortgagor. But the personal contract between the original mortgagor and the original mortgagees subsisted and the latter cannot be heard to say that their entire character as mortgagees ceased with the sale of their mortgagee rights and they became free to do anything although that anything might put an obstacle in the redemption of the mortgage. There is no direct authority on the point either way. But on broad principles I am not all inclined to let the original mortgagees' profit by an act of their own to the detriment of the interest of the mortgagor, whose rights they were bound to guard on general principles recognised in s. 76 (*e*) of the Transfer of Property Act. There can be no doubt that creation of an occupancy right (assuming that such has been created in this case) seriously affects the usefulness of a piece of land. If the defendants Nos. 3 to 7 are allowed to hold the land as occupancy tenants it is clear the plaintiff would not be permitted to cut any of the trees standing on the land or to bring the land under cultivation. I think that the Courts below were right in their opinion.. In the view I take of the case it is no longer necessary to consider whether s. 202 of the Tenancy Act is applicable to the case. Mr. Mital has strenuously argued that the suit is not for an agricultural holding and s. 202 has no application to it. He relied on the allegation in para. 9 of the plaint and on the admission of the defendants Nos. 3 to 7 in their written statement as regards that paragraph. The question, however, does not arise and need not be considered. The result is that the appeal fails and is hereby dismissed with costs which will include Counsel's fees in this Courts on the higher scale.

R. L. *Appeal dismissed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 210 OF 1925.

January 25, 1925.

Present:—Mr. Justice Pearson.

ALBERT BONNAN—PLAINTIFF

versus

IMPERIAL TOBACCO Co. (INDIA) LTD.—DEFENDANTS.

Limitation Act (IX of 1908), Sch. I, Arts. 25, 36, 42, 48—Civil action brought maliciously and without reasonable and probable cause—Suit for damages, whether lies—Limitation—Temporary injunction obtained in suit—Damages, cause of action for—Sea Customs Act (VIII of 1878), ss. 18, 19-A—Detention of goods in customs house maliciously—Damages, cause of action for—Civil Procedure Code (Act V of 1908), s. 95, interpretation of.

Where a party maliciously obtains an order for the detention of goods of a person under s. 19A, Sea Customs Act, the latter is entitled to bring a suit for damages and limitation for such a suit is two years under Art. 36 of Sch. I to the Limitation Act. [p. 458, col. 2.]

Nemi Chand v. *Wallace*, 34 C. 495; 11 C. W. N. 537, referred to.

A suit for damages for wrongful interference with the property of a person by obtaining an order from a Court in a suit or proceeding, when malice and want of reasonable and probable cause is established, is maintainable. The summary remedy provided by s. 95, C. P. C., is no bar to such a suit. [p. 450, cols. 1 & 2.]

Mohini Mohan Misser v. *Surendra Narain Singh*, 26 Ind. Cas. 296; 18 C. W. N. 1189; 21 C. L. J. 68, *Quartz Hill Gold Mining Co.* v. *Eyre*, (1883) 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668, *Bishun Singh* v. *Wyatt*, 11 Ind. Cas. 729; 16 C. W. N. 540; 14 C. L. J. 515, *Bhut Nath Pal Mistry* v. *Chandra Benode Pal Chowdhury*, 16 Ind. Cas. 443; 16 C. L. J. 34, *Norendra Nath Koer* v. *Bhusan Chandra Pal*, 57 Ind. Cas. 375; 31 C. L. J. 495 at p. 500, *Madras Steam Navigation Co.* v. *Shalimar Works Ltd.*, 28 Ind. Cas. 463; 42 C. 85, *Clissold* v. *Cratchley*, (1910) 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 54 S. J. 442; 26 T. L. R. 409, *Kissorimohun Roy* v. *Harsukh Das*, 17 I. A. 17; 17 C. 436; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472; 8 Ind. Dec. (N. S.) 830 (P. C.), and *Smith* v. *Day*, (1882) 21 Ch. D. 421 at p. 428; 31 W. R. 187; 48 L. T. 54, referred to.

For purposes of limitation a suit for slander of title or slander of goods is governed by Art. 36 of Sch. I to the Limitation Act. [p. 451, col. 2.]

A provision as to limitation for a particular suit in the Limitation Act is no argument that such a suit is maintainable, for the Act does not create a cause of action if it does not already independently exist. [*ibid.*]

Mr. *S.C. Mitter* (with him Mr. *C. Bagram*), for the Plaintiff.

Mr. *L. P. E. Pugh* (with him Messrs. *N. N. Sircar* and *W. W. K. Page*), for the Defendants.

JUDGMENT.—This is a suit for damages arising out of certain acts of the defendant Company alleged to be wrongful and malicious. The defendant Company had been formed in 1910 to take over the business for importing and selling within the limits of India various cigarettes under the manufacturers' brand of W. D. and H. O. Wills including this Gold Flake brand. On the 1st September 1910 an agreement was executed with that object, the parties being the British-American Tobacco Co., Ltd., the British American Tobacco Co, (India), Ltd., and the defendant Company. No actual document of assignment or transfer was executed until the 11th April 1922. The shares in the defendant Company were owned to the extent of some 80 per cent. or 90 per cent. by the vendor Company, and from 1910 onwards the sale of these brands in India was entirely in the hands of the defendant Company acting under the agreement. At the termination of the war the

Army Canteen Authorities found themselves in possession of a very large stock of cigarettes purchased from the British-American Tobacca Co., and from elsewhere: accordingly they took steps to sell them off, but imposed on purchasers the restrictive condition that the goods should not be disposed of in Great Britain. The plaintiff was one of those who came forward and made considerable purchases of these cigarettes of the Gold Flake Brand from the Canteen Authorities through Venis & Co., Ltd. and M. Drapkin. Some he disposed of in Europe, Egypt or Palestine. Others he imported into India for sale through Calcutta or Bombay. The first arrivals in India were at the end of February and beginning of March 1922. By the middle of March 1922 the defendant Company too was alive to the plaintiff's intrusion and the effect it might have on its trade. On the 12th April 1922 the defendant Company moved the Collector of Customs in Calcutta for confiscation of some of these goods which had arrived and were lying in bond. The goods were accordingly detained by the Collector of Customs under his statutory powers, and the usual period of 30 days was later extended by 10 days at the request of the defendant Company. On the 10th May 1922 the indenture of assignment (dated 11th April 1922) was executed in Calcutta by Mr. Abbott as agent of the British-American Tobacco Co., Ltd., and by Mr. Abbott and another as Directors of the defendant Company: the 10th May 1922 was also the date of registration of that document in Calcutta.

On the next day, the 11th May 1922, the Company filed a suit in the High Court here against the plaintiff and A. Bonnan & Co., claiming an injunction to restrain him from selling his goods. The defendant Company in that suit based its claim upon an exclusive proprietary right in the brand and also upon the allegation that the Gold Flake cigarettes had acquired amongst purchasers in India the reputation of being goods imported by the Company and that the plaintiff in selling his goods in India would be deceiving purchasers by passing off his goods as those imported by the defendant Company. The Company also gave notice of motion for an injunction and obtained an *interim* order for injunction covering the 100 cases then in the Customs in Calcutta, the plaintiff giving the usual undertaking in damages. This injunction was dissolved by an order of 8th June when the plaintiff undertook to place a certain sum of money out of the sale proceeds on deposit of receipt with the Bank and lodged the receipt in Court. The suit in Calcutta was dismissed on the 18th July 1922, the appeal on the 10th April 1923 and the appeal to His Majesty in Council on the 13th May 1924.

Similar action was taken by the defendant Company in Bombay. On the 1st May 1922, application was made to the Collector of Customs in regard to 60 cases by S S "Australia." An order for detention for one month was passed, but this was re-called and the goods were released after 48 hours' notice from the 5th May. An unusual feature was that in this instance in addition to the usual indemnity bond, a Bank guarantee was taken from the Company. On the 22nd May the defendant Company filed a suit in the High Court in Bombay against the Cigarettes Importers Agency and Bonnan & Co., under which names the cigarettes had been imported, claiming an injunction and other relief similar to that in the suit filed in Calcutta. Notice of motion was given on the 23rd May for an injunction restraining the defendants in that suit from importing, advertising, exposing for sale or selling their goods. On the 19th June 1922 when the motion came on, it was ordered by consent that it should stand over to the hearing on the 17th July 1922 and it was further ordered by consent that pending the hearing of the suit the defendants undertook not to dispose of or in any other way deal with the cigarettes then lying in Bombay or to arrive in the *interim* and it was further ordered by consent that the plaintiffs' undertaking as to damages should continue pending the final disposal of the suit. On the 2nd August 1922 an order was passed staying the suit until after disposal of the appeal in the Calcutta suit, the defendants' undertaking was also vacated, they having agreed to keep an account of sales. Subsequently on the 25th September 1923 an order was passed discharging the defendants' undertaking of 2nd August 1922 to keep account of the sales. Finally on the 9th January 1925 a consent decree was made in the suit whereby the suit was dismissed with cost, "without prejudice to the defendants' rights, if any, to claim and recover damages from the plaintiffs in any other proceedings."

On the 21st January 1925 the present suit was filed against the Company to recover damages in regard to the detention of the plaintiff's goods by the Collector of Customs in Calcutta and Bombay: damages in respect of the injunction and restraint on the goods in the High Courts of Calcutta and Bombay: and damages for injury to his trade and reputation caused by untrue and disparaging statements as to the quality, etc., of the plaintiff's goods.

One of the important questions which arises in the suit upon the facts is whether malice finds place in the action of the Company in procuring the Collector of Customs to exercise his powers of detention over the goods, and in instituting and carrying on the proceedings in the two suits in the High Court. From the correspondence before me I find that on the 15th March the Company in Calcutta was writing to the British-American Tobacco Co. in London with whom constant communication was maintained, that 60 cases had arrived of Gold Flake cigarettes. The letter is headed "competition" and shows that it was realised then that the goods were those of the British-American Co.'s manufacture, made in United States of America and Mr. Abbott, the writer, adds: "Evidently the cigarettes form part of some more stocks and they may cause us some trouble here." On the 16th March the Company's Bombay office informed the Calcutta office of the arrival of 80 cases there, intimating that "the goods though old are still sound." On 23rd March 1922 Mr. Abbott again wrote to London with news of the Bombay consignment of which 10 cases had been sold to dealers at Rs. 20 per thousand (the Company's selling price for Gold Flake cigarettes being Rs. 36 per thousand). "This," says Mr. Abbott, "is most annoying, but we cannot so far as we can see do more than warn our dealers that we accept no responsibility for these goods." He also says that it is possible there may be a difficulty in disposing of the plaintiff's goods in the carton packing for which the demand is limited; "if, however, they get below the Scissors price" (which was Rs. 19 per mille) "they may cause no trouble." On the 23rd March the Bombay office through Mr. Selfe wrote that these importations "will certainly have bad effects on the sale of our Gold Flake and Capstan on account of the cheap rate at which they are being or will be marketed." Mr. Selfe also stated in his weekly report that these importations had affected the sales of Gold Flake Magnums. On the 28th March Mr. Abbott wrote to London asking for particulars of the stocks of Gold Flake cigarettes available on the Continent or elsewhere.

On the 4th April 1922 the Company received a telegram from a Mr. Macnaughten of the Legal Department of the British-American Tobacco Co. in London in reply to Mr. Abbott's letter of the 15th March:—

"60 cases Gold Flake the sale of these cigarettes is infringement of your mark and if the bond customs should be asked to destroy them if owners will not re-export."

Until that moment it never seems to have occurred to Mr. Abbott or anybody else that they possessed any right in law to which recourse was possible in order to stifle the competition of the plaintiff's cigarettes. The reason for that was that so far as they knew, they had no such right: that is clear from a passage in Mr. Abbott's letter of 10th May, where he says, "We may say that as soon as the first shipment of 'Gold Flake' came to our notice, we immediately questioned ourselves as to what was our position. A few years ago some 'Three Castles' cigarettes were imported into Rangoon from Singapore, and the legal advice we then had was that we were not in a position to prevent them from being imported. As the Gold Flake shipment was on a par, as far as we know, with that of the 'Three Castles' from Hongkong, we felt it was no use taking the matter up from a legal point of view." This is an important statement of the Company's state of mind and knowledge with reference to the period to which it refers.

Mr. Macnaughten's telegram, based on what materials I do not know, was on the 4th April. The Bombay weekly report of 7th April brought the information that the whole consignment of 80 cases had been disposed of to dealers, and the anticipation that the goods, if not disposed of before the monsoon, would probably not hold out; on the 12th April 1922 came the application to the Collector of Customs in Calcutta to confiscate the 60 cases arrived by the "Sardinia." The ground expressed in the application itself was that the importation of plaintiff's goods was "infringement of our trade mark in W. D. & H. O. Wills brand of Gold Flake cigarettes," but Mr. Ryan had already been down himself to interview the Collector on the subject before the application was put in. Section 18 of the Sea Customs Act, 1878, deals with the classes of goods whose importation is prohibited and whose detention or confiscation may be allowed under s. 19A of the Act. It is admitted that the endeavour in the present case was to bring the plaintiff's goods under s. 18 (*d*) which relates to "goods having applied thereto a counterfeit trade mark within the meaning of the Indian Penal Code, or a false trade description within the meaning of the Merchandise Marks Act." Mr. Ryan, a solicitor, who is in charge of the legal department of the Company in Calcutta says that his opinion was that the plaintiff's goods could be brought under neither category. Mr. Abbott though he must have known Mr. Ryan's view says that he charged the plaintiff's goods as being counterfeit before the Collector and if he did so before the Collector, it is difficult to think that he would restrain himself otherwise. Some attempt has been made to whittle away the offensive meaning, but from any point of view it is a dangerous word for one trader to use of the goods of another. That that was the view which they desired to impress on the Collector and in which they succeeded, is clear from paras. 4 and 5 of the Collector's order, dated the 19th June 1922, where reference is made to the earlier application.

Then there are two letters, dated the 12th April 1922 and 19th April 1922 from the British-American Tobacco Co., and received on the 8th and 10th May respectively. The last named Company played a prominent part throughout in this correspondence and apparently took upon itself to advise if not to dictate the course to be followed by the defendant Company. The intrusion of the plaintiff's goods affected the one as much as the other. These two letters refer to Mr. Abbott's previous question as to the amount of old stocks and the passages in them are as follows.—"We believe there is still a very large quantity of old stocks of this description in various parts of the world, and if you do not take steps to stop their importation in India now, it is very probable that you will be having constant repetitions of this trouble." Then in the letter of 19th April is this; "We regret to say that it is impossible to estimate what quantities of goods of this description are available in different parts of the world but we may say that it is probable that they are very large indeed. This makes it all the more important that you should establish the fact as soon as possible that goods of this nature cannot be imported in India, otherwise those at present holding stocks will very soon hear that they can dispose of them in India, and there is no saying to what extent the trouble may grow." There is no doubt that the steps initiated by the Company were all calculated to make it "as difficult as possible for the plaintiff to market his goods" (see Ex. LL) and so further representations were made to the Collector of Customs after suit with the object of obtaining from him an assessment of the plaintiff's goods to duty at the same rate as that paid by the defendant Company. The Collector, however, ultimately allowed an assessment based on the invoice value of the plaintiff's goods.

Mention must be made of an interview which took place between Bonnan and Abbott on the 6th May, as to which the oral evidence is somewhat conflicting. The plaintiff's version was not put to Mr. Abbott, but Mr. Ryan was present on the occasion; his version of the story is borne out by a letter written to the British-American Tobacco Co. on the 10th May which summarises the result of the interview, and may be assumed to be substantially true, namely, that the Company wanted an undertaking from the plaintiff not to remove the goods from bond, to which the plaintiff was agreeable if the Company would pay him Rs. 13-8-0 per thousand in bond for what arrived. I have little doubt that there may have been suggestions by the plaintiff in the course of the interview as to the Company taking over the whole of his purchases at their own selling rate of Rs. 36 per thousand but the letter of 15th May bears out the Company's story of the interview quite sufficiently. The offer was not accepted by the Company, however, as they "felt certain that the British-American Tobacco Co. would not listen to this." The result was the filing of this suit on the 11th May.

Paragraph 11 of the plaint alleges the circulation by the defendant Company of statements and rumours in the nature of slander of the plaintiff's goods, that they were inferior in quality, not in a sound and merchantable condition, and not genuine and also that the Company would boycott dealers purchasing or selling the plaintiff's cigarettes. As regards the quality of the cigarettes themselves, I do not forget the plaintiff's own representations to the Collector as to his cigarettes being entirely different in quality and everything else, the plaintiff's explanation of which in his evidence I find it difficult to accept. But the evidence clearly shows that in fact there was no difference; also that the condition of the plaintiff's cigarettes was somewhat inferior due to age, the chief effect of that being that they would deteriorate quicker than fresh stock and be more easily affected by adverse climatic conditions, such as those prevailing in the monsoon. At the same time there is no doubt that the plaintiff's cigarettes on arrival in this country were sound, smokeable, and at their price freely merchantable. Mr. Abbott in his letter of 10th May says he can quite believe that Baksh Ellahi would be a willing purchaser of plaintiff's goods and further mentions that they are in surprisingly good condition (though to Mr. Abbott's rival palate they "smoke rather nasty." Khodadad, one of the dealers, says that when he was first shown them he considered them as good as the Company's both in quality and condition. Mr. Selfe when he says in para. 8 of his affidavit in the Bombay suit that the plaintiff's cigarettes are "old, inferior in quality and in preparation and packing" is not strictly accurate. They are indeed old, and the packing was inferior, because the Company had air-tight tin containers, for the smaller quantities within the tin-lined cases, whereas the plaintiff had not: but the quality was the same, both of the cigarettes and of their preparation. The plaintiff has called a witness named Corr, a servant in 1922 of the Company who stated that it was his business in particular to look out for competition. He says that Mr. Selfe's instructions were to warn the various dealers about the plaintiff's cigarettes as being old stock and inferior in quality, and that he could do anything he liked so long as he stopped competition, and kept the market for the Company. Khodadad says that he was visited by Corr who informed him that plaintiff's cigarettes were not genuine but imitations imported from Basra, and he would get into trouble and be involved in litigation with the Company if he continued. Corr's evidence taken by itself would hardly be safe to act upon. He is apparently now a dismissed servant of the Company, over some monetary defalcation in regard to which he seems to have put forward two different explanations, added to which his demeanour in the box could not be described as well-balanced or impartial. The details given by Khodadad are difficult to accept because they are not put to Mr. Abbott or spoken to by Corr. It is, however, difficult to brush it aside entirely having regard to the other evidence which goes to support it, and to the way in which the Company had already overstepped the mark in the matter of the applications to the Collector. Two Calcutta dealers Kalipada Roy and Narendra Nath Chakraverty, father and son, gave evidence that they had been visited by officials from the Company and had had it impressed on them that the goods were "bad" (*kharab*) which I think was used not so much applying to their quality as to their merchantability having regard to the litigations that were going on. The evidence of these witnesses was to some extent damaged by their identification in Court of Mr. Ryan as one of the persons whom they had seen on the occasions in question, whereas I am quite clear that Mr. Ryan's denial must be accepted and those witnesses are consequently mistaken in that particular. There is some further evidence of the same nature from other dealers. Undoubtedly the Company's servants were going round warning dealers that they would not be responsible for the plaintiff's goods. There is no harm in that, and they could probably employ the whole of their organisation in broadcasting it to the dealers. There seems to be no doubt, however, that they went further and wrongly impressed on dealers a non-existent difference in the quality of the goods; and also made full use of the litigation in Bombay and Calcutta with its attendant threat of trouble to others as an obstruction to the plaintiff and as a deterrent. That is a clear impression which I retain after hearing the evidence. Considering these matters to which I have referred I hold that the conduct of the Company in regard to the proceedings before the Collector was malicious and without reasonable and proper cause. Between the application to the Collector and the filing of the suit nothing has emerged, though privilege has been claimed for certain documents, to show that the Company can say it was now in any better position as regards the filing of the suit. I have supported the claim of privilege, but I am certainly not going to assume in the Company's favour that the documents in question would support its case on the question of malice or want of reasonable and probable cause. Looking to the evidence, as it stands, I hold that in filing the suit and proceeding with it as it did the Company was acting maliciously, and without reasonable and probable cause. These findings also apply to the Bombay proceedings both before the Collector and in Court. I also find that the Company did make and circulate the statements in para. 11 to the extent already mentioned. In connection with the question of malice I should mention a further fact that was relied upon as evidence of malice, namely, the filing of the suit in Bombay when the Company were already amply protected by the suit instituted in Calcutta and the injunction there. The contention, I think, is unsustainable, having regard to the fact that the injunction in Calcutta was limited to the Calcutta goods, the plaintiff being apparently not then within the jurisdiction, and also to the fact that the plaintiff was using different names or styles for his importations, so that the parties to the suits were nominally different, though in fact, as it turned out, the plaintiff alone was interested. That the plaintiff suffered damage by reason of malicious acts of the Company cannot I think be reasonably contested. A certain amount of delay occurred in consequence of the Collector's action and the injunction and undertakings and other proceedings in the suits, while plaintiff had to cancel a very favourable contract with one of his buyers and had also to arrange to submit a cancellation of some of the goods he had still to take up from his own sellers under his original purchase contracts. He started off very well in Bombay: it made a lot of difference to him if he could dispose of his perishable goods before the arrival of the monsoon and the Company knew it. But instead of finding a fair field for his goods he found himself faced with obstruction after obstruction maliciously raised by the Company, courses of delay, disparagement of his goods, assertion of unfounded rights —all of which interfered with his right to trade his goods in the ordinary way.

It is argued by the Company that notwithstanding the injury he has suffered, the plaintiff cannot recover. So far as the action of the Collector goes, it is said that it was a judicial act of the Collector and the Company cannot be held responsible for it. I think that *Nemi Chand* v. *Wallace* (1) supports the opposite contention that such a suit will lie, at any rate where, as in the present case, there is evidence of malice, and no reasonable and probable cause exists.

As to the suits and the proceedings in them the same contention is made by the Company, that no action will lie for damages, even if malice was present and reasonable and probable cause was absent. In support of this the case of *Mohini Mohan Misser* v. *Surendra Narain Singh* (2) is cited. That is a suit where damages were claimed against the defendant for having previously instituted an action against the plaintiffs for an injunction to restrain them from erecting a building on a certain land. An *interim* injunction had been granted but the action had ultimately terminated in favour of the defendants in the action. The defendants were sued for damages for malicious prosecution of the suit for an injunction. The question of the maintainability of such a suit was raised and Fletcher, J., came to the conclusion that there was no authority for the proposition that a suit was maintainable for maliciously and without reasonable and probable cause obtaining a perpetual injunction which was subsequently dissolved on appeal. He relied upon *Quartz Hill Gold Mining Co.* v. *Eyre* (3), while pointing out that there are certain exceptions where the proceedings involve either scandal to reputation or the possible loss of liberty to the person. In *Bishun Singh* v. *Wyatt* (4), a case of wrongful attachment, Mookerjee, J., in the course of his judgment remarks that the statement that the institution of an ordinary civil action, however, unfounded, vexatious and malicious it may be, is not a good cause of action must be qualified where there has been arrest of person or seizure of property. In *Bhut Nath Pal Mistry* v. *Chandra Benode Pal Chowdhury* (5), the plaintiff sued for damages for an injunction, wrongfully issued against him at the instance of the defendants, restraining him from erecting a building. It was there held that such a suit was maintainable on the ground that the defendants had unlawfully interfered with the exercise of his property rights by the plaintiff. The defendants, therefore, committed an act in the nature of trespass to the property, "and are consequently liable in an action for trespass ; it is not necessary for the plaintiff to prove any malice or want of reasonable or probable cause." In *Narendra Nath Koer* v. *Bhusan Chanara Pal* (6), the plaintiff sued for damages for wrongful attachment and wrongful detention of certain chattels belonging to him. The question was raised of whether *Bhut Nath Pal Mistry* v. *Chandra Benode Pal Chowdhury* (5) was correctly decided having regard to other decisions of this Court including *Madras Steam Navigation Co.* v. *Shalimar Works Ltd.*, (7), and the case, already cited, of *Mohini Misser* v. *Surendra Narain Singh* (2). The point was accordingly referred to a Full Bench, which, however, disposed of the case by re-affirming the general principle that a suit does not lie for damages against a defendant for maliciously and without reasonable and probable cause instituting a civil action ; as also the other principle that a person who unlawfully interferes with the exercise of the property rights of another, commits an act in the nature of trespass to property, and is liable for damages in an action for trespass. I may draw attention here to that portion of the judgment of the learned Chief Justice in the referring judgment of *Narendra Nath Koer* v. *Bhusan Chandra Pal* (6), where he indicates that the defendant in his view should not be held liable because the injunction under which the chattels are detained was an act of the Court "*and* inasmuch as it has been held that there was no *mala fides* on the part of the defendant *and* as there is no finding that there was an absence of reasonable and probable cause." So in the case of *Madras Steam Navigation Co.* v. *Shalimar Works Ltd.* (7), already mentioned, an action *in rem* against a vessel had been instituted in this Court in its admiralty jurisdiction. The vessel was arrested but the suit was subsequently dismissed for want of jurisdiction. In a suit by the owners for damages for the arrest on the footing of trespass, Sir Lawrence Jenkins, C. J., held that the action based on trespass would not lie, and he also refers to the fact that the "arrestment of the ship is a judicial act of the Court and an ordinary step in an action *in rem*. So, where it constitutes a legal grievance, it is not an independent wrong, but an integral part of an action *in rem* in which there was malice, or its equivalent, entitling the aggrieved person to seek compensation either in the admiralty proceedings or by separate action" and (at page 109*) he adds that "in the absence of proof of malice or its equivalent the suit if treated as one for trespass, will not lie in the circumstances of this case."

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(1) 34 C. 495; 11 C. W. N. 537.

(2) 26 Ind. Cas. 296; 18 C. W. N. 1169; 21 C. L. J. 68.

(3) (1883) 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668.

(4) 11 Ind. Cas. 729; 16 C. W. N. 540; 14 C. L. J. 515.

(5) 16 Ind. Cas. 443; 16 C. L. J. 34.

So *Clissold* v. *Cratchley* (8), referred to in some of the cases in this Court cited above shows that a wrongful seizure of goods under a writ of *fi. fa.*, where the judgment is already satisfied, may make a party liable in trespass, whether malice is present or not? but that where it is an action on the case the plaintiff must fail unless he can also prove malice. In *Kissorimohun Roy* v. *Harsukh Das* (9), a case of wrongful attachment of the goods of a third party for which damages were claimed, it was argued that the plaintiff could not recover unless he proved malice and want of probable cause. "That," says Lord Watson (at page 27†), "is a rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence." It is unnecessary for me to consider further the cases in this Court above referred to in so far as any of them may seem to afford ground for the contention that a suit may lie for damages for wrongful interference with the property rights of another by obtaining an order from a Court, even though no malice is proved. It is enough that in the circumstances of this case malice has been proved and want of reasonable and probable cause, both in regard to the proceedings before the Collector in Bombay and Calcutta, as also in regard to the proceedings in the two suits instituted and carried on in those places. That damage resulted to the defendant in consequence is clear, and in my view he has a good cause of action, on which a suit is maintainable.

As regards the injunction, it may be a question whether it is to be regarded as separate and independent or as a part of and a step in the suit itself which as I have

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(6) 57 Ind. Cas. 375; 31 C. L. J. 495 at p. 500.

(7) 28 Ind. Cas. 463; 42 C. 85.

(8) (1910) 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 54 S. J. 442; 26 T. L. R. 409.

(9) 17 I. A. 17; 17 C. 436; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472; 8 Ind. Dec. (N. s.) 830 (P C.).

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*Page of 42 C.—[*Ed.*]

†Page of 17 I. A.—[*Ed.*]

held bears the taint of malice. It is argued that no action will lie in respect of damages arising out of the injunction. If there was reasonable and probable cause or absence of malice, it may be that is so; if otherwise, what is the position? The defendant relies upon *Mohini Mohan Misser* v. *Surendra Narain Singh* (2), to show that even then no suit is maintainable. I am not satisfied that that principle is applicable to the facts of this case, and if necessary I should say that the circumstances place the matter on a different footing, otherwise it might be that in the case of perishable goods they might be utterly destroyed, yet the defendant for all his malice could shelter behind the injunction as the act of the Court and get off scot-free. True it is obtained on evidence on which the Court will say that a *prima facie* case is established, but that evidence is afterwards shown to be unacceptable. As already stated, the injunction of this Court only affected 100 cases then in Calcutta and continued from the 11th May till the 8th June. An undertaking was given by the Company in damages. That undertaking might have been acted upon by the Court on application of the plaintiff in that suit. In *Smith* v. *Day* (10), Brett, L. J., says that if the injunction had been obtained fraudulently or maliciously the Court would give exemplary damages. No case, however, has been shown to me where upon such an enquiry as to damages the Court has consented to assess damages upon the footing that the suit had been maliciously carried on, where such malice had not arisen as an issue for decision in that suit. It is argued that the fact that the undertaking is embodied in the order is itself an indication that apart from it the defendant could not recover. Similarly that when s. 95 of the C. P. C. allows limited damages in the case of an injunction being obtained on insufficient grounds, it is because apart from such provision of law, no such damages would be recoverable. On the other hand, it may be argued that the undertaking is inserted because it gives a quicker remedy, and so with the application under s. 95. As to the latter and the inference to be drawn, it seems illogical to allow a defendant who has incurred Rs. 1,000 damages to recover Rs. 1,000 and only allow the same to a defendant who has incurred Rs. 10,000. I agree that the existence of Art. 42 of the First Schedule to the Limitation Act is in itself no argument that a suit is maintainable for damages for an injury caused by an injunction wrongfully obtained, because such an Act cannot create a cause of action if it does not already exist independently. Nevertheless in the circumstances of the present case I think that a cause of action may exist in respect of the injunction and the resulting damages to the plaintiff's trade: but whether that be so or not the plaintiff can obtain his relief in respect of it as a proceeding forming part of the suit which is itself affected by malice in its entirety.

As regards the Bombay suit the order of 19th June 1922, made upon the notice of motion, dated 23rd May, for *interim* injunction, was a consent order, the defendant in the suit undertaking not to deal with the goods in Bombay or to arrive, and the plaintiff Company giving an undertaking in damages. The defendant's undertaking was vacated by the order of 2nd August, without prejudice to his rights in damages. As to this part of the case I think that the plaintiff's remedy, if at all, would be limited to the enforcement of the undertaking in the suit in which it was given, and that as he submitted to the making of the order by giving his consent, he has no separate cause of action in this respect although he may say his consent was accorded only under pressure of the circumstances maliciously brought about by the Company.

Next, it is contended that even if the present suit is maintainable it is barred by limitation, whatever the cause of action may be. That appears to be so partly. I think that limitation intervenes in so far as the proceedings before the Collector are concerned. The detention terminated not later than June 1922. Article 36 is the general Article which provides a period of two years' limitation for a suit to recover damages in tort, unless any specific Article provides otherwise. Article 48 has been referred to but in my view does not apply, if for no other reason because the defendant Company never had possession of or control over the goods and the Collector cannot be looked upon as the Company's agent. In so far as the cause of action may be slander of title or slander of goods the limitation would be either one year under Art. 25 or two years under Art. 36, the latter is, in my opinion, applicable in the circumstances, for I think the action would be on the case. Nevertheless I think it is a fair inference to draw from the evidence that the statements alleged and complained of, continued, to the extent already mentioned, to be repeated within two years before suit, particularly having regard to the continuance of the previous suits which throughout were designed as a disparagement of the plaintiff's goods and in obstruction to the unfettered exercise of his rights as a trader, of which I have no doubt the Company made the fullest use the whole time the litigation lasted, and whenever occasion so required. I am not prepared to say that in any view of the matter the Company is excused by the principle that a trader is entitled to protect his own property and his own interests, because I think in this case there was *mala fides* and ulterior motive from the beginning until the end.

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(10) (1882) 21 Ch. D. 421 at p. 428; 31 W. R. 187; 48 L. T. 54.

There remains the question of damages. One head of damages is that for loss of trade and business based upon the suggestion that the plaintiff might have established himself in the tobacco trade in India at any rate to the extent of the remaining canteen war stocks of cigarettes which were very large indeed. He says that it was his intention to do so, but the evidence does not appear to me to be sufficient to enable me to hold that he has established his case in this particular, or that his failure in this respect could be said to be the proximate effect of the defendant's action. Similarly he has claimed damages under certain other heads which I think are inadmissible. These are the items at the end of his schedule of claim, namely, (1) living expenses in India for 642 days, (2) travelling expenses to and from India and also in India, and (3) difference between party and party costs allowed to him in the previous suit, and his attorney and client costs.

As regards the remainder of the claim I think that the plaintiff must recover damages substantially according to the headings of his schedules. Exhibit O is a convenient resume furnished to me by plaintiff's Counsel of the goods that came to India, and their disposal as well as the other goods contracted for of which the plaintiff lost the benefit owing to concellation of the contract. The sales effected by the plaintiff after he had undertaken to keep an account show that in many instances he was able to dispose of his goods at so high a rate as Rs 30 per thousand. At the end of March he started his sales to Sheriar & Co, and other Bombay dealers at rates of Rs. 18 and Rs. 20 per thousand: while he contracted to sell 220 cases to Sheriar at the rate of Rs. 23 8. The Company argues that the sales paper in packets of these Gold Flake cigarettes are shown from their own experience to be very small in India, and, therefore, the plaintiff would have had the greatest difficulty in disposing even of what he had actually brought out; but that argument could only have weight if the plaintiff were selling at the same rates as the Company, whereas he was in a position to undersell them heavily. It leaves out of account the attraction of a bargain price. Besides, if there was any substance in the argument the best course for the Company would have been (subject to warning their dealers) total passivity. The best answer is the conduct of the Company itself, the passages from the letters already referred to and the considerable sales to the Bombay dealers. There would be no doubt a certain amount of deterioration, particularly in the rains once the cases are opened, and indeed, I find the plaintiff writing to the Collector about the end of the rains claiming further reduction of duty on the ground of substantial deterioration; but I believe upon the evidence before me that but for the defendants' action plaintiff would have been able to dispose of his goods that had already come out here before the monsoon season, and as regards those at home they would still have been saleable by the time they were brought out. Still, there would necessarily have been some amount of deterioration among them in the matter of condition.

On the question of damages I am not inclined to attach much weight to the evidence of the interview of 8th May, even accepting the Company's version of it, because that took place when the interference through the Collector was actually in existence, and the impending litigation was held over the plaintiff's head. The plaintiff's claim under the headings with which I am now dealing is based upon the assumption that he would have been able to dispose of his goods at the uniform rate of Rs. 30 per thousand. Taking the various matters into consideration I have endeavoured to put myself in the place of a Jury and arrive at a fair and reasonable figure which may be taken as an average rate to form a basis for the calculation of damages, and in the circumstances I think an all round figure of Rs. 23 8 would not be excessive. The defendant Company does not admit the items of the account as set out in the schedule to the plaint, so that subject to the rate of Rs. 23-8 which I have fixed, there must be a reference to ascertain what is the amount of damage under the claims numbered 1 to 5 in the schedule. The decree will be made accordingly and the plaintiff will have his costs of the suit on Scale No. 2.

R. L. *Order accordingly.*

MADRAS HIGH COURT.

City Civil Court Appeal No. 38 of 1924.

November 10, 1925.

Present:—Justice Sir Charless Gordon Spencer, Kt.

MUNUSAMI PILLAI—Appellant

versus

MAHDI HUSSAIN KHAN SAHEB—Respondent.

Civil Procedure Code (Act V of 1908), s. 152—Amendment of decree after satisfaction.

Section 152 of the C. P. C. permits clerical or arithmetical mistakes in judgments and decrees to be corrected at any time, but an amendment of a decree after satisfaction has been entered up is a mere nulllity unless steps are also taken at the same time to set aside the order recording satisfaction. [p. 453, col. 2; p. 454, col. 1.]

Appeal against a decree of the City Civil Court, Madras, in O. S. No. 225 of 1920 as amended by the said Court by order, dated the 20th October 1924.

Mr. *R. Sriramachariar*, for the Appellant.

Mr. *M. S. Venkatarama Iyer*, for the Respondent.

JUDGMENT.—The respondent brought O. S. No. 225 of 1920 under the Madras City Tenants' Protection Act to eject the appellant. Under s. 9 of the Act, the appellant applied for an order that the landlord should be directed to sell the land for a price to be fixed by the Court. The result of the suit was that the appellant got a decree on 12th May 1922 directing the respondent to convey the land to him upon his paying Rs. 615-6 10, being the value of the land at the rate of Rs. 1,100 per ground, and that the appellant should pay the respondent his costs and past and future mesne profits. On 10th July 1923, in E. P. No. 249 of 1923, the respondent applied for execution by attachment and sale of the superstructure. On 18th December 1923, the appellant applied in C. M. P. No. 1814 of 1923 for a direction of the Court to the respondent to execute and register the conveyance and got an order that respondent should execute a conveyance in three weeks. On 5th December 1923, the decree was entered as satisfied and the execution petition noted as disposed of. On 24th September 1924, the respondent applied under s. 152 of the C. P. C., for an amendment of the decree by altering the amount to be paid as the price of conveyance from Rs. 615-6-10 into Rs. 756-4-0. The appellant filed a counter-affidavit alleging that the respondent was vexatiously attempting to get more money out of him by this means and delaying to attend the Registrar's office for registration of the conveyance. The City Civil Court Judge observed that the amendment asked for was the rectification of a slip due to the mistake of a clerk and that the petitioner was not estopped from applying and accordingly he made the order from which this appeal has been preferred.

Now s. 152 of the C. P. C. permits clerical or arithmetical mistakes in judgments and decrees to be corrected at any time, but it is questionable whether a Court would be justified in making a correction which involved the payment of a larger sum of money by one party to another, long after satisfaction had been recorded, and when nothing remained to be done and the decree had become dead. Under the old C. P. C., before errors in decrees were permitted by s. 152 to be corrected "at any time", and when the making of corrections was under s. 206 made obligatory and not discretionary, the High Court of Calcutta in *Fakar-ud-din Mahomed Ahsan* v. *Official Trustee of Bengal* (1) held that matters, which might have been discussed in the course of execution proceedings could not be reopened after execution had been closed and the decree satisfied. The learned Judges observed that if a judgment-debtor desired to show that more money had been levied from him under the execution than was due from him under the decree, the only course open to him was to apply for a review of the order, which declared the decree to be satisfied and the execution proceedings struck off. Under the present Code the Allahabad High Court in *Pitam Lal* v. *Balwant Singh* (2) revised an order of a Subordinate Court amending a money-decree which had been completely satisfied. Daniel, J., observed "When a decree for money had been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment under s. 152 of the C. P. C.," In *Sheo Prasad Rai* v. *Dharam Sen Rai* (3) it was held that "the *dictum* in *Fakar-ud-din Mahomed Ahsan* v. *Official Trustee of Bengal* (1) quoted with approval in *Ram Saran Pande* v. *Janki Pande* (4) to the effect that where a decree has been completely executed the Court executing the decree is *functus officio* has not found complete favour in subsequent decisions." Nevertheless, on the facts of that case, the Court dismissed the second appeal of the judgment-debtor against an order of an Executing Court confirmed by the District Court refusing to cancel the execution proceedings on the ground that lands not covered by the decree had been delivered.

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(1) 10 C. 538; 5 Ind. Dec. (N. S.) 360.

I am of opinion that the ground upon which *Pathambi* v. *Mytheen Bibi* (5) was disposed of, namely, that an amendment of a decree after satisfaction has been entered up is a mere nullity unless steps are also taken at the same time to set aside the order recording satisfaction, is a sound objection to the procedure of the lower Court in this case in amending its decree at the stage when the respondent applied for amendment. I also think that this application should have been rejected on the ground that it involved a substantial alteration of the terms upon which the land was to be conveyed.

It is contended that, because the lands were found to measure 1,650 square feet, the price necessarily had to be varied after the rate had been fixed at Rs. 1,100 per ground. In answer to this contention the appellant stated in his counter-affidavit that the land measured only 1,386 square feet. The Judge has not decided in his order now appealed against which figure is correct. He only says "If the land is 1,650 square feet the plaintiff is entitled to Rs. 756-4 0". Moreover, the method by which the sum given in the decree was arrived at is not of consequence after the decree has been executed without objection. If the defendant had known, before he took a conveyance for the land, that he would have to pay Rs 150 more than the sum ordered in the decree, it would have been open to him to have given up possession of this land and taken compensation under s. 3 of the Act instead of getting a conveyance executed by Court and registered. The plaintiff, having taken all that was due to him for costs and mesne profits, and having allowed this petition to be entered as disposed of and the decree as satisfied, cannot plead mistake and demand a larger sum as consideration for doing that which has been done already. Section 9, cl. (3) declares that "upon a final order being passed directing the conveyance of the land by the landlord to the tenant, the suit shall stand dismissed". The respondent's application may thus be regarded as an attempt to re-open a closed suit, and he is estopped from putting forward a plea that the decree is wrong by his conduct in not taking the objection earlier.

The appeal is, therefore, allowed with costs and the lower Court's order directing an amendment of the decree is quashed.

V. N. V.

R. L. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 142 OF 1925.

March 9, 1926.

Present:—Mr. Justice Walsh and Mr. Justice Dalal.

BABU LAL—DECREE-HOLDER—APPELLANT

versus

Musammat JANAK DULARI AND ANOTHER —OBJECTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Legal representative—Right to contest liability under decree in execution.

The question whether or not an alleged legal representative does or does not occupy that capacity so as to be bound by the decree, is one which is to be decided in the Execution Court. Such a determination does not offend against the principle that an Execution Court cannot go behind the decree. [p. 456, col. 1.]

Liladhar v. *Chaturbhuj*, 21 A. 277; A. W. N. (1899) 64; 9 Ind. Dec. (N. S.) 885, distinguished,

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(2) 88 Ind. Cas. 396; 23 A. L. J. 518; L. R. 6 A. 423 Civ.; A. I. R. 1925 All. 556.

(3) 49 Ind. Cas. 948.

(4) 18 A. 106; A. W. N. (1895) 240; 8 Ind. Dec. (N. S.) 716.

(5) 12 M. L. J. 96.

Khuman Singh v. *Makhan Singh*, 5 A. L. J. 550; A. W. N. (1908) 92 and *Jagar Nath Singh* v. *Sheo Ghulam Singh*, 1 Ind. Cas. 704; 31 A. 45; A. W. N. (1908) 288; 5 A. L. J. 745, referred to.

First appeal from an order of the Second Subordinate Judge, Cawnpore, dated the 13th May 1925.

Mr. *Binode Behari Lal*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—We are of opinion that this appeal fails. The point is a simple one. One Maheshi Lal left a widow surviving him, who executed two mortgages under circumstances which are not known, and which have never been investigated upon the question whether the loan made by the widow was either for legal necessity, or for some other purpose which by Hindu Law binds the estate. The mortgagee shortly before the death of the widow sued her and obtained a decree for sale On the death of the widow, or some little time afterwards, he applied for execution, and sought to join, or bring on the record, two daughters of the deceased widow and of their father, the deceased Maheshi Lal, on the ground that they were the legal representatives of the deceased widow. They objected Their objection took the obvious form that they were not the legal representatives of their deceased mother because there was nothing to represent. They were the legal representatives, or reversioners, of their deceased father, and the decree against the widow could have no more binding effect than the mortgage contract which she had entered into in her capacity as a Hindu widow with a Hindu widow's estate. The Munsif rejected this objection taking the view that they were the legal representatives of the widow and that in questioning whether the decree was binding upon the estate in the hands of the reversioners they were seeking to go behind the decree in the Execution Court. On an appeal brought to the Subordinate Judge this view was overruled, and the Subordinate Judge has explained the law in a very clear and able judgment, holding that in substance the decision of the First Court really begged the whole question, and that the daughters were entitled to contest the view in the Execution Court that they were legal representatives of their deceased mother, inasmuch as it had never been decided whether the mortgage, or the decree based thereon, bound the whole estate, or anything more than the interest of the Hindu widow, and he remitted the case to enable that question to be decided.

With regard to the contention that the daughters are seeking to go behind the decree it should be observed, that this is not the case. What they are seeking to do is to interpret the decree, or in other words to ascertain whether the decree is such as to bind the whole estate, or whether it only bound the interest of the widow. That question has never been determined. For one reason, the reversioners were not made parties to the suit in which the decree was passed, and, therefore, unless the widow herself chose to raise the question which she was not very likely to do, it would not arise at all, and, therefore, the fundamental question, namely, whether the contract was such as to bind the whole estate or not when it was originally made by the widow, has never been determined, and it would be contrary to all principles of law and justice if the Courts were to give a wider interpretation and operation to a decree than the contract upon which it was based.

The appellant before us relied upon the decision in *Liladhar* v. *Chaturbhuj* (1) but the decision in that case turned upon a very narrow question. The objectors in that case disputed their liability as judgment-debtors, not having resisted an order bringing them upon the record as legal representatives of the deceased judgment-debtor, and the case decides nothing more than the well-known principle that a judgment-debtor, or his legal representative, cannot go behind the decree, or dispute the validity of a contract upon which a decree has been passed. That authority was clearly explained in *Khuman Singh* v. *Makhan Singh* (2) a case which certainly should have been, but which appears not to have been published in the authorised Law Reports but it should be observed with regard both to this case, and to the preceding one to which we have already referred, that these decisions were under the old law as provided by s. 244 of the Code of 1882 and, therefore, have little or no application to the legal position to day. The opinion was expressed in those cases, and it was definitely held in *Jagar Nath Singh* v. *Sheo Ghulam Singh* (3) that a suit might be brought by a reversioner disputing the operation of the decree where it was contended that it bound the whole estate, and that the old s. 244 constituted no bar. But the old s. 244 has been altered and the provisions of s. 47 of the present Code make it quite clear that the question whether or not an alleged legal representative does or does not occupy that capacity so as to be bound by the decree, is one which is to be decided in the Execution Court. That is precisely the question raised by this appeal. We repeat that it does not offend against the principle that an Execution Court cannot go behind the decree. The question raised in this and cognate cases is, what is the true interpretation of the decree, and what is its operative effect and in order to decide that question it is necessary to investigate in the case of a Hindu widow the circumstances under which the contract was entered into upon which the decree is based.

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(1) 21 A. 277; A. W. N. (1899) 64; 9 Ind. Dec. (N. S.) 885.

(2) 5 A. L. J. 550; A. W. (1908) 92.

(3) 1 Ind. Cas. 704; 31 A. 45; A. W. N. (1908) 288; 5 A. L. J. 745.

We, therefore, dismiss the appeal with costs in this Court on the higher scale.

R L. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 108 OF 1925.
December 16, 1925.
Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Ramesam.

THE OFFICIAL ASSIGNEE OF MADRAS —DEFENDANT No. 1—APPELLANT
versus
A. RAMALINGAPPA AND OTHERS— DEFENDANTS Nos. 5 AND 6—RESPONDENTS.

Letters Patent (Mad.), cl. 15—Order transposing defendant as plaintiff—Judgment—Appeal.

A determination, whatever it may be called, which has the effect, whether on a technical ground or on the merits, of putting an end to the proceedings as regards the particular people or *in toto* is a judgment within cl. 15 of the Letters Patent and is appealable but if the pronouncement leaves the suit free to go on, then it is not a judgment within the meaning of the clause. [p. 457, col. 1.]

An order of a Judge of the High Court, on the Original Side transposing a person from the position of a defendant to that of a plaintiff is not a judgment under cl. 15, Letters Patent, and is, therefore, not appealable. [p. 457, col. 2.]

Tuljaram Row v. *Alagappa Chettiar*, 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1, considered.

Appeal against the interlocutory order made on the 15th September 1925 by Mr. Justice Srinivasa Iyengar in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, on an application in C. S. No. 395 of 1922.

Messrs. *Grant* and *Greatorex*, for the Appellant.

Messrs. *K. Rajah Iyer* and *V. Ramaswamy Iyer*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—The preliminary point is taken in this case that no appeal lies because the pronouncement appealed against was not a judgment but an order. The words have been the subject of great controversy in these Courts and I certainly do not propose to attempt to go through the welter of conflicting decisions with many of which I may say I do not in the least agree. It seems to me that the matter is left in a state in which all that this Court can do is to take the principle underlying the Full Bench case in *Tuljaram Row* v. *Alagappa Chettiar* (1) and apply it as best as it can to the actual matter before it. In this case the learned Judge directed that certain persons who appeared in the first instance on the record as defendants should be added as plaintiffs, the second plaintiff having given up his cause of action and thereby adversely no doubt affected the position of the defendants who were transposed, because, if he obtained a decree, in the working out of that decree they might have their rights affected. However, that is a question on the merits which really does not arise. The learned Chief Justice, Sir Arnold White laid down the following test in the case cited above *Tuljaram Row* v. *Alagappa Chettiar* (1) and if I may respectfully say so, I think he very wisely guarded himself from setting up a too *procrustean* bed in the language that he adopted. In laying down the principle for Courts to work out on the facts of each case he says "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application in which it is made is, to put an end to the suit or proceeding so far as the

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(1) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1.

Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

Then later on he says this and I respectfully agree with it:

"I think the decision may be a judgment for the purposes of the section though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding."

Applying that and endeavouring as best as I can to see what is its true application, I think it is this, that a determination, call it what you will, which has the effect, whether on a technical ground or on the merits of putting an end to the proceedings as regards the particular people or *in toto* is a judgment and is appealable, but, if the pronouncement leaves the suit free to go on, then it is not a judgment within the meaning of the clause. In my opinion, a distinction may be drawn which unfortunately has not been, between the grant and the refusal of leave to sue. It seems to me that it may well be said that refusing leave to sue is a final determination of the matter against the proposed plaintiff. Similarly in a case where a Court held that it had no jurisdiction to entertain the suit, I make no doubt that these Courts would accept that in accordance with the decision in *Tuljaram Row* v. *Alagappa Chettiar* (1) as being a final determination. But it seems to me that, if the effect of the order is to allow the proceedings to go on, it is impossible to say that it satisfies the test laid down by Sir Arnold White in the Full Bench case. I do not desire to multiply illustrations, because it is much better to leave these things to be dealt with as they arise. I have, therefore, contented myself with what appears to me to be reasonably clear illustration one way or the other. Looking at this order, its effect was to allow the suit to go on for determination on the merits and I am utterly unable to see that the order of transference of these persons from the position of defendants to that of plaintiffs was in any way a decision the effect of which was to put to an end to the suit or proceeding. In my opinion, therefore, without attempting to lay down any different test to that laid down by my learned predecessor in *Tuljaram Row* v. *Alagappa Chettiar* (1), I think it is not a case which is on the line. It is a case where any person applying ordinary language would without hesitation say that this was an order and not a judgment. I am, therefore, of opinion that no appeal lies and that this appeal must be dismissed with costs.

Ramesam, J.—I agree. The state of the case-law has been aptly described by my Lord and having regard to it, I will not attempt any definition of the word "judgment." I will only say this, that I am not prepared to say that every order on a contested petition is a judgment. The line dividing judgments from orders must be drawn somewhere short of this. Having regard to the fact that in the case before us no substantial right of the defendants has been adversely affected by the order under appeal, I would say that it does not fall on the judgment side of the line. Beyond this I make no further attempt.

V. N. V. *Appeal dismissed.*
R. L.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 560 OF 1925.
March 16, 1926.
Present :—Mr. Justice Campbell.
TEJU—PLAINTIFF—PETITIONER
versus
RALLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 3—Limitation urged for first time in appeal.

Question of limitation should not be allowed to be raised for the first time in appeal where its determination requires an investigation into facts to see whether a particular payment was made in such a way as to extend time.

Petition for revision of a decree of the Senior Subordinate Judge, Hoshiarpore, dated the 14th July 1925, reversing that of the Subordinate Judge, Fourth Class, Dasuya, District Hoshiarpore, dated the 11th February 1925.

Lala *Fakir Chand*, for the Petitioner,

JUDGMENT.—In this case the decree of the Trial Court against the surety Ralla was practically a consent decree. Ralla admitted his liability as surety but pleaded an additional payment of Rs. 50 in addition to the payment of Rs. 10 admitted in the plaint. The plaintiff accepted the statement that Rs. 50 had been paid and a decree was passed accordingly. Ralla then appealed and set up for the first time the question of limitation.

The lower Appellate Court allowed him to do so and decided in his favour. The question, however, required for its determination an investigation into the facts to see whether either the payment of Rs. 10 which was said to have been made in December 1923 or that of Rs. 50 of which the date is not stated, were made in such a manner as to extend time under s. 19 or s. 20 of the Indian Limitation Act. The plea should not have been enteretained.

I accept the petition, set aside the order of the lower Appellate Court, and restore the decree of the first Court. The petitioner will have his costs here and in the lower Appellate Court.

R. L. *Petition accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 745 OF 1923.

November 3, 1925.

Present :—Mr. Justice Venkatasubba Rao.

KANDADA THIRUVENKATA CHARLU AND OTHERS—PLAINTIFFS —APPELLANTS

versus

SHAIK ALTOO SAHIB—DEFENDANT —RESPONDENT.

Inam—*Service* inam, *resumption of—Nature of service* inams—*Incidents of service—Presumption of grant in lieu of wages, permissibility of—Right of resumption—Burden of proof*—Mudam *service, duties of.*

To determine whether a grant of a service *inam* land is resumable or not, regard must be had to the nature of the tenure, whether the grant was made in lieu of wages for service or whether it was an absolute grant subject to the condition of the performance of the service. In grants of the former description, the relation between the grantor and the grantee is that of master and servant, and the grant may be resumed on the services being dispensed with. In a grant of the latter description, *i.e.*, one burdened with service, it is an absolute grant with a condition annexed to it, namely, the rendering of service. In the absence of provision to the contrary it is only on breach of that condition and on the grantee committing default in the performance of that service that the grantor becomes entitled to resume the grant. [p. 459, cols. 1 & 2.]

Where there is a grant in writing and it is produced, on a construction of it will depend the nature of the tenure, whether the grant was made in lieu of wages or was burdened with service. But where, either the original grant is not in writing or in any event is not before the Court, the nature of the tenure can be determined only on the evidence given and the facts and circumstances of each case. [p. 459, col. 2; p. 460, col. 1.]

When the question arises as to the class to which a specified grant belongs, there is no presumption that the grant was one made in lieu of wages for services. Nor can such a presumption arise even where it is proved that the services are personal. [p. 460, col 1.]

The burden of proving the right of resumption lies on a plaintiff who seeks to resume. [p. 461, col. 2.]

Presumptions are not made at random. In order to raise a presumption some connection must be shown to exist between the fact proving and the fact to be proved, which warrants an inference from the one to the other when the two are brought into proximity. [p. 460, col. 1.]

The duties of *mudam* service consist in looking after the harvest of the crops, watching the heaps of harvested produce, placing seals upon them, preventing removal of cow-dung from waste lands and general supervision of harvest operations. [p. 459, col. 1.]

[Case-law reviewed.]

Second appeal against a decree of the Court of the Subordinate Judge, Chittor, in A. S. No. 160 of 1921 (A. S. No. 5 of 1921, District Court, Chittor), preferred against that of the Court of the District Munsif, Tirupati, in O. S. No. 402 of 1919.

Messrs. *C. S. Venkatachariar* and *N. S. Rangaswami Iyengar*, for the Appellants.

Mr *B. C. Sankara Narayana*, for the Respondent.

JUDGMENT.—The plaintiffs who are the *inamdars* of Lupuchendrapet seek to resume the plaint land which was granted for *mudum* service and to recover possession of it with mesne profits. The defendants contend that the land has been in the possession of their family for about 150 years and that they are entitled to enjoy it so long as they are able and willing to perform the duties of *mudum*, that there has been no default and that the land cannot, therefore, be resumed.

The District Munsif has found that the land is not resumable and the Subordinate Judge has confirmed this finding.

The plaintiff has filed the present appeal. The lower Appellate Court on a review of the whole evidence has come to the conclusion that the grant cannot be resumed, This is what the learned Judge says:—"I am not satisfied on the evidence that the *iman* is resumable."

The appellant asks me to reverse this finding.

The learned Judge has also found that there has been no default on the part of the defendants and the correctness of this part of his judgment has not been questioned.

In arriving at his conclusion that the grant is not resumable, the Subordinate Judge has relied to some extent upon the conduct of the plaintiffs as disclosed in various proceedings and upon the incongruous statement which they made from time to time. He has also relied upon the fact that the defendants have expended money and dug a well. Further, the defendants and their ancestors have been long in possession and the second witness for the plaintiff who is 70 years old has admitted that the grant was made before his time.

Mudam's duties are said to consist in looking after the harvest of the crops, watching the heaps of harvested produce, placing seals upon them, preventing removal of cow-dung from waste lands and general supervision of harvest operations. The first witness for the plaintiff admits that the *inamdars* as well as the *ryots* are interested in the performance of these duties. I need not go more minutely into the evidence. Although the Subordinate Judge refers to certain authorities which contain observations regarding onus of proof, he has not himself decided the case with reference to any presumptions. His finding is the result of his appreciation of the evidence independent of the rule of onus of proof. It has not been shown that his finding is wrong or vitiated by any mistake and I must, therefore, accept it in second appeal.

Regarding the nature and incidents of service tenure and the presumptions that may be drawn in dealing with such tenures, there has been a fairly long argument before me. I shall, therefore, proceed to discuss these points. The finding that the land is not resumable implies that the grant was burdened with service.

To determine whether the grant is resumable or not regard must be had to the nature of the tenure. Was the grant made in lieu of wages for service or was it an absolute grant subject to the condition of the performance of the service. First, dealing with grants of the former description, the relation between the grantor and the grantee is that of master and servant. Instead of remunerating the servant by wages the master grants land to him and treating the rent payable as equivalent to wages, the grantor makes a remission of the rent. The contract, however, is, in essence, one of service and as the master can on terminating the employment cease to pay wages, in like manner he may resume the grant on dispensing with services. The servant cannot compel his master to continue to employ him on the score that he is willing and able to serve.

Now let me turn to the second description of grants, those burdened with service. The position here is that there is an absolute grant but a condition is annexed to it. On the breach of the condition, the grant may be resumed. The condition being the rendering of the service, if the grantee commits default in its performance, the grantor becomes entitled to resume the grant. The mere fact that the grantor no longer requires service does not give him the right to resume the grant. Whether he requires the service or not is immaterial, the only question being whether there has been default on the part of the grantee.

It is also recognised that in the case of a grant burdened with service, it may be made a condition of the grant that it should cease when the services are no longer required, But in the absence of a provision to that effect, land held under that grant is not resumable unless the grantee commits default. This does not affect the main division of the grants under two headings, namely, those burdened with service and those made in lieu of wages: see *Forbes* v. *Meer Mohomed Tuquee*(1), *Lakhamgavda* v. *Keshav Annaji* (2) and *Yellava Sakreppa* v. *Bhimappa Gireppa* (3).

Where there is a grant in writing and it is produced, on a construction of it will depend the nature of the tenure, whether the grant was made in lieu of wages or was burdened with service. But, where, as in the present case, either the original grant was not in writing or in any event is not before the Court, the nature of the tenure can be determined only on the evidence given. The Subordinate Judge agreeing with the Trial Court has found on the evidence that the grant is not resumable. Where an inference is drawn from certain facts or circumstances, it must be shown that the lower Appellate Court has made some mistake before its finding can be set aside in second appeal. I am not satisfied that the appellant has succeeded in showing that the finding is liable to be reversed.

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(1) 13 M. I. A. 438; 14 W. R. P. C. 28; 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R 614.

(2) 28 B. 305; 6 Bom. L. R. 364.

(3) 28 Ind. Cas. 12; 39 B. 68; 17 Bom. L. R. 128.

The appellant's learned Vakil has contended that this appeal ought to be decided with reference to two presumptions, one of them broad, the other more limited. When the question arises as to the class to which a specified grant belongs he contends that it should be presumed that the grant was one made in lieu of wages for services. Putting it in other words, the grantor has only to come to Court and show that it is a service grant. Nothing further need be done by him and the Court is bound to presume that the grant was in lieu of wages. The next presumption which he asks should be drawn is, that when the grantor proves that the services are personal, the Court should infer that the grant was made in lieu of wages. The range of this presumption is somewhat more limited for, this assumes that the grantor has at least to prove one fact, do nothing more and the Court will at once presume that the grant is resumable.

For making either of these presumptions, I do not believe there is the slightest ground. Presumptions are not made at random. Some connection must be shown to exist between the fact proving and the fact to be proved, which warrants an inference from the one to the other when the two are brought into proximity. On many and varied circumstances may depend what kind of grant a man may choose to make. To presume at the very outset of a case that the grant is one in lieu of wages, does not seem to be in conformity with reason.

The second presumption referred to is, in my opinion, also opposed to reason. Having regard to the springs of human action, can it be said that a man is less likely to make an absolute grant burdened with personal service, or again can it be said that when services are of a public nature there is any strong impelling motive for not making the grant in lieu of remuneration for those services? There exists thus on principle no ground for making either of the two presumptions. I am also satisfied that this is the position established by authority.

Before discussing the cases on the point, I should like, in order to remove a confusion that prevails, to refer to a presumption that is permissible and has often to be drawn. When a *zemindar* seeks to resume a grant, the question arises, is the land included in the *zemindari*? This will depend upon whether the revenue from the land was or was not included in the assets of the *zemindari* at the time of the settlement. If it was included, the right of resumption would be with the *zemindar*, if not, he would not have the right. If there is no direct evidence to show whether the revenue was or was not included, you may turn to the nature of the services as they may furnish a clue. If the services were personal to the *zemindar*, it may reasonably be assumed that the Government would not have exempted the land from the revenue but would have treated it for the purpose of the settlement as revenue paying land. The reason is obvious. It was the *zemindar* that had the benefit of the services and there would be no reason why the Government should not assess the land to the revenue for the services were after all an equivalent of the rent. A presumption is, therefore, made that when the services are proved to be personal, the right of resumption, if it exists vests in the *zemindar*. This is the presumption that decided cases very often refer to and this presumption and its implication are misunderstood and some loose thinking has, I am afraid, given rise to some laxity of expression.

I shall now examine the cases on the point. *Forbes* v. *Meer Mahomed Tuquee* (1) is one of the earliest and most authoritative of the decisions. The *zemindar* sued for the resumption of a *jagir*. Their Lordships of the Judicial Committee dealt with two questions (1) regarding the nature of the tenure on which the lands were held; (2) whether the *jagir* lands were made the subject of assessment at the settlement. Having held on the second point that the *jaghir* was included in the *zemindari* their Lordships proceed to ask the qusstion: "But is it a necessary consequence of this finding that the appellant is entitled to resume these *jagir* lands?" They then observe that his right to do so must depend upon the nature of the tenure. They distinguish between the two categories of grant and conclude that the grant before them is one burdened with service. In the course of the discussion they observe that the grantees they were dealing with, were not the private servants of the *zemindar*. But they do not anywhere say that if the services were private or personal, there would arise a presumption that the grant was made in lieu of wages. On the contrary, in the concluding paragraphs of their judgment, they remark that, it being emphatically upon the *zemindar* who is seeking to dispossess or to rack rent the grantees to make out a clear title to resumption, he, in their opinion, failed to discharge the onus and his suit was, therefore, dismissed. This case, therefore, far from recognising the rule of presumption contended for by the appellant, clearly lays down that the rule is the other way, namely, that the onus of proof is upon the grantors claiming resumption.

Lakham Gavda v. *Keshavannaji* (2) is a suit by an *inamdar* to resume lands alleged to be held on service tenure. Jenkins, C. J., and Chandavarkar, J., assume for the purpose of their judgment that the tenure was connected with services and proceed to examine if the plaintiff was entitled to resume. They refer to *Forbes* v. *Meer Mahomed Tuquee* (1) and the classification of grants adopted in that case, and in the end dismiss the plaintiff's suit observing that it lay upon him to make out that the combination of the grantee's interest and his obligation to serve was such, as to permit of resumption. This case follows the Privy Council decision and holds that the onus is upon the party claiming the right to resume.

A contention similar to the one advanced by the appellant was raised in *Yellava Sakreppa* v. *Bhimappa Gireppa* (3). The learned Judges rejected it saying that there is no presumption that where the services are personal, the grantor has a right to resume the land. They say that this is the Bombay Law, though they add very guardedly, that the law is possibly different in Calcutta and Madras. This does not show that the law is in fact different in these Provinces but it clearly shows that in Bombay such a presumption is not drawn.

The question again arose in *Chandrappa* v. *Bhima Dassappa* (4). Beaman, J., refuses to recognise any such distinction between public and private services remarking that the distinction attempted is vicious.

In *Baslingappa* v. *Chandrappa* (5) it was again held that the onus is upon the plaintiff seeking to resume.

With reference to the observation in *Yellava Sakreppa* v. *Bhimappagireppa* (3) that possibly the law in Madras is different, I must point out that *Lakham Gavda* v. *Keshavannaji* (2) has been followed in the Province in *Ramasami Pattar* v. *Lakshmi Kuarassiar* (6), and that *Yellava Sakreppa* v. *Bhimappa Gireppa* (3) has been referred to and followed by Seshagiri Aiyar, J., in *Kamaravutu Mrutyunjayadu* v. *Rajah of Pittapuram* (7). It cannot, therefore, be said that the Madras Law is different from the Bombay Law on this point.

Radha Pershad Singh v. *Budhu Dashad* (8) relied on by the appellant proceeds, with all respect, on a misconception. In it, a two-fold classification of grants is made. First, it is said there is a distinction between a grant for services of a public nature and a grant for services of a private nature. In the former, the *zemindar* cannot resume while in the latter he may. Secondly, it is said, that there is a distinction between grants of an estate burdened with some service and grants in lieu of wages. This twofold classification is, in my opinion, unnecessary and loses sight of the real principle involved. The main division as pointed out by Beaman, J., in *Chandrappa* v. *Bhima Dassappa* (4) is that of grants burdened with service and that of grants by way of wages for service. Each of these two main categories may again be sub-divided according to the nature of the services, personal or public. The judgment in *Radha Pershad Singh* v. *Budhu Dashad* (8) loses its value by reason of this mistake and I am not prepared to agree with the view that when services to be rendered are personal, the grantor has a *prima facie* right to resume the grant. It further seems to me that *Radha Pershad Singh* v. *Budhu Dashad* (8) is opposed to the authority of the Privy Council in *Forbes* v. *Meer Mahomed Tuquee* (1).

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(4) 47 Ind. Cas. 330; 43 B. 37; 20 Bom. L. R. 779.

(5) 35 Ind. Cas. 860; 18 Bom. L. R. 695.

(6) 72 Ind. Cas. 627; 17 L. W. 514; (1923) M. W. N. 343; 32 M. L. T. 399; A. I. R. 1923 Mad. 572.

(7) 33 Ind. Cas. 901; 30 M. L. J. 132; (1916) M. W. N. 279.

(8) 22 C. 938; 11 Ind. Dec. (N. S.) 622.

If the Madras cases are examined, they do not support the appellant's contention.

The sentence in *Sanniyasi Razu* v. *Salur Zemindar* (9) that is relied on reads thus:—"It is ordinarily competent to a *zemindar* to dispense with such services and to resume the tenure". This may only mean that if the grant is in lieu of wages it may ordinarily be resumed. There is nothing to show that the learned Judges meant to say that if the services are personal, they would presume that the grant was one made in lieu of wages. I cannot regard this as an authority for the proposition contended for.

In *Mahadevi* v. *Vikrama* (10) the following passage is relied on:

"Now it is admitted, on behalf of the appellants, that, if the land was held on service tenure, it is resumable at the will of the *zeminder* for the time being in possession." What is the tenure that is referred to in the above passage? All lands held on service-tenure are not resumed.

There are two lands of service-tenures. The learned Judges were presumably referring to grants made in lieu of wages. The words literally taken mean that both kinds of grants are resumable which, of course, is not the case. I am unable to see how this supports the appellant's contention.

In *Sri Rajah Sobhnadri Appa Rao Bahadur* v. *Sri Rajah Venkatanarasimha Appa Rao Bahadur* (11) there is an observation at page 408 that it is for the grantee to make out that the land is not resumable. This case went up to the Privy Council and the decision of the Madras High Court was confirmed. But their Lordships of the Judicial Committee while agreeing with the conclusion of the learned Judges, observe that their judgment does not imply that they adopt in entirety their reasoning. This is an important reservation and must not be lost sight of.

In *Vadisapu Appandora* v. *Vyricherla Veerabhadra Raju Bahadur* (12) there is a passage at page 408 to the effect that in this Presidency there is a series of decisions and that where a land granted on service tenure was included in the assets of the *zemindari* at the time of the settlement there is a presumption that the *zemindar* can resume. This only means that if the question is between the *zemindar* and the Government as to who has the right to resume, the fact that the land is included in the *zemindari*, indicates that the right vests in the *zemindar*. This passage does not help the appellant. There is another passage page 409* where the learned Judges say that in the case of a grant subsequent to Permanent Settlement to which personal services are attached, the burden of proving that it is not resumable is on the grantee. In the first place, with all respect, I cannot accede to this proposition. Secondly what difference does it make in regard to the present question, whether the grant was prior to or subsequent to the Permanent Settlement.

There is one other case cited by the appellant to which I must refer. In *Gajapathi Maharaju Garu* v. *Sondi Prahaladha Bissoyi Ratno* (13) Ayling, J., observes at page 180† that the services are of a personal character and for that reason the *inams* are resumable by the *zemindar*. This observation if I may say so with respect, is not quite accurate and I may point out that in a later case the same learned Judge expresses his view somewhat very differently. In *Mrutyunnjayadu* v. *Raja of Pittapuram* (7) Ayling, J., differing from Sadasiva Aiyar, J., observes: "I can find no authority for holding that the nature of the services makes any difference in the case of such a grant, though in the case of a service grant, where lands are held and enjoyed in lieu of wages, the power of arbitrary resumption would largely turn on whether the services were private or public."

By reason of the difference of opinion there was a Letters Patent Appeal and Seshagiri Iyer and Phillips, JJ., held, Sir John Wallis, C. J., dissenting, that the grant was a grant burdened with service and was not resumable. The judgment of Ayling, J., was upheld. Sashagiri Iyer, J. at page 144‡ observes:—

"The next contention is that as the service was personal it was open to the *zemindar* to dispense with it and to resume the land. Here again, it is not in every case of personal service that the grant can be resumed.

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(9) 7 M. 268; 2 Ind. Dec. (N. S.) 771.

(10) 14 M. 365; 5 Ind. Dec. (N. S.) 255.

(11) 26 M. 403.

(12) 12 Ind. Cas. 487; (1911) 2 M. W. N. 406; 10 M. L. T. 391.

(13) 21 Ind. Cas. 833; (1914) M. W. N. 179; 14 M. L. T. 562.

*Page of (1911) 2 M. W. N.—[*Ed.*]

†Page of (1914) M. W. N.—[*Ed.*]

‡Page of 30 M. L. J.—[*Ed.*]

It is thus clear that both on principle and on authority, neither of the presumptions contended for by the appellant can be accepted. The plaintiff who seeks to resume must make out his title.

As the appeal has been argued at some length, I have reviewed the law and shown what, in my opinion, the right principle is. But as I have said, the lower Appellate Court has not considered the case with reference to any rule of onus of proof, but has, on the other hand, arrived at a finding on a consideration of the entire evidence. Whether my view is correct or not, it follows that the judgment of the Subordinate Judge must stand. The second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*
R. L.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1713 OF 1924.
March 15, 1926.
Present:—Mr. Justice Sulaiman and
Mr. Justice Mukerji.
DEONATH SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
TILAKDHARI SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Custom of pre-emption, finding as to,* inter partes *in previous suit, effect of—One of parties minor in previous litigation—Variation in custom, right to prove.*

A finding in a previous suit *inter partes* as to the existence or non-existence of a custom of pre-emption is binding on the parties in a subsequent suit subject only to the condition that it is open to the either party to show in the subsequent suit that the custom has ceased to exist or has in any other way been abandoned. [p. 463, col. 2.]

The mere fact that one of the parties to the subsequent suit was a minor in the previous litigation does not take away from the binding force of the finding in the previous suit. [*ibid.*]

Second appeal against a decree of the District Judge, Azamgarh, dated the 31st of May 1924.

Mr. *P. L. Banerji,* for the Appellants.

Dr. *K. N. Katju* and Mr. *U. S. Bajpai,* for the Respondents.

JUDGMENT.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption. On a previous occasion Deoraj Singh for himself and acting as guardian for his nephew Udai Narain Singh transferred a share in this same village to the present vendees Tilakdhari Singh and Amrat Singh. The plaintiff No. 1, and the father of the plaintiffs Nos. 2 and 3, brought a suit for pre-emption and obtained a decree. In that suit it was found against the vendees that there was a custom of pre-emption in this village under which the vendors were bound to make the offer to the co-sharers in the first instance. About the same time the minor Udai Narain Singh through another next friend brought a suit for cancellation of the sale-deed on the ground of want of legal necessity. The decree in the suit was a conditional decree and the document was to be set aside on payment of a part of the sale consideration. The property having gone back to the family the same has now been sold by Deoraj Singh and Udai Narain Singh who is now a major, in favour of the same vendees. The Courts below have held that the finding in the previous suit between the parties does not operate as *res judicata.* They have held that in view of the interpretation now put on *wajib-ul-arzs* of a similar nature by a recent Full Bench of this Court the evidence is not sufficient to establish the custom.

In our opinion the finding in the previous suit being *inter partes* must bind the present defendants. The question of the existence or non-existence of a custom of pre-emption is not a pure question of law but is a mixed question of law and fact which depends on evidence which may be oral or documentary. If a finding is once arrived at that ought to bind the parties to that litigation, of course it would be open to either party at a subsequent stage to show that the custom has ceased to exist or has in any other way been abandoned.

The learned Advocate for the respondents has argued before us that inasmuch as Udai Narain Singh was a minor on the previous occasion the vendors are not the same. With this contention I do not agree. In the pre-emption suit Udai Narain Singh was impleaded under the guardianship of a person who was appointed by the Court, and he was bound by the finding arrived at in that litigation. Next the defendants vendees claimed to derive title through Udai Narain Singh on the previous occasion and they claimed to do the same on this occasion. It is, therefore, difficult to hold that they are defending this case on a title derived from a different person. I am, therefore, of opinion that the finding in the previous suit as between plaintiff No. 1 Deonath Singh and the two vendees is *res* *judicata.* There is no evidence to show that this custom has fallen into disuse. The learned Advocate for the respondents has drawn our attention to the fact that after the institution of the suit the recent pronouncement of a Full Bench in *Randhir Singh* v *Rajpal Miser* (1) has thrown a doubt on the previous view. That case, however, did not come from this particular village and there is nothing to show that the decision of the Full Bench became known to the co-sharers and they put an end to the custom in this village before the decree was passed by the first Court.

The learned Advocate for the appellants concedes that it is difficult to hold the other plaintiffs can take advantage of this finding on the ground that their father was a party to the previous litigation inasmuch these plaintiffs cannot be said to claim title through their father. I would, therefore, allow the appeal.

Mukerji, J.—I entirely agree. I wish to say one word on the question whether Udai Narain Singh is bound by the previous judgment in the pre-emption case.

Udai Narain Singh was made a party although he was a minor. *Prima facie* the judgment would bind him and for the binding character of the judgment it is not necessary that Udai Narain Singh should have been an adult at the date of the suit. Udai Narain Singh could have escaped the binding effect of the judgment by showing that he was not represented by a proper guardian and that, therefore, he was not at all represented in the suit. He has not taken any such plea and such a plea would be one of fact. I should, therefore, have no hesitation in holding that the pre-emption suit is as much binding on Udai Narain Singh as on Deoraj Singh.

By the Court.—We allow the appeal of Deonath Singh alone and setting aside the decrees of the Courts below remand the case to the Court of first instance through the lower Appellate Court for disposal of the remaining issues according to law. The suit of the plaintiffs Nos. 2 to 4 will stand dismissed. The plaintiffs Nos. 2 to 4 will bear their own costs and will pay to the contesting defendants half of their costs incurred so far. The costs in this Court will include Counsel's fees on the higher scale.

R. L. *Appeal allowed.*

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(1) 81 Ind. Cas. 25; 22 A. L. J. 561; 46 A. 478; A. I. R. 1924 All. 321 L. R. 5 A. 151 Civ.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATIONS NOS. 87 AND 88 OF 1925.

September 22, 1925.

Present:—Sir John Guy Rutledge, KT., Chief Justice, and Mr. Justice Brown.

MA THAN AND OTHERS—APPLICANTS

versus

MA KYIN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 109, 110—Appeal in High Court dismissed in default—Appeal to Privy Council—Substantial question of law—Inferior wife, rights of, under Buddhist Law.

Leave to appeal to Privy Council cannot be granted where the appeal in the High Court has been dismissed for want of prosecution.

Buddhist Law regarding the rights of a lesser or inferior wife when living apart from her husband having been established by a series of decisions is not a substantial question of law within the meaning of s. 110, C. P. C.

Maung Tha Dun v. *Ma Thein Yin*, 73 Ind. Cas. 1044; 1 R. 1; A. I. R. 1924 Rang. 37, *Ma Thein Yin* v. *Maung Tha Dun*, 79 Ind. Cas. 501; 2 R. 62; 2 Bur. L. J. 292; A. I. R. 1924 Rang. 105, *Ma Gywe* v. *Ma Thi Da*, 2 U. B. R. (1892-96) 194, *Ma U Byu* v. *Ma Hnyin*, 2 U. B. R. (1897-1901) 160 and *Shwe Ma* v. *Mi Me*, 12 Ind. Cas. 191; U. B. R. (1910-13) I, 114; 4 Bur. L. T. 235, referred to.

Mi Kin Gale v. *Mi Kin Gyi*, 8 Ind. Cas. 1169; U. B. R. (1910-13) 42 at p. 49; not followed.

Mr. *Burjorjee*, for the Applicants.
Mr. *Kyaw Din*, for the Respondents.

JUDGMENT.—These are two applications for leave to appeal to His Majesty in Council from the decisions of the Appellate Side of this Court passed in Civil First Appeals Nos. 183 and 187 of 1923.

The learned Advocate for the applicants admits that in the second of these applications Ma Pwa Yin's appeal was dismissed on the 7th of January 1924 for want of prosecution. In these circumstances it is obvious that leave to appeal cannot be granted to her in that case. She is, however, a respondent in Ma Than's appeal, and as such her claim was considered in the judgment from which an appeal to the Privy Council is sought. Consequently, if we grant the leave to appeal in the first of these applications, Ma Pwa Yin's status and claim would necessarily come up for consideration before their Lordships.

Admittedly, the decree sought to be appealed from affirmed the decree of the District Court. Consequently, under s. 110 of the C. P. C., the appeal must involve some substantial questions of law. It is admitted that the judgment in appeal followed the decisions of this Court reported as *Maung*

Tha Tun v. *Ma Thein Yin* (1) and *Ma Thein Yin* v. *Maung Tha Dun* (2).

For the applicants it is urged that these decisions revolutionized Burmese Buddhist Law in respect of the rights of a lesser or inferior wife when living apart from her husband and occasionally visited by him, and that in such circumstances it is only right and proper that a ruling should be obtained from the highest tribunal. We cannot agree that the rulings in question revolutionize Burmese Buddhist Law at all.

It is true that no lower Burma Ruling has been cited before us. But successive Upper Burma Rulings for about 30 years have been cited, and they are in general agreement with the principles enunciated by a Bench of this Court in *Maung Tha Dun* v. *Ma Thein Yin* (1) and *Ma Thein Yin* v. *Maung Tha Dun* (2). We need only refer to the Judicial Commissioner, Mr. Hodgkinson's judgment in *Ma Gywe* v. *Ma Thi Da* (3), the Judicial Commissioner, Sir H. Thirkell White's judgment in *Ma U Byu* v. *Ma Hnyin* (4) and the Judicial Commissioner, Sir George Shaw's judgment in *Shwe Ma* v. *Mi Me* (5). Some remarks by the Additional Judicial Commissioner, Mr. McColl, in *Mi Kin Gale* v. *Mi Kin Gyi* (6) would seem to indicate a different opinion, *i.e.*, "A wife who lives in a separate house from her husband is entitled or is not entitled to inherit according as she is a wife or a concubine." But a perusal of the facts of that case shows clearly that this is but an *obiter dictum* and not necessary for the decision arrived at. The decisions of this Court following, as they do, successive decisions of the higest Court in Upper Burma are, in our opinion, consistent with the law as stated in the Manukye Dhammathat, Vol. X, s. 42, and should be regarded as settled law. In these circumstances, we do not consider that we would be justified in certifying that the case involves a substantial question of law.

It is to be observed that though the application is made in the name of Ma Than, a lesser wife of the deceased Shwe Yin, she seems to have parted with all interest in the subject-matter of the suit by selling her rights to one Khorasany who similarly purchased the rights of Ma Pwa Yin. In these circumstances unless we were satisfied, as we are not, that a substantial point of law was involved, we would not be disposed to assist a gambler in litigation at the expenses of the legal heirs to the estate.

The applications are accordingly dismissed with costs five gold *mohurs* in each case.

R. L. *Applications dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 2271 OF 1925.
March 10, 1926.
Present:—Mr. Justice Kanhaiya Lal
and Mr. Justice Ashworth.
RADHA KISHEN AND ANOTHER—
DEFENDANTS—APPELLANTS
versus
Master SITAL PRASAD—PLAINTIFF—
RESPONDENT.

Contract Act (IX of 1872), s. 23—Pro-note for existing liability—Criminal liability as well as civil—Pro-note, legality of.

Where a *bona fide* debt exists and where the transaction between the parties involves a civil liability as well as possibly a criminal act, a promissory note given by the debtor executed for the debt constitutes a valid agreement. [p. 466, col. 2.]

Jai Kumar v. *Gauri Nath*, 28 A. 718; 3 A. L. J. 506; A. W. N. (1906) 212, followed.

Second appeal against a decree of the Additional Subordinate Judge, Muttra, dated the 15th September 1925.

Mr. *Panna Lal*, for the Appellants.

JUDGMENT.—This second civil appeal arises out of a suit brought by the plaintiff respondent on the basis of two *hundis*, both executed on the 6th July 1920, one for Rs. 400 and one for Rs 200. The defendant-appellant pleaded in defence that the *hundis* were without consideration and were executed in order to induce the plaintiff to stifle a prosecution pending against him for embezzlement. This defence was accepted by the Court of first instance. On appeal the District Judge of Muttra, remanded the case to determine whether at the date of the execution of the *hundis* there was any liability on the part of the defendant to pay the sum secured by the *hundis* to the plaintiff, and secondly whether the *hundis* were executed to induce the plaintiff to abstain from prosecution of the embezzlement case. The first Court found both these issues in favour of the defendant but the Additional Subordinate Judge has decided that there was existing a liability on the part of the defendant which served as consideration for the *hundis*, and that this being the case the fact, that the execution of the *hundis* operated to induce the plaintiff to stop the prosecution for embezzlement, was immaterial.

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(1) 73 Ind. Cas. 1041; 1 R. 1; A. I. R. 1924 Rang. 37.

(2) 79 Ind. Cas. 501; 2 R. 62; 2 Bur. L. J. 292; A. I. R. 1924 Rang. 105.

(3) 2 U. B. R. (1892-96) 194.

(4) 2 U. B. R. (1897-1901) 160.

(5) 12 Ind. Cas. 191; U. B. R. (1910-13) I. 114; 4 Bur. L. T. 235.

(6) 8 Ind. Cas. 1169; U. B. R. (1910-13) 42 at p. 49.

The facts of the case appear to be as follows. The defendant was occupying a building belonging to the plaintiff as a press and type-foundry. He became indebted to the plaintiff to the amount of Rs. 1,164 and in order to liquidate this debt he agreed to make over the machinery and fittings to the plaintiff for the nominal sum of Rs. 1,164.

He was, however, to continue to occupy the building and in addition to the rent due for such occupation, he was to pay a further sum for use of the machinery.

That this was the case is proved by two documents executed by the plaintiff and defendant respectively on the 4th of May 1919.

On the 30th of June 1920, the plaintiff lodged a criminal complaint against the defendant that he had wrongly sold and disposed of some of the machinery to a third party, some one living at Hathras. The 22nd July 1920 was fixed for trying the case. Before this date, namely, on the 6th July 1920, Rs. 480 appears to have been the amount calculated as depreciation of the total machinery by reason of the alienation to the man at Hathras.

Subsequently on the 12th October 1920, the remainder of machinery was sold to one Parsi Mal for Rs. 700, which was paid over to the plaintiff.

On these facts, it is contended by the appellants' Counsel that the Rs. 480, secured by their *hundi*, were merely money paid for the stifling of the criminal prosecution. With this suggestion we do not agree. The defendant was liable to make good to the plaintiff the value of any machinery wrongfully alienated by him when using that machinery as lessee of it from the plaintiff. It makes no difference that the plaintiff also was entitled to prosecute the defendant for embezzlement. The decision of the Allahabad High Court relied upon by the lower Court, *i. e.*, *Jai Kumar* v. *Gauri Nath* (1), appears to us to be applicable. "Where a *bona fide* debt exists, and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor executed for the debt constitutes a valid agreement." We have been referred to a decision of the Calcutta High Court by the appellants' Counsel, but that decision does not appear to have been based on facts in the slightest degree similar to the present one. It may be that the lower Appellate Court misconstrued the evidence, in its decision as to the existence of the liability, but the liability existed, we hold, for the reasons stated above. We, therefore, see no reason to interfere in second appeal with the decision of the lower Appellate Court and dismiss this appeal under O. XLI, r. 11, C. P. C.

R. L. *Appeal dismissed.*

(1) 28 A. 718; 3 A. L. J. 506; A. W. N. (1906) 212.

RANGOON HIGH COURT.

FULL BENCH.

CIVIL REFERENCE No. 7 OF 1925.

September 9, 1925.

Present:—Sir John Guy Rutledge, KT., Chief Justice, Mr. Justice Das, and Mr. Justice Brown.

THE COMMISSIONER OF INCOME-TAX, BURMA—

versus

MESSRS. STEEL BROTHERS & CO.—LTD.

Income Tax Act (XI of 1922), ss. 2 (4), 4 (1), 6, 42 (1)—Non-resident assessee, liability of, to income tax—Non-resident limited company in India engaged in manufacture and export of worked up goods and raw materials—Principles of assessment.

Under s. 42 (1), Income Tax Act, all profits or gains accruing or arising to a non-resident, whether directly, or indirectly, through or from any business connection or property in British India are deemed to be income accruing or arising within British India. [p. 481, col. 1.]

Rogers Pratt Shellac Co. v. *Secretary of State for India*, 83 Ind. Cas. 273; 52 C. 1; 40 C. L. J. 110; 28 C. W. N. 1074; A. I. R. 1925 Cal. 34, followed.

A limited Company was registered in London under the English Companies Act with its headquarters in London and was admittedly a non-resident of British India. It carried on large business operations in Burma in connection with rice, timber and cotton. It also had various rice mills, saw mills, cotton ginning mills and vegetable oil mills in Burma whereby commodities or raw material was worked up into forms suitable for use. The Company exported the material thus worked up as well as raw commodities without working them up in any way :

Held, (1) that in determining whether any income, profits or gains arise or accrue, it is not only the last stage of the accrual that has to be looked to but the previous stages also have to be taken into consideration and that, therefore, the mere fact that produce of the Company was sold in London and the money was received there did not prevent profits or gains accruing or arising or being deemed to accrue or arise in British India from being taxable under the Income Tax Act; [p. 481, col. 2]

Rogers Pratt Shellac Co. v. *Secretary of State for India*, 83 Ind. Cas. 273; 52 C. 1; 40 C. L. J. 110; 28 C. W. N. 1074; A. I. R. 1925 Cal. 34 and *Commissioners of Taxation* v. *Kirk*, (1900) A. C. 588; 69 L. J. P. C. 87; 83 L. T. 4, followed.

(2) that no distinction, so far as liability to income tax was concerned, could be drawn between profits on produce which had undergone some process of conversion or working up by the assessee in Burma, and profits on produce purchased by the assessee in Burma and exported in the same form as when purchased; [p. 481, col. 1.]

(3) that in arriving at the amount of profits liable to income-tax, a reasonable commission, agents' commission, should be allowed on goods exported and sold in London. [p. 482, col. 1.]

Rogers Pratt Shellac Co. v. *Secretary of State for India*, 83 Ind. Cas. 273; 52 C. 1; 40 C. L. J. 110; 28 C. W. N. 1074; A. I. R. 1925 Cal. 34 and *Commissioners of Taxation* v. *Kirk*, (1900) A. C. 588; 69 L. J. P. C. 87; 83 L. T. 4, referred to.

(4) that profits arising from contracts of insurance entered into by the Head Office in rice cargoes consigned to it by the Rangoon branch were not taxable in India; [*ibid.*]

(5) that commission earned by the Company through its export department on stores, etc., purchased and shipped from the United Kingdom to Burma could not be assessed to income-tax. [*ibid.*]

Reference made by the Commissioner of Income Tax, Burma, under the provisions of s. 66 (1) of the Indian Income Tax Act, 1922.

REFERENCE.—This is a Reference made on my own motion under s. 66 (1) of the Income Tax Act, 1922. The questions of law on which it is desired that the Hon'ble Judges of the High Court should give a decision have arisen in the course of an appeal preferred before me by Messrs. Steel Brothers & Company, Limited, against an assessment order of the Assistant Commissioner of Income Tax, Rangoon. The said assessment order was passed by the Assistant Commissioner in exercise of the powers of an Income Tax Officer with which he had been invested by an order passed under s. 5 (4) of the Income Tax Act, 1922. Against such an order appeal lies in accordance with s. 30 of the Act to the Commissioner of Income Tax.

2. The facts regarding the assessee and the assessment are set forth in the following paragraphs. Messrs. Steel Brothers and Company, Limited, are a limited Company registered in London under the English Companies Acts. The head-quarters of the business is in London. The Company claims to be, and it is admitted that it is, a non-resident of British India.

3. In addition to their business activities in the United Kingdom and in British India, Messrs. Steels carry on business in Siam. Part of their income is also derived from investments in the United Kingdom. Income from both these sources, *viz.*, business carried on outside of British India and investments in the United Kingdom, do not come under the scope of the Indian Income Tax Act and are not concerned in the present reference. Part of Messrs. Steels' income also is derived from business wholly carried on within British India. As a type of this class of business we may take, for instance, the purchase of paddy in Burma, the milling of it in Burma and the sale of the resulting rice in Bombay. Income from this class of business is admittedly liable to Indian income tax and it also is not concerned in the present reference.

The third class of business carried on by Messrs. Steels involves transactions both in British India and outside of British India. As a type of such transactions we may take business consisting in the purchase of paddy in Burma, the milling of it in Burma, and the sale of the resulting rice in London. It is with the profits from this third class of business that the present reference in part is concerned. The profits arising to Messrs. Steels from business done on account of subsidiary or connected companies is also concerned.

4. Messrs. Steels' business activities in Burma are numerous and there are different departments of their business dealing with imports, insurance, shipping, rice, timber, cotton and produce and oil.

Part of Messrs. Steels' business is carried on direct and part is carried on by means of subsidiary Companies. Thus dealing with imports and insurance there is a subsidiary Company George Gordon & Company (Burma) Limited, the whole of the shares in which are held by Messrs. Steels with the exception of a few held by Messrs. Steels' nominees. Another subsidiary Company is the Burma Company, Limited, which carries on part of Messrs. Steels' business in rice.

As regards oil Messrs. Steels carry on the managing agency of the Indo-Burma Petroleum Company, Limited, in which Company they have large share-holding interests. The relations of Messrs. Steels with this Company will be noticed in detail below.

Of the branches of their business which Messrs. Steels themselves carry on direct, the only department concerned in the present reference are those dealing with (*a*) Rice, (*b*) Timber, and (*c*) Cotton and Produce. For the purposes of the present reference it is necessary to indicate the extent of Messrs. Steels' activities in Burma in connection with each of the three departments enumerated.

5. The head-quarters of Messrs. Steels' business in India is in Rangoon where there is a large staff. In connection with their business in rice Messrs. Steels have mills in Rangoon and also in the principal exporting towns in Burma. Upcountry they also own mills where cotton is ginned and oil-seed pressed. In connection with their timber department Messrs. Steels own saw-mills and also hold leases of Government forests at various places throughout the Province. The same mills and the same staff deal with the goods and merchandise which are the subject both of Messrs. Steels' trade within India and also of their export trade. As regards rice Messrs. Steels purchase paddy in Burma which is milled in their mills in Burma. Of the three resulting products, white rice, broken rice, and bran, all three may be exported. But it does not follow that if one of the products resulting from the milling of a particular parcel of paddy is exported that the other products will also be exported. They may be sold locally. The three products, white rice, broken rice, and bran from a particular parcel of paddy may all be sold in India or they may all be exported; or any of the intermediate permutations and combinations between export and local sale may take place.

6. In the department of Cotton and Produce the principal commodities dealt in are cotton and ground-nuts. As regards cotton, raw cotton (*kappas*) is purchased and ginned in Messrs. Steels' mills, the resulting product being cleaned cotton and cotton-seed. The cleaned cotton is baled. Some of it is exported to Europe, some to Japan, and some of it is sold in India. Part of the cotton seed is pressed, the resulting products being cotton-seed oil and cotton seed oil-cake. The cotton-seed oil is sold locally. The cotton seed oil-cake is exported to Europe. As regards ground-nut Messrs. Steels purchase ground-nuts and press them in their mills. Of the two resulting products ground-nut oil and oil-cake all the oil-cake is exported to Europe. The ground-nut oil is all sold locally.

As regards the timber business I cannot give a more succinct account than has been supplied by Messrs. Steels themselves. The following is an extract from their letter:—" All timber extracted from our leased forests or purchased at auction is not converted for shipment to Europe. The logs are converted into the most valuable form of cut timber that their size, shape and quality permit and the squares, planks, scantlings, etc., so produced are exported to the various markets in which they can be most suitably sold or are disposed of locally. In some cases when logs are so inferior as to make it unprofitable to cut up for export or sale locally, they are auctioned by us in the form of round logs."

7. In addition to the commodities purchased in a raw form and exported by them after they had been converted in Messrs. Steels' mill into a form suitable for export Messrs. Steels also in each of the three departments of their business concerned purchase in India produce which they export out of British India in the same form as when purchased. Thus they ship quantities of rice, rice bran, cut timber, ground-nut oil-cake, beans, etc., which they purchase in a form ready for export and which are submitted to no process before shipment.

None of the commodities exported by Messrs. Steels, however, was after being exported from Burma subjected to any other process before being sold by them.

8. The different items constituting the profits, the liability or non-liability of which to Indian income-tax is at issue in the present reference, are shown in Messrs. Steel Brothers & Company's Profit and Loss account and also in the "Statement of Profits" for the year ending 31st December 1922 which accompanied Messrs. Steels' return. These items are :—

	£	s.	d
(*a*) Profit on Burma Rice in London	68,218	14	11
(*b*) Profit on Timber in London ...	14,163	0	0
(*c*) Profit on Cotton and Produce in London	6,816	18	8
(*d*) Profit on Insurance in London	2,507	16	9
(*e*) London Commission a/c I.B.P.	3,667	8	11
(*f*) Sales Commission, etc., a/c Attock Oil Company Limited	8,354	13	2
(*g*) London Commission on Stores shipped	7,199	0	0

9. It is necessary to examine these items seriatim. It will also be necessary to subdivide some of the items into different categories from the point of view of liability to income-tax.

10. As regards the two items :

	£	s.	d.
Profit on Burma Rice in London ...	68,218	14	11
Profit on Timber in London ...	14,163	0	0

the following draft of the present paragraph was made by me after interviews with Messrs. Steels' representative and was submitted by me to Messrs. Steel Brothers for their remarks :—

The first two items :—

	£	s.	d.
Profit on Burma Rice in London ...	68,218	14	11
Profit on Timber in London ...	14,163	0	0

appear to be entirely homogenous for the purposes of the present reference. The two sums in question represent the profits accruing to Messrs. Steels, respectively out of their transactions in Burma rice and in Burma timber sold outside of British India. Messrs. Steel Brothers' method of accounting for this class of business is such that all the profits are shown as accruing in London or at any rate in the London books. For such business Messrs. Steels, Rangoon, run accounts with Messrs. Steels, London. In the Rangoon accounts the produce, etc., is shown as made over to Steels, London, at the actual cost. Steels, London, are debited with the actual cost incurred in Burma including the price of purchase, the cost of converting or working up and of putting the produce on board aship as nearly as can practically be ascertained. The figures concerned, therefore, represent the difference between the final price realized in London and the actual cost in Burma *plus* any further expenses incurred outside of India.

In reply to my letter forwarding the draft Messrs. Steels made the following observation :—

In this paragraph the description of the method of arriving at invoice cost of rice shipped to Europe obscures a most important fact, *viz.*, that included in " the cost of converting or working up and of putting the produce on board aship," there is an item of milling hire charged to London for cost of converting paddy into rice, which leaves a margin of profit in the Burma Accounts. It will be readily understood that when mills are employed in milling both for shipment to Europe and for local sales, it is not possible to determine the exact cost of conversion of each lot of rice milled for Europe and a fixed charge is, therefore, adopted. In our experience of the rice milling industry, the milling hire thus charged is greater than can generally be obtained by selling rice in the local market. Conversely, it is our experience that we can generally buy rice in the local market as cheaply as or at a lower price than the cost to produce the same quality in our own mills inclusive of the abovementioned milling hire. On these grounds we claim that the price at which we transfer rice to our London accounts is at least as high as could be obtained by selling in Rangoon. Any profit secured over and above this price is, therefore, in our opinion, due to the operations of our London house who finance shipments and sell the rice in the various markets to which they have access by virtue of their establishment in London. Such profit we hold does not accrue or arise in India

We consider it necessary that the above facts should be brought out in the Statement of Reference.

11 The next item in question, *viz.*, £6,816 10-8 "Profit on Cotton and Produce in London" is arrived at differently. Steels' method of accounting for this department of their business is different to that followed in the case of rice and timber Formerly up till 1920 the Cotton and Produce department of Messrs. Steels' business was carried on through the medium of a limited Company, the Jamal's Cotton & Produce Company, Limited, in which Messrs. Steels held half the shares and of which Messrs. Steels were Managing Agents. This Company is now defunct and its business has been taken over by Messrs. Steels and is run by one of their departments. But the former method of accounting as between Steels, London, and this department of the business in Burma has persisted. This is that Messrs. Steels, London, in consideration for the work done at the London end, charge Messrs. Steels, Rangoon, a commission of 2½ per cent. of the sale proceeds received for cotton and produce sold by the London Managers out of British India. In the case of this item the actual profit accruing is shown as accruing in the Rangoon books, and is shown as a Rangoon profit. (It is assumed for the purposes of the present reference that the whole of this sum of £ 6,816-18-8 is of the nature indicated.

Strictly it is not so. A sum of £ 17-15-9 represents the commission on stores shipped by the Export Department of Messrs. Steels, London. If after the decision of the Court has been obtained, it should be necessary to differentiate between this latter sum and the main sum this can be done. But in the meantime, in order to avoid further complicating a reference that is already complicated enough, the whole of the sum of £ 6,816-18-8 is assumed to be as stated above).

12. The item "Profit on Insurance in London, £ 2,507-16-9" is described by Messrs. Steel Brothers as being made up as follows :—

	£	s.	d.
(a) Brokerage and discount allowed on marine insurance taken out in London covering rice shipments from Burma	2,149	19	10
(b) Agency commission on Fire, Riot and Civil Commotion covers taken out in London on rice stored in Europe	357	16	11
Total ...	2,507	16	9

13. The item "London Commission Account Indo-Burma Petroleum Co., Ltd., £ 3,667-8-11" is made up as follows :—

	£	s.	d.
(a) Commissions earned by Oil Department, London, on sales of Wax, etc., in the United Kingdom for account of Indo-Burma Petroleum Company, Limited ...	1,058	16	6
(b) Commission earned by Steels' Export Department in London on Stores, etc., purchased and shipped from the United Kingdom to Burma for account of the Indo-Burma Petroleum Company, Limited	2,608	12	5
Total ...	3,667	8	11

14. The item "Sales Commission, etc.,—Attock Oil Company, Limited, £ 8,354-13-2" is made up as follows :—

	£	s.	d.
(a) Allowance from Attock Oil Company, Limited, to cover administration expenses as managing agents as per agreement dated 14th November 1921 ..	6,374	13	7
(b) Agency commissions received by Steels on Insurance effected by them in London on Attock Oil Company's account	740	0	5
(c) Commissions earned by Steels' Export Department in London on Stores, etc., purchased and shipped from the United Kingdom to India	1,239	19	2
Total ...	8,354	13	2

15. The item "London Commission on stores shipped £ 7,199-0-0" is described by the Company as arising from "Commissions charged by the Export Department, London, on General Goods, Stores, etc., purchased by London Office and shipped to Steels, Rangoon."

16. As has been stated above the main part of the produce exported by Messrs. Steels in all the three departments of their business concerned consists of produce converted or worked up by them in Burma. But, again in all the three branches of their business, part of the produce exported was purchased by Messrs. Steels in Burma in the same form in which it was exported. It is possible that it will be necessary to differentiate for the purposes of the present reference between each of the two classes of business. In their books Messrs. Steels do not maintain separate accounts for the two classes of business. The extraction of figures showing separately the profit from the two classes of business would involve considerable labour. In the present case the contention of Government is that the whole of the profits concerned from both classes of business are liable to Indian income-tax. Messrs. Steels' contention is that no portion of the profits concerned is liable to income-tax. It is possible that ultimately it will not be necessary to extract the figures in question. Accordingly in order to save trouble I have decided with the consent of Messrs. Steels to adopt for the purposes of the present reference an arbitrarily fixed figure. For all the three departments of Messrs. Steels' business that are concerned it is assumed that of the total profits 80 per cent. arises from transactions in produce which was submitted to some process of conversion or working up in British India and that 20 per cent. arises from transactions in produce which was exported from British India by Messrs. Steels in the same form as when purchased by them in British India. This 80: 20 proportion is purely arbitrary. If as a result of the decision of the Honourable Judges in the present reference it is necessary to differentiate between the profits of the two classes of business, the exact figures will have to be worked out later on.

According to this arrangement we have the following sub-division of some of the items enumerated in para. 8 above :—

I. The item (*a*) rice profits in London £ 68,218 14s. 11*d*. is divided as follows:—

	£	*s*.	*d*.
(*a*) (*i*) Profits in London on rice, etc., milled in India ...	51,575	0	0
(*ii*) Profits in London on rice purchased in India and exported in the same form ...	13,643	14	11

II. The item "Profits on Timber in London" must be similarly sub-divided as follows:—

	£	*s*.	*d*.
(*b*) (*i*) Profits in London on timber which has been converted or worked up in India ...	11,330	8	0
(*ii*) Profits in London on timber which has been exported from India in the same form as it was purchased ...	2,832	12	0

17. As regards the item shown as "London Profits on Cotton and Produce £ 6,816-18 8," as has been stated above this sum is really wrongly described in the accounts. The particular method of accounting which Messrs. Steels have adopted as regards this part of their business cannot in any way affect the liability or otherwise to income-tax of the profits concerned. There is nothing in this department of Messrs. Steels' business that is fundamentally different to the business done by the Rice Department and Timber Department. The decision of the Court on the liability to Indian income-tax of the profits of the Rice Department and of the Timber Department will be applicable to the profits of the Cotton and Produce Department.

18. The remaining items appear to involve s. 42 (I) of the Act. As regards the items "Profit on Insurance in London" and "London Commission on Stores shipped," Messrs. Steels, London, and their branch, Messrs. Steels, Rangoon, are the two parties concerned. In connection with the other items, it is necessary to examine the relations between Messrs. Steels and (*a*) the Indo-Burma Petroleum Company, Limited, (*b*) the Attock Oil Company, Limited, and (*c*) the Burma Company, Limited. The Indo-Burma Petroleum Company, Limited, was originally founded by Messrs. Steel Brothers and Messrs. A. S. Jamal Brothers, each of whom held half of the issued shares. The original authorized capital of the Company was Rs. 1,00,00,000 of which Rs. 93,38,000 was issued almost immediately. The issued shares were held equally between Messrs. Steels and Messrs. Jamals up till the end of 1921 when Messrs. Jamals fell behind. In the last annual statement filed with the Registrar of Joint-Stock Companies of a total of 1,55,950 shares issued, 92,975 shares were held by Messrs. Steel Brothers direct. The original articles of association contain provisions ensuring that in the event of new shares being issued half of every such issue should be offered to Messrs. Steel Brothers & Company, Limited, and half to Messrs. A. S. Jamal Brothers & Company and in the event of either of these two parties not exercising its option of taking up its full quota of shares that the other party should have the right of pre-emption before any shares were offered to the public. The Articles of Association also contain provisions that, while certain conditions should continue, Messrs. Steels had the right to nominate, out of a directorate of three, one Director and Messrs. Jamals had the right of nominating another Director. Messrs. Steels and Messrs. Jamals had the right of jointly nominating the third Director. By the Articles of Association it was also laid down that Messrs. Steels should be the Managing Agents of the Indo-Burma Petroleum Company, Limited, for so long as they were willing to act in that capacity. Messrs. Steel Brothers & Company, Limited, were precluded from engaging in any other oil business in India and without the consent of the Indo-Burma Petroleum Company, Limited, even from holding shares in another Oil Company in India. The Articles of Association of the Attock Oil Company, Limited, of 1919 reserve to Messrs. Steel Brothers & Company, Limited, certain rights as regards the taking up of new shares issued by the Attock Oil Company, Limited. These rights were exercised through the medium of the Indo-Burma Petroleum Company, Limited, which holds a large part of shares in the Attock Oil Company, Limited. By the Articles of Association of the Attock Oil Company, Limited, the Managing Agency of the Attock Oil Company, Limited, was reserved to Messrs. Steel Brothers & Company, Limited. As regards the third subsidiary Company, the Burma Company, Limited the whole of the shares in this Company are held by Messrs. Steel Brothers and Company, Limited, and by Assistants in Messrs. Steel Brothers and Company, Limited.

19 I think it best to refer to each item separately and accordingly submit the appended statement of the question referred:—

I. Is the whole or part of the sum of £68,218-14-11 described as London Profits on Rice and consisting of £54,575-0 0 profits on produce which has undergone some process of conversion or working up in Messrs. Steels' hands in Burma and £ 13,643-14-11 profits on produce purchased in Burma and exported in the same form as when purchased., liable to Indian income tax?

II. Is the whole or part of the sum of £14,163-0 0 shown as London profits on timber and consisting of £11,330-8-0 being profits on timber which has undergone some process of conversion or working up in Messrs. Steels' hands in Burma and of £2,832-12-0 being profits on timber purchased in Burma and exported in the same form as when purchased liable to Indian income-tax?

III. Is the whole or part of the sum of £6,816-18-8 (approximately) described as London profits on cotton and produce and consisting of £5,453-10-11 (approximately) being profits on cotton and produce which has undergone some process of conversion or working up in Messrs. Steels' hands in Burma and £1,363-7-9 (approximately) being profits on cotton and produce purchased in Burma and exported in the same form as when purchased liable to Indian income-tax?

IV, Is the whole or part of the sum of £2,507-16-9 described as profits on insurance in London and consisting of £2,149-19-10 being brokerage and discount allowed on marine insurance taken out in London covering rice shipments from Burma and £357-16-11 being Agency Commission on Fire, Riot and Civil Commotion covers taken out in London on rice stored in Europe liable to Indian income-tax?

V. Is the whole or part of the sum of £3,667-8-11 described as "London Commission Account, Indo-Burma Petroleum Company, Limited," and consisting of £1,058-16-6 being commission earned by the Oil Department, London, on sales of wax, etc., in the United Kingdom for account of the Indo Burma Petroleum Company, Limited, and £2,608-12-5 being commission earned by Steels' Export Department in London on stores, etc., purchased and shipped from the United Kingdom to Burma for account of the Indo-Burma Petroleum Company, Limited, liabe to Indian Income-tax?

VI. Is the whole or part of the sum, of £8,354-13-2 described as "Sales Commission, etc.,—Attock Oil Company, Limited," and consisting of £6,374-13-7 being allowance from Attock Oil Company, Limited, to cover administration expenses as Managing Agents as per agreement dated 14th November 1921, £40-0 5 being Agency Commission received by Steels' London, on insurances effected by them in London, on Attock Oil Company's account and £1,239-19-2 being commissions earned by Steels' Export Department in London on stores, etc., purchased and shipped from the United Kingdom to India liable to Indian income-tax?

VII. Is the whole or part of the sum of £7,199-0-0 described as "London Commission on stores shipped" liable to Indian income tax?

In this case the plan which I think it will be best to follow is first to discuss the general principles of law involved and then to apply these to each of the six questions stated.

2. At one of the hearings it was put forward by the Barrister who appeared for Messrs. Steels that the principal decided cases on which they rely in their contention that the items of income at present under reference are not liable to Indian income-tax are the cases *Secretary to the Board of Revenue, (Income tax) Madras* v. *Madras Export Co* (1) and the English case *Smidth & Co.* v. *Greenwood* (2). The claim of Messrs. Steels, however, is very much wider than the claims put forward against the Revenue Authorities either in the *Madras Export Company's case* (1) or in *Smidth & Co.* v. *Greenwood* (2) or in any of the other leading English cases. For convenience these English cases may be quoted here: *Sulley* v. *Attorney-General* (3), *Erichsen* v. *Last* (4), *Tischler* v. *Apthorpe* (5), *Pommery* v. *Apthorpe* (6) *Colquboun* v. *Brooks* (7), *Werle* v. *Colquhoun* (8), *Sanpaule* (*Brazilian Ry.* v.

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(1) 71 Ind. Cas. 756; 46 M. 360; 17 L. W. 161; 44 M. L. J. 290; A. I. R. 1923 Mad. 422; 32 M. L. T. 37.

(2) (1921) 3 K. B. 583; 37 T. L R. 949.

(3) (1860) 5 H. & N. 711; 29 L. J. Ex. 464; 6 Jur. (N. S.) 1018; 2 L. T. 439; 8 W. R. 272; 157 E. R. 1364; 120 R. R. 793.

(4) (1882) 8 Q. B. D. 414; 51 L. J. Q. B. 86; 45 L. T. 703; 30 W. R. 301; 46 J. P. 357.

(5) (1885) 52 L. T. 814; 2 Tax. C. 89; 33 W. R. 548; 49 J. P. 372.

(6) (1887) 56 L. T. 24; 2 Tax. C. 182; 56 L. J. Q. B. 155; 35 W. R 307.

(7) (1889) 14 A. C. 493; 59 L. J. Q. B. 53; 61 L. T. 518; 38 W. R. 289; 54 J. P. 277.

(8) (1888) 20 Q. B. D. 753; 57 L. J. Q. B. 323; 58 L. T. 756; 36 W. R. 613; 52 J. P. 644.

Carter(9) *Crookston* v. *Inland Revenue* (10) and *Weiss Biheller & Brooks, Ld.*, v. *Farmer* (11) In all of these cases which concern dealing in commodities, the trading the profits of which it was proposed to tax was the purchase or sale of a finished article or of an article which was not transformed by manufacture within the taxing realm while in the hands of the person whom it was proposed to tax. Messrs. Steels however go much further. As stated in para. 7 of the statement of Facts the vast bulk of the rice, timber, cotton, oil-cake, etc., which Messrs. Steels exported during the accounting period now in question was produce which had been submitted to some process of manufacture in British India by Messrs. Steels before export. The claim of Messrs. Steels is that none of the profits which arise, for instance, from the export and sale out of British India of teak extracted from Burma forests and converted in Burma to a form marketable in Europe is liable to Indian income-tax.

3. I think that there are two general questions of law which it is necessary to decide before each of the questions referred can be properly decided. These two principal questions of law are.

(*a*) whether a person who makes profits by buying or extracting produce in British India transforming or working it up by mechanical process in British India and exporting and selling it outside of British India is liable to pay Indian income-tax on such profits and

(*b*) whether certain classes of income derived by a non-resident from a business connection in British India are made liable to Indian income-tax by the provisions of s. 42 sub-s. 1, of the Indian Incom-Tax Act, XI of 1922.

4. In connection with both these general questions it is pertinent to observe that the definition of "trade" in s. 237 of the United Kingdom Income Tax Act of 1918 is practically the same as the definition of "business in s. 2, sub-s. (4) of the Indian Income Tax Act, XI of 1922.

5. In Murray's "New English Dictionary" to "manufacture" is defined as "to work up (material) into forms suitable for use." In Annandale's "Concise English Dictionary" "manufacture" is defined as "the operation of reducing raw materials into a form suitable for use by more or less complicated processes". In Chambers "Twentieth Century Dictionary" to "manufacture" is defined as "to make from raw materials by any means into a form suitable for use." According to these definitions it appears to me to be self-evident that Messrs. Steels' operations in the milling of rice, in the extraction and conversion of timber, in the ginning of raw cotton and the pressing of oil-seeds all amount to "manufacture."

6. As regards the former of the two principal questions to be decided, namely, whether profits derived from the sale outside of British India of commodities converted or worked up in British India are liabe to Indian income-tax, I can find no legal authority whatever to support the view that the profits in question are not taxable. The profits concerned arise from activities which include manufacture in British India. Accordingly under the definition in s. 2 sub-s. (4) of the Indian Income Tax Act, Messrs. Steels' activities in British India in connection with the produce from which the profits in question arise amount to carrying on business. All the profits arising therefrom appear to be liable to Indian income-tax under the provisions of s. 4 sub-s. (1) and ss. 6 and 10.

7. The law on the subject is clearly set forth in the Calcutta Ruling *Rogers Pratt Shellac Co.* v. *Secretary of State for India* (12) by Mr. Justice Chatterjea at the end of his judgment.

"So far as the factory at Wyndhamgunj is concerned, it clearly comes within the Act. Admittedly there is a manufacturing branch of the Company at that place, and under s. 2 cl. (3) of Act VII of 1918 'business' includes among other things any 'manufacture' The income, therefore, from such manufacture would be income from 'business' and as such taxable under ss. 3 and 5 of the Act."

In this respect there is no difference between Act VII of 1918 to which Mr. Justice Chatterjee refers and the present Act XI of 1922. The case quoted *Rogers Pratt Shellac Co.* v. *Secretary of State for India* (12) is the only Indian case I can find dealing directly with the question under examination. The same question arose in a Madras case, *Chief Commissioner of Income-Tax Madras* v. *North Anantapur Gold Mines Ld.* (13). In this case a Gold Mining Company which had its registered office in London earned profits from the sale in Great Britain of gold mined in the Ananthpur District in the Madras Presidency. The Company contended that as the sale of the gold took place entirely in Great Britain its profits did not arise and accrue in India. The Madras High Court in refusing to issue a *mandamus* requiring the Commissioner of Income tax to state a case incidentally expressed the opinion that having regard to the language of the Act the assessment was validly imposed. The relevant passage is at page 728 of I. L. R. 44 Madras, 1921, where Wallace, C. J., is reported as stating "As regards this particular case, I will only say that while the Commissioner has rightly based his decision on the language of the Indian section, which differs materially from the corresponding section of the English Act, etc."

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(9) (1896) A. C. 31; 65 L. J. Q. B. 161; 73 L. T. 538; 44 W. R. 336; 60 J. P. 84 & 452.

(10) (1912) 5 Tax. C. 602; (1911) S. C. 217.

(11((1918) 2 K B. 725; 31 T. L. R. 561,

(12) 83 Ind. Cas. 273; 52 C. 1; 40 C. L. J. 110; 28 C. W. N. 1074; A. I. R. 1925 Cal. 34.

It is to be noted that this question, *i. e.*, the first of the two general questions set out in para. 3 above, did not arise at all in the *Madras Export Company's case* (1).

8. I can find no relevant English ruling. So far as I can ascertain it has never been contended that a Company carrying on manufacture in the United Kingdom is not liable to English income-tax on its profits. No process of manufacture was concerned in any of the relevant English cases. In *Sulley* v. *Attorney-General* (3) the firm which it was sought to tax purchased piecegoods in England and sold them in America. In *Werle* v. *Colquhoun* (8) and *Tischler* v. *Apthorpe* (5) and also in *Grainger* v. *Gough* (14) the business concerned was the sale of French champagne in England. In *Crookston* v. *Inland Revenue* (10) the business was the importation of phosphates from Algeria. In *Erichsen* v. *Last* (4) the business concerned was the despatch of foreign cablegrams from the United Kingdom. In *Weiss, Biheller & Brooks, Ld.* v. *Farmer* (11) the business consisted in the sale in the United Kingdom of gas mantles imported from Holland.

9. There is however a Colonial case decided by the Judicial Committee of the Privy Council which appears to apply directly to the question at present under examination. The case is *Commissioners of Taxation* v. *Kirk* (15). In this case the assessee was a Company registered in the Colony of Victoria and managed by a Board of Directors with head-quarters at Melbourne in Victoria. The Company carried on the business of mining in the Colony of New South Wales. The ore obtained in New South Wales was treated in that Colony but the merchantable product was sold outside the Colony of New South Wales. The Income-Tax authorities in New South Wales sought to tax the Company on the whole of its profits. In the judgment the operations of the Company are divided into four parts:—

(1) the getting of the ore;
(2) the refining of the ore;
(3) the sale;
(4) the receipt of the money.

Of these four processes only the first two took place in New South Wales. In the judgment it is laid down as follows with regard to the four processes mentioned:—

All these processes are necessary stages which terminate in money and the income is the money resulting less the expenses attendant on all the stages.

The Judicial Committee held that as the profits of the first two stages arose or accrued in New South Wales it necessarily followed that the Company was liable on the whole of their profits.

10. The whole judgment of the Judicial Committee in this case supports the finding in the *Rogers Pyatt Shellac Company's case* (12). This ruling also points to the conclusion that the profits we are considering, namely, profits derived from the sale outside of British India of produce extracted and worked up in British India, are liable to Indian income-tax.

11. In applying the finding in the case of *Commissioners of Taxation* v. *Kirk* (15) to an Indian case it is necessary to consider whether there is any difference between the relevant sections in the Indian Income Tax Act and the sections in the New South Wales taxing Statute. The relevant sections of the latter Act are quoted in the judgment cited. It is clear from the judgment that the words "earned", "derived" and "arising and accruing" are used interchangeably throughout. Under the New

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(13) 64 Ind. Cas. 682; 44 M. 718; 14 L. W. 108; (1921) M. W. N. 502; 41 M. L. J. 177

(14) (1896) A. C. 325; 65 L. J. Q. B. 410; 74 L. T. 435; 44 W. R. 561; 60 J. P. 692.

(15) (1900) A. C. 588; 69 L. J. P. C. 87; 83 L. T. 4.

South Wales Law tax was payable on the annual amount of all incomes—

(2) arising or accruing to any person wheresoever residing in New South Wales from any profession or business carried on in New South Wales.........

There is a provision in s. 27, however, to the effect that—

(3) No tax shall be payable in respect of income earned outside the Colony of New South Wales.

The net effect of these provisions appears to me to be exactly the same as the net effect of the relevant section of the Indian Income Tax Act. The Indian Act makes taxable profits arising or accruing in British India or deemed to arise or accrue in British India. The New South Wales Act makes taxable profits arising and accruing from business carried on in New South Wales. There is so far no local limitation as regards arising or accruing. But the clause which exempts income earned outside New South Wales has, in view of the fact that "earned" and "derived" and "arising and accruing" are treated as being interchangeable, the effect of making the law the same as the Indian law.

12. On the above view both on the authority of the Calcutta High Court in the *Rogers Pratt Shellac Company's case*(12) and on that of the Judicial Committee in the case of *Commissioners of Taxation* v. *Kirk* (15) there is ground for holding that if any part of the process of arising or accruing takes place in British India the whole of the profits are liable to Indian income-tax. An alternative view, for which I can find no legal authority whatever, is that the total profits in question can be divided up into two portions:—

(*a*) a portion arising and accruing in British India;

(*b*) a portion arising and accruing outside of British India.

There is no means of making such a division. The only actual profits are constituted by the money received by Messrs. Steels in London less the expenses incurred at all stages of the transactions involved. But if it were theoretically possible to divide the profits into two parts as above, the part (*a*) would on the authority of the *Rogers Pratt Shellac Copany's case* (12) and the *Commissioners of Taxation* v. *Kirk* (15) be liable to Indian income-tax. The second portion would, it is submitted, be income derived by a non-resident from a business connection in British India, and would, as is claimed below, also be liable to Indian income-tax.

13. I turn now to examine the second principal question of law, namely, whether profits derived directly or indirectly from a business connection in British India are made liable to Indian income-tax by the provisions of s. 42 (1) of the Indian Income Tax Act, 1922.

On this point there are two conflicting Indian rulings. In 1922 in the *Madras Export Company's case* (1) the Madras High Court held that s. 42 (1) is a machinery section and that it does not make liable to Indian income-tax any income which would not be otherwise chargeable. In March 1924 the Calcutta High Court in the case of *Rogers Pratt Shellac Co.* v. *Secretary of State for India* (12) dissented from the view taken by the Madras High Court and held that s. 42 (1) is a charging section. There are the two principal rulings. But there are references in other Indian cases which throw light on the questions at issue.

14. The questions at issue have been so thoroughly examined and the findings so clearly set forth by the Honourable Judges of the Calcutta High Court that it is unnecessary for me to do more than shortly to recapitulate the main points decided. As pointed out by Mr. Justice Mukerjee with reference to the *Madras Export Company's case* (1) "the learned Judges in that case proceeded upon the supposition that the Legislature intended no change from the earlier Statutes which to a large extent were modelled on the English Statutes. That there is now a substantial difference is clear, and has been recognised in the cases, amongst others, of *Secretary to the Commissioner, Salt, Abkari and Separate Revenue, Madras* v. *Ramanathan Chetty* (16), *In re Aurangabad Mills, Ltd.* (17) and *In the matter of A. John & Co.* (18)."

Under the United Kingdom law a person is liable to United Kingdom income-tax who exercises a trade in the United Kingdom. In the English cases concerned which have been enumerated in s. 2 above the Judges have divided up the kind of trading concerned which, as has been pointed out, above, practically invariably consists in the purchase or sale of a completely finished article, into three constituent parts;—

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(16) 53 Ind. Cas. 976; 43 M. 75 at p 86; (1919) M W. N. 826; 10 L. W. 570; 37 M. L. J. 663; 26 M. L. T. 417.

(17) 64 Ind. Cas. 9; 45 B. 1283; 23 Bom. L. R. 570.

(18) 58 Ind. Cas. 836; 43 A. 139; 18 A. L. J. 1017; 2 U. P. L. R. (A.) 394.

(a) the making of the contract;
(b) the delivery of the goods;
(c) the payment for these goods.

The Judges have decided the English cases according to the locality in which one or other of the three constituent parts of trading has taken place. The provisions of the Indian Income Tax Act as has been pointed out are entirely different. Section 4 (1) of Act XI of 1922 expressly lays down that the Act applies not only to (a) income accruing or arising or received in British India, but also to (b) income deemed under the provisions of this Act to accrue or arise or to be received in British India. Section 42 (1) enacts that in the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connection or property in British India shall be deemed to be income accruing or arising within British India. The sorts of income described in s. 42 (1) are deemed to accrue or arise or be received in British India and, therefore, as laid down in s. 4 (1) the provisions of the Act apply to them and they are liable to Indian income-tax.

15. The scheme of the Indian Act appears to me to be as follows. The principal charging section is s. 4 (1). This, I think, is made more clear from the fact that the principal exempting section is s. 4 (3). Section 4 (1) and also s. 4 (2) create a liability to income-tax. In s. 6 income, profit, or gains which, under the provisions of s. 4 (1) or 4 (2), are liable to tax, are divided into heads. Sections 7 to 12 lay down the method in which the chargeability to tax is to be applied to the heads into which income liable to tax is divided by s. 6. Sections 6 to 12 may be described as secondarily or derivatively charging sections. They prescribe the manner in which the chargeability to tax which is created by s. 4 (1) or 4 (2) is to be applied to the several heads into which income liable to tax has been divided for the purposes of assessment.

It appears to me that the fundamental fallacy underlying the decision of the Honourable Judges of the Madras High Court is that they have treated s. 5 of Act VII of 1918 (which corresponds with s. 6 of Act XI of 1922) as being the principal charging section. It is clear from various passages in the printed judgments that the Honourable Judges regarded s. 5 as being the principal charging section. Thus in the head note it is stated: "It (s. 31 of the Income Tax Act, 1918) is not a section designed to declare some other gains taxable beyond what has been declared by s. 5 of the Act to be taxable." Lower down in the headnote we find "s. 33 (1) of the Income Tax Act was not intended in any way to enlarge the scope of s. 5." Sir Walter Schwabe, C. J., states (I. L. R. Madras 46, page 363, line 1), "by s. 5 which is the charging section." Lower down, (page 364, line 8), he says, "the words are in my view most unsuitable if intended to have a wider meaning than the well-known meaning of the words in the charging s. 5 (iv)........ ..." Mr. Justice Wallace (page 368, line 7) states, "The charging section of the Act is s. 5," and lower down (at page 368, line 28) he states, "s. 33 (1) is not designed or situated in the Act as a charging section in addition to s, 5." On page 369, line 7, it is stated that "It is not a charging section designed to declare some other gains taxable beyond what has been declared by s. 5 to be taxable".

16. This view that s. 5 of Act VII of 1918 (corresponding to s. 6 of Act XI of 1922) is the principal charging section is quite at variance with previous opinions given by the Honourable Judges of the Madras High Court and also with the stated opinions of other High Courts in India. Thus the whole scheme of Act VII of 1918, which is the same as the scheme of Act XI of 1922, is properly set forth by Mr. Justice Seshagiri Ayyar in his judgment at page 89 of I.L.R. Mad. 43. Again in the case *Deputy Commissioner & Secretary to the Chief Commissioner of Income Tax, Madras* v. *Bhanjee Ramjee & Co.*, (19), the Honourable Judges correctly treat s. 3 of Act VII of 1918 (corresponding to s. 4 of Act XI of 1922) as being the principal charging section. I quote the beginning of the opinion of the Madras High Court Bench in that case:—

"Now the income which is taxable under the Act is, as provided in s. 3, 'All income from whatsoever source it is derived if it accrues or arises or is received in British India or is under the provisions of this Act, deemed to accrue or arise or to be received in British India.'

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(19) 64 Ind. Cas. 239; 44 M. 773; 14 L. W. 75; 41 M. L. J. 191; (1921) M. W. N. 531.

And under s. 33 (i), in the case of any person residing out of British India.

'All profits or gains accruing or arising to such person whether directly or indirectly through or from any business connexion in British India shall be deemed to be income accruing or arising in British India.'

And is consequently taxable under the express provisions of s. 3."

Again in the case *In re Aurangabad Mills, Ltd.* (17) Mr. Justice Macleod states (p. 1289*), "The important section is s. 3, sub-s. (1) of the Act (VII of 1918). Save as hereinafter provided, this Act shall apply to all income from whatever source it is derived, if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India."

17. There are other fallacies involved in the *Madras Export Company's case* (1). The Madras High Court held that s. 42 (1) only applied to profits received in British India by the agent of a non-resident. But if this were so why does s. 42 (1) say that "profits... from a business connection in British India" shall be "deemed to accrue or arise in British India." It is impossible to make sense of s. 42 (1) on the view that it is a machinery section.

18. For the reasons stated in the preceding paragraphs it appears to me that s. 42 (1) of Act XI of 1922 coupled with s. 4 (1) has the effect of making liable to Indian income-tax profits or gains accruing or arising to a non-resident whether directly or indirectly through or from a business connection in British India.

19. In para. 8 above I set forth the conclusion arrived at as regards the first general question of law stated in para. 3 above, namely, that a person who makes profits from exporting produce manufactured in British India is liable to pay income-tax thereon. In the immediately preceding paragraph I have come to the conclusion that income derived by a non-resident from a business connection in British India is also liable to Indian income-tax. I now proceed to examine the six referred questions by the light of the above conclusion.

20. With regard to the question as to whether the whole or part of the sum of £68,218-14-11 described as "London profits on Rice" is liable to Indian taxation it appears to me that (*a*) one constituent portion £54,575 being profits arising from transactions in produce which has undergone some process of manufacture in Messrs. Steels' hands in Burma is liable to Indian income-tax under the provisions of s. 4 (1) and ss. 6 and 10 of the Indian Income Tax Act XI of 1922. Messrs. Steels carry on manufacture in Burma in respect of this produce and accordingly under the definition in s. 2. sub s. 4, they are carrying on business and liable to income-tax in respect of these profits under s. 10.

(*b*). With regard to the other constituent portion of the total sum concerned in the first question referred, namely, £ 16,345-14-11 being profits on produce purchased in Burma and exported in the same form, in my opinion these profits are liable to Indian income-tax under the provisions of ss. 4 (1) and 42 (1) of the Indian Income Tax Act. For Messrs. Steels are by admission non-resident in British India. Their position with regard to the transactions concerned is exactly the same as that of the *Rogers Pratt Shellac Co.* v. *Secretary of State for India* (12) in the corresponding transactions in the Calcutta case. Accordingly following that decision the profits in question are profits derived from a business connection in British India and are liable to Indian income-tax.

21. With regard to the second question the two constituent items into which the profits have been divided appear to me to be exactly on all fours with the corresponding portions of the profits dealt with in question (1) and call for no further remark. The whole of these profits also is liable to Indian income-tax for the reasons given in the preceding paragraph.

22. It may be possible to differentiate Messrs. Steels' profits from the rice, timber and cotton and produce purchased by them in India and exported in the same form from the profits that were at issue in the English decided cases which have been quoted. So far as I can ascertain in all the English cases in which the profits concerned were derived from transactions in merchandise, these transactions were the only business done in the United Kingdom by the firm which it was sought to assess to income-tax. As has been shown this is not the case with Messrs. Steels. They carry on, in addition to the class of business now under examination, business to a very large extent both entirely within British India

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and also in exporting produce manufactured by them in British India. The same staff deals with all these classes of business. The "purchase-export" business is merely part of a larger business the profits and gains of the other parts of which are liable to income-tax. The whole of Messrs. Steels' business in Burma is a venture in the nature of commerce. It may be questioned if it is legitimate to isolate one particular type of business and hold that they are not "carrying on business" in respect of that type of business. Furthermore, Messrs. Steels themselves lease forests and own rice mills, cotton mills, saw mills and maintain a large staff to operate these. It is a legitimate presumption that they want to make all the profits possible. On this view their purchases of manufactured commodities would be made merely to supplement the available stocks of their own manufacture. On this view the "purchase-export" business would be merely ancillary to their other business. I suggest that the profits at present under reference can be differentiated for the above reasons from the profits in the English cases quoted.

23. With regard to the item £ 6,616-18-8 approximately, described as "London Profits on Cotton and Produce" it has been stated above that this sum really represents a commission of two and-a-half per cent. on the value of the Cotton and Produce sold in London. I cannot see that there is any case for exempting from Indian income-tax this sum as it stands at present. The sum in question is part of Messrs. Steels' profits. There is, in my opinion, no provision of law enabling Messrs. Steels to charge themselves a commission for doing their own business and then to claim that such commission should be allowed as a deduction from their profits for purposes of income-tax. The sum in question is, in my opinion, clearly liable to Indian income-tax. Messrs. Steels claim that the profits in question are not liable to income-tax on the ground that the profits are shown as accruing in London. The method of book-keeping adopted by Messrs. Steels, however, has nothing to do with the question of liability to income-tax. In my opinion the whole of the profits of the Cotton and Produce Department whether shown in Messrs. Steels' books as accruing in London or in Rangoon should be treated as a whole and divided into two portions in the same manner as the profits of the Rice Department and of the Timber Department, one portion representing profits on produce manufactured in India and the other portion profits on merchandise exported from India in the same form as when purchased by Messrs. Steels. The liability or otherwise to Indian income-tax of the profits of this Department would then have to be decided on the same lines as laid down in para. 20 above.

24. With regard to the fourth question referred, regarding the sums described as "Profits on Insurance in London" in my opinion the whole of these profits are liable to Indian income-tax either on the ground that the insurances in question are part of Messrs. Steels' business in rice and that as the expenses of insurance are included as a charge against the profits, so any incidental profits made by Messrs. Steels out of the same transactions in insurance should be added back to the profits. Alternatively the profits in question are profits derived from a business connection in British India and are taxable under s. 42 (1).

25. As regards the fifth question referred the relations subsisting between Messrs Steels and the Indo-Burma Petroleum Company, Limited, and the Attock Oil Company, Limited, have been fully set forth in the Statement of Facts. Messrs. Steels' connection with the Indo-Burma Petroleum Company, Limited, is not that of ordinary share-holders Rather it is the case that Messrs. Steels carry on an oil business and that their method of doing so is through the medium of the Indo-Burma Petroleum Company, Limited. The relations between Messrs. Steels and the Indo-Burma Petroleum Company, Limited, as set out in para. 18 of the Statement of Facts, and in particular the fact that the Managing Agency of this Company is reserved to Messrs. Steels by the Articles of Association appear to me to be sufficient proof of this. The profits now under question whether "Commission on Sales in the United Kingdom" or "Commission on stores exported from London" are, in my opinion, profits arising from a business connection in British India. In his judgment in the *Rogers Pratt Shellac Company's case* (12) Mr. Justice Mukerjee interpreted the words "Profits...... arising from a business connection in British India" as including income "which is attributable to the connection (a person) has with a business in British India." On this view

the profits in question are liable to Indian income-tax.

26. The profits concerned in the sixth question referred are, in my opinion, exactly on all fours with those in the fifth question referred and are liable to Indian income-tax for precisely the same reasons.

27. The profits concerned in the last question referred, namely, "London Commission on Stores shipped £7.199" appear to me to be part of Messrs. Steels' general profits from business. This profit has been separated off only because of the particular method of book-keeping followed by Messrs. Steels. But the fact that Messrs. Steels follow a particular method of book-keeping does not affect the liability of the profits in question to income-tax. I cannot see that there is any sanction for Messrs. Steels charging themselves a commission for work done for themselves and then claiming to deduct the amount of this commission from their profits. In my opinion the profits in question should be added to Messrs. Steels' general profits which are taxable as income derived from business.

Mr. *E. Higinbotham*, Government Advocate (with him Mr. *Alan Keth*), for the Commissioner of Income-Tax.

Mr. *T. F. R. Macdonnell*, for Steel Brothers and Company, Limited.

JUDGMENT OF THE FULL BENCH.—This is a Reference made by the Commissioner of Income-tax onhis motion under s. 66 (1) of the Income Tax Act, 1922.

The facts and the questions referred are clearly stated by the Commissioner of Income-tax in his reference.

The assessee is a limited Company registered in London under the English Companies' Act. Its headquarters are in London and, admittedly, it is a non-resident of British India. For many years the firm has carried on large business operations in Burma, especially in connection with rice, timber and cotton.

It was stated in Court that for some time the firm was assessed on a certain percentage of its net profits by consent and without prejudice to the strict legal liability, but the Income-tax authorities considered that this percentage was not high enough. The Company contends that none of its profits which form the subject of reference are assessable to income-tax in British India. The Commissioner of Income-tax, on the other hand, considers that all the heads of profits mentioned in his reference are assessable.

The question raised is one of very great legal and practical importance, and it has been very fully and ably argued before us for three days.

A great many cases have been cited before us, both English and Indian, but it will be only necessary, for the reasons hereinafter given, to refer to a few of these.

The assessment was made under the provisions of s. 4 (1), read with s. 42 (1) of the Indian Income-Tax Act, 1922. The provisions of s. 4 (1) run as follows:—

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in s. 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

On reference to s. 6, the only head therein applicable seems to be the 4th—"Business" —In the definition section—s. 2 (4)—"'Business' includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

The firm admittedly has various rice mills, saw mills, cotton ginning mills and vegetable oil mills in the Province, whereby commodities or raw material are "worked up into forms suitable for use." (New Oxford Dictionary). It consequently manufactures and, so, carries on business within the Province. Any income, profits, or gains arising from such business seems to be chargeable under ss. 4 (1) and 6 of the Act of 1922.

For the assessee it is contended that no income, profit or gain accrues or arises in respect of the bulk of its rice, timber and cotton business, because these goods are shipped to the head office in London, where they are sold on the English market and the payment is received in London and not remitted to India, and that a profit or gain cannot be said to accrue or arise until the goods are sold and the money is received.

This contention was put forward in the case of *Commissioners of Taxation* v. *Kirk* (15) but was overruled by their Lordships of the Privy Council in the judgment of Lord Davey.

Under the New South Wales Land and Income-Tax Assessment Act of 1895, s. 15, income-tax was payable in respect of th annual amount of all income:—

(*i*) "Arising or accruing to any person wheresoever residing from any .... trade,...............carried on in New South Wales,..............;

(*ii*) Derived from lands of the Crown held under lease..............;

(*iii*) Arising or accruing to any person wheresoever residing from any other source whatsoever in New South Wales not included in the preceding sub-sections."

The Company was registered in Victoria and had its head office and Board of Directors at Melbourne. It had mines in New South Wales, where the crude ore was smelted. None of the ore was sold in New South Wales, sales being made for the most part in Melbourne, and the money received for the ore either in London or Melbourne.

Their Lordships held that, whether or not the Company traded in New South Wales, so as to come within sub-s. (1), if there was income, it was clearly income from lands of the Crown held on lease and so came under sub-s. (3), and also was income from some other source in New South Wales, and so came under sub-s. (4).

As to whether there was income: "It appears to their Lordships that there are four processes in the earning or production of this income—

(*i*) the extraction of the ore from the soil;

(*ii*) the conversion of the crude ore into a merchantable product, which is a manufacturing process;

(*iii*) the sale of the merchantable product;

(*iv*) the receipt of the moneys arising from the sale.

All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-s. (3) and the second or manufacturing process, if not within the meaning of 'trade' in sub-s. (1), is certainly included in the words 'any other source whatever' in sub-s. (4).

So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South Wales."

As the Commissioner of Income-tax, in his opinion attached to the reference, seems to have fallen into an error on this point, it is well to remember that their Lordships did not decide that the whole of the profits to the Company were chargeable. They merely answered the first question stated in the special case in the affirmative, and that question was whether the Companies had *any* income in 1897 within the meaning of the Act.

Applying that case to the present, it seems clear that, in determining whether any income, profits or gains arise or accrue, we must not be content to look only at the last stage of the accrual, but must take into consideration the previous stages as well.

The main battle-ground, however, in this case has been over the provisions of s. 42 (1).

For the assessee it is contended that the section is not a charging section at all, but merely a machinery section, that is, in the words of Lord Sterndale, a section which provides a method of carrying out the charge imposed by some other section; that it is embedded amongst a number of other provisions clearly of that character; that, if it is taken as a charging section, it is so wide and far reaching in its terms and so manifestly unjust in its application to non-residents, that it could not have been so intended by the Legislature; and that a fiscal burden can only be imposed upon the subject by clear and unmistakeable language.

Reliance is placed on the case of [*Smidth & Co.* v. *Greenwood* (20), *Smidth & Co.* v. *Greenwood* (2), *Greenwood* v. *Smidth & Co.* (21)] in its various stages in the English Courts, which has been followed by a Bench of the Madras High Court in the case of the *Secretary to the Board of Revenue, (Income-tax), Madras* v. *Madras Export Co.* (1). The English Courts were construing s. 31 of the Finance Act No. 2 of 1915, and, if the Act which we are construing was, in its provisions, identical with, or similar to, the English Finance Act, No. 2 of 1915, the decisions of the several eminent Judges, though not binding on us would naturally carry the greatest weight and authority. But a comparison of the two Acts shows that not merely in arrangement, but also in substantive provisions, the Acts are, in many respects, dissimilar.

To take one point of difference indicated by Chatterjea, J., in *Rogers Pratt Shellac Co.*, v. *Secretary of State for India* (12): "It will be seen that under the English Acts, it is essential that the profits should arise from the *exercise of the trade within the*

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(20) (1250) 3 K. B. 275; 89 L. J. K. B. 993; 36 T. L. R. 760.

(21) (1922) A. C. 417; 91 L. J. K. B. 349.

United Kingdom. In the Indian Acts, (VII of 1918 and XI of 1922), however, in the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connection in British India shall be deemed to be income accruing or arising within British India. There is no such provision in the English Acts, and that distinguishes the English Acts and the cases decided thereunder from the Indian Acts."

With regard to non-residents, the only question in the English Acts is whether there is a trade exercised in the United Kingdom. This, as we have seen, is not the case under the Indian Acts.

We may here state that, though the Madras decision, already quoted, [*Secretary to the Board of Revenue (Income-tax) Madras* v. *Madras Export Co.* (1)], was under the India Income Tax Act of 1918, for the purposes of the question before us that Act does not differ from the Act of 1922, with which we are dealing.

A significant point is that the words "or deemed under the provisions of this Act to accrue, or arise, or to be received in British India" in s. 4 (1), and the analogous words in s. 4 (2), do not appear anywhere else in the Act except in s. 42 (1).

That being so, it is, in our opinion, necessary to read both sections together to arrive at the meaning of the Legislature. In other words, it is necessary to look to s. 42 (1) to find out, in the case of a non-resident, what income, profits or gains are "deemed to accrue, or arise, or to be received in British India" under the provisions of the Act; and from s. 42 (1), we find that all profits or gains accruing or arising to a non-resident, whether directly or indirectly, through or from any business connection or property in British India is deemed to be such income, and is, therefore, chargeable under ss. 4 (1) and 6.

This is the view taken by a Bench of the Calcutta High Court in *Rogers Rratt Shellac Co.* v. *Secretary of State for India* (12), and we find ourselves in general agreement with the judgment of Mr. Justice Chatterjee, with which Mr Justice Chotzner agreed, and with conclusions of which Mr. Justice Mukerji was in complete agreement.

We admit the difficulty arising from the vague expression "from any business connection." Taken in its wide sense, it would render liable to Indian income-tax any profits made by a manufacturer in England on a single consignment of goods to an importer in India. This is the meaning which the Commissioner of Income Tax seems to have attached to the phrase, and is the meaning which, the learned Government Advocate contends, is the correct one. It is one, however, which we cannot adopt, as such a meaning would be repugnant to the word "business" in s. 6 as defined by s. 2 (4), and we can assign no wider meaning to it than the latter words of the definition as "any adventure or concern in the nature of trade, commerce or manufacture." It was probably used, as Mr. Justice Chatterji conjectures, as a compendious expression to cover such concerns in the nature of trade, commerce, or manufacture as arise through a branch, factorship, agency, receivership or management. But be this as it may, its meaning, in our opinion, must be strictly confined to the meaning of the word "business" in s. 6.

Applying the foregoing conclusions to the questions of reference, we would answer the first and second questions referred as follows:—

Under the authority of *Commissioners of Taxation* v. *Kirk* (15), we hold that the fact of the produce being sold in London and the money being received there does not prevent profits or gains accruing, or arising, or being deemed to accrue or arise in British India from being taxable under the Indian Income Tax Act.

We are also of opinion that no distinction, so far as liability to income tax is concerned, can be drawn between profits on produce, which has undergone some process of conversion or "working up" by the assessee in Burma and profits on produce purchased by the assessee in Burma and exported in the same form as when purchased.

But a serious practical question arises as to whether all the net profits are liable to Indian income-tax. As we have already seen, their Lordships of the Privy Council did not so decide in the case of *Commissioners of Taxation* v. *Kirk* (15). At page 42*, Mr. Justice Mukerji, in the Full Bench Case of *Rogers Pratt Shellac Co.* v. *Secretary of State for India* (12), seems to indicate that the calculation of what part of the net profits are to be deemed to arise and accrue in India and what part at the place of disposal and realization may have to be made.

No doubt, in calculating the net profits, due deductions have already been made in

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respect of the Home establishment; but this, in our opinion, is not sufficient.

If the assessee had not had a Head Office in London and wished to ship and dispose of its produce in the English market, it could only do so, for ordinary practical purposes, by means of commission agents there, and a reasonable remuneration to such commission agents would have to be deducted before arriving at the net profits earned. But, if the Head Office in London and the various branches controlled by the Head Office in Rangoon happen to be one and the same firm, it does not, in our opinion, affect the question. And in arriving at the amount of profits liable to Indian Income-tax, the Commissioner of Income Tax, in our opinion, should allow a reasonable commission agents' commission on the sale and realization of the produce. So much of the profits as can reasonably be attributed to commission agents' commission should not be assessable to Income-tax in Burma.

With regard to question No. 3 in para. 19 of the Reference, the Commissioner refers to the same as being claimed as a commission of 2½ per cent. of the sale proceeds received for cotton and produce sold by the London Managers out of British India in consideration for the work done at the London end. It is not clear to us whether the claim is considered as a reasonable commission agent's commission. If it is, in accordance with our answer to the previous questions, this sum should not be assessed. If it is not a reasonable commission, so much of it as would represent a reasonable commission ought to be deducted and the balance assessed to Income-tax.

With regard to question No. 4: These profits seem to have arisen on contracts of insurance entered into by the Head Office on rice cargoes consigned to it by its Rangoon branch. Admittedly, the Burma branch or agency had nothing to do with them. The profits were not merely earned in England, but the contract was entered into in England.

That the policies were effected on produce coming from Burma is much too remote a connection to justify us in holding that the profits could be deemed to arise or accrue in British India, bearing in mind the circumscribed meaning to be attached to the expression "business connection."

With regard to question No. 5: The items there referred to belong to two quite distinct categories. The sum of £2,608-12-5 is described as commission earned by Steel Brother's Export Department in London on stores, etc., purchased and shipped from the United Kingdom to Burma for account of the Indo-Burma Petroleum Company. As regards this item, our answer is the same as our answer to question No. 4.

As regards the item of £1,058-16-6 which is described as commission earned by the Oil Department, London, on sale of wax, etc., in the United Kingdom for account of the Indo-Burma Petroleum Company, our answer is the same as our answer to question No. 3.

With regard to question No. 6: The last two items of £740-0-5 and £1,239-19-2 are, in our opinion, not liable to Income-tax in Burma. The first item of £6,374-13-7 is described as an allowance from the Attock Oil Company, Limited, to cover administration expenses as Managing Agents as per agreement dated the 14th November 1921. So much of this sum as represents profits on management in British India is assessable to India Income-tax. There are not sufficient data before us to answer this question with regard to this item more specifically.

With regard to question No. 7 the reference does not specify what part of the item arises from commission on stores not for sale, such as mill plant and accessories, and what, if any, arises from goods for sale, such as piecegoods. As we have already indicated, the Head Offie in London are entitled to charge a reasonable commission on all goods shipped to their branch in Burma. Unless the commission charged is unreasonable, it is not assessable to Income-tax in Burma.

On our finding, as neither party has wholly succeeded in its contention, we make no order as to costs.

R. L. *Order accordingly.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 1048 OF 1925.

March 9, 1926.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth.

Musammat SAHODRA AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

Mahant BHAGWAN DAS—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), s. 15, Sch. I, Arts. 181, 182

– *Civil Procedure Code (Act V of 1908), s. 39, O. XXI, r. 10—Transfer of execution, application for—Step-in-aid of execution—Limitation—Stay of execution—Deduction of period of stay in computing limitation.*

An application under s. 39, C. P C., for transfer of the execution of the decree is not an application for execution within the meaning of O. XXI, r. 10, C. P. C., but an application to take a step-in-aid of execution governed by Art. 181, Sch I, Limitation Act.

Where on the request of the parties execution of a decree is stayed and the judgment-debtor is allowed a certain period to pay the decretal amount, a subsequent application for transfer of execution made within three years from the date of the expiry of the period allowed to the judgment-debtor is within time.

The period allowed to the judgment-debtor for payment of money, during which period execution remains stayed, is deducible under s. 15, Limitation Act, in computing period of limitation for an application for transfer of execution.

Silta Das v. *Sheo Prasad*, 4 A. 60; A. W. N. (1881) 113; 2 Ind. Dec. (N. s.) 619 and *Balchand* v. *Raghunath Das*, 4 A. 155; A. W. N. (1881) 168; 2 Ind. Dec. (N. s.) 766, distinguished.

Execution second appeal against a decree of the District Judge, Agra, dated the 19th February 1925.

Dr. *S. N. Sen*, for the Appellants.

JUDGMENT.—The sole question for determination in this case is whether an application for the transfer of execution of a decree to the Court of the Subordinate Judge, Lucknow, made by a decree-holder on the 2nd of January 1924, was barred by limitation. The decree in question was passed on the 16th December 1919 and was transferred for execution to the Court of the Subordinate Judge of Lucknow, where some property was attached, but on an application made by the decree-holder and *Musammat* Ramjanki, the principal judgment debtor, representing the estate of the original debtor, the execution was stayed but the attachment was maintained, and the judgment-debtor was granted a year's time to pay the decretal money. The present application is within time from the expiry of the said year and if the period for which the execution was stayed be excluded under s 15 of the Indian Limitation Act, also from the date on which the above compromise was filed.

The Courts below held that the application for execution was not barred by time, because the judgment-debtor was granted a year's time for the payment of the decretal money. The present application was made under s. 39 of the C. P. C., for the transfer of the execution of the decree and as such it was not an application for execution within the meaning of O. XXI, r. 10 of the C. P. C., but an application to take a step-in-aid of execution, governed by the residuary Art. 181 of the Indian Limitation Act, which allows a period of three years from the date when the right to apply accrues. The right to apply accrued in this case when the period of a year for which the stay was granted expired. But whether we apply Art. 181, or Art. 182 read with s. 15 of the Indian Limitation Act, the application is within time.

The learned Counsel for the judgment-debtors-applicants has referred to the decision in *Sitla Das* v. *Sheo Prasad* (1) and *Balchand* v. *Raghunath Das* (2). But both these cases were decided when Act XV of 1877 was in force, s. 15 of which was confined to suits, the institution of which might be stayed by an injunction or order. Section 15 of the Indian Limitation Act now in force, however, applies to suits and execution proceedings alike.

The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

R. L. *Appeal dismissed.*

(1) 4 A. 60; A. W.N. (1881) 113; 2 Ind. Dec. (N.s.) 619.

(2) 4 A. 155; A. W. N. (1881) 168; 2 Ind. Dec. (N. s.) 766.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 751 OF 1925.

March 16, 1926.

Present:—Mr. Justice Harrison.

SHIB DIYAL—DEFENDANT—PETITIONER

versus

ALI BAKSH AND SONS, AGENT FOR ENGLAND—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss 104, 115, Sch. II, para. 5—Arbitrator, order of Court as to appointment of—Agreement to refer to arbitration, order as to—Revision.

An order directing a party to nominate a substitute for an arbitrator or else the Court would nominate one itself can only be passed as ancillary to an order directing the agreement to refer to be filed. Non-compliance with this provision is both an exercise of jurisdiction not vested as well as a failure to exercise a jurisdiction vested by law in Court and furnishes a good ground for revision.

Chandu Lal v. *Kokamal*, 61 Ind. Cas. 36; 43 A. 334; 19 A. L. J. 110, *Gurcharan Singh* v. *Shibdev Singh*, 66 Ind. Cas 258; 3 L. 175 at p. 180; A. I. R. 1922 Lah. 309, *Balakrishna Udayar* v. *Vasudeva Aiyar*, 40 Ind. Cas. 650 40 M. 793 at p. 795; 15 A. L J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M W N. 628; 6 L. W. 501; 22 O W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.) and *Har Kaur* v. *Munni Lal*, 53 Ind. Cas. 441; 134 P. R. 1919, referred to.

Petition for revision of an order of the District Judge, Lahore, dated the 20th July 1925, modifying that of the Subordinate Judge, First Class, Lahore, dated the 2nd April 1925.

Diwan *Mehr Chand*, for the Petitioner.

Malak *Barkat Ali*, for the Respondent.

JUDGMENT.—This is a revision from an order of the District Judge of Lahore in which he quashed an order passed by the Trial Court. The order quashed ran as follows:—

"I order the defendant to nominate a substitute for Balkishen Das within seven days under para. 5 of Sch. II, otherwise I will proceed to appoint another arbitrator."

The District Judge refers to both portions of this order and goes on to say that he leaves the parties to bear their own costs.

The defendant has presented this application for revision and a preliminary objection is taken that no revision lies from an order passed on appeal in virtue of s. 104 (1) of the C. P. C. Counsel relies on s. 104 (2) read with the enabling s. 115 of the Code and on the authorities *Chandu Lal* v. *Kokamal* (1), *Gurcharan Singh* v. *Shibdev Singh* (2), *Balakrishna Udayar* v. *Vasudeva Aiyar* (3) and *Har Kaur* v. *Munni Lal* (4). So far as it goes the objection is sound enough, but it ignores the fact which appears to me to be all important that such an order could only be passed as ancillary to an order directing the agreement to refer to be filed, and there is no such order. In ground No. 5 of the appeal to the District Judge it is clearly stated that no such order has been passed. Ground No. 6 is "That inasmuch as the order of the lower Court under appeal may be construed as one under para. 17, cl. (4), Sch. II, C P. C., inferentially directing the agrreement to refer to arbitration to be filed, therefore, the present appeal is preferred under s. 104 (1) (*d*), C. P C., to avoid all further complications" This, I understand, is in the alternative, if ground No. 5 does not prove acceptable. In his judgment the District Judge (the word plaintiff being read as defendant) has held that the defendant was estopped from raising this technical objection because he had taken part in the proceedings which followed the passing of the order by the Subordinate Judge. I do not think that this omission can be cured in this way, nor that because an order under the second portion of 17 (4) follows upon an order under the earlier portion of the same sub-rule, the existence of the latter somehow creates the former. There has, therefore, been a failure to exercise jurisdiction vested in the Subordinate Judge by law and there has also been an exercise of jurisdiction not vested in him in the sense that he has passed an order which could only be passed under certain conditions which have not been fulfilled.

I, therefore, set aside the whole order and in so far I agree with the District Judge, though not with the reasoning adopted by him. I order the Trial Court to suppliment the defect and to pass such order either directing the filing of the agreement or declining to do so as he may think right after hearing Counsel.

R. L. *Order set aside.*

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(1) 61 Ind. Cas. 36; 43 A. 334; 19 A. L. J. 110.

(2) 66 Ind. Cas. 258; 3 L. 175 at p. 180; A. I. R. 1922 Lah. 309.

(3) 40 Ind. Cas. 650; 40 M. 793 at p. 795; 15 A. L. J. 645; 2 P. L. W. 101: 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L R. 715; (1917) M. W. N. 628; 6 L. W. 401; 22 C. W N 50; 11 Bur L. T. 48; 44 I. A. 261 (P. C.).

(4) 53 Ind. Cas. 441; 134 P. R. 1919.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 66 OF 1925.
March 12, 1926.
Present:—Mr. Justice Walsh and
Mr. Justice Dalal.
Mahant SHANKER BAN—APPLICANT
versus
Musammat RAM DEI AND OTHERS—
OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), s. 115—Refusal of leave to sue as pauper—Revision.

No revision lies from an order refusing leave to sue in *forma pauperis.*

Buddhoo Lal v. *Mewa Ram*, 63 Ind. Cas. 15; 19 A. L. J. 558; 43 B. 564, *Secretary of State for India* v. *Jillo*, 21 A. 133; A W. N. (1898) 204; 9 Ind. Dec. (N s.) 784, *Muhammad Ayub* v. *Muhammad Mahmood*, 6 Ind. Cas. 831; 32 A 623; 7 A. L. J. 741 and *Mahadeo Sahai* v. *Secretary of State for India*, 65 Ind. Cas. 255; 20 A. L. J. 55; A. I. R. 1922 All. 1; 44 A. 248, referred to.

Civil revision from an order of the Subordinate Judge, Moradabad, dated the 17th January 1925.

Messrs. *Shiva Prasad Sinha* and *Janki Prasad*, for the Applicant.

Messrs. *R. K. Malaviya*, *S. D. Sinha*, *K. N. Malaviya* and *Debi Prasad Malaviya*, for the Opposite Parties.

JUDGMENT.—In this case the applicant in revision has been refused leave to sue as a pauper, and he aplies to this Court to review that order in revision. In our opinion we have no power to do so. The refusal to sue as a pauper does not determine anything in the suit. It is merely the decision of a preliminary issue arising in or anterior to the suit. It determines nothing except that the plaintiff cannot sue as a pauper. He can sue in the ordinary way like anybody else, and to my mind the case is indistinguishable from the case of *Buddhoo Lal* v. *Mewa Ram* (1) in which a Full Bench of this Court finally endeavoured to set at rest a point upon which there had been considerable controversy. The question there was whether a preliminary issue on a question of jurisdiction was a case decided within the meaning of s. 115. That issue if decided in the negative determined the proceedings in that Court. But it is after all only a preliminary issue arising in a suit. Although the plaintiff cannot after the determination of that issue sue in that Court, he can still sue in the proper Court which has jurisdiction. If the decision of an issue that the Court has no jurisdictian is not a case decided, I am unable for my part to see how it is possible to hold that the decision of a preliminary issue that the plaintiff is, or is not a pauper, is a case decided. The only authority of any weight, in which this matter is reported, is the case of *Secretary of State for India* v. *Jillo* (2) decided by three Judges, the then Acting Chief Justice, and Banerji, J., and Burkitt, J. Nothing is said in the head-note about revision, but the Court held that no appeal lay from an order rejecting an application for leave to sue in *forma pauperis*, and they dismissed the appeal. They then entertained the matter of their own motion in revision saying:—"The order passed by the Subordinate Judge is so extraordinary that we direct this case to be treated as a case in revision," and they appointed a further date for argument, after allowing the other party to be heard, and they quashed the order in revision. The report and the head-note are alike somewhat difficult to follow probably due to the confusion arising from the procedure of the Subordinate Judge. What does appear to be clear is that, although the pauper's application was rejected, the Secretary of State, who had resisted it, was refused his costs. In revision the High Court passed an order directing the application to sue in *forma pauperis* to be dismissed with costs giving the Secretary of State his costs against the applicant. The point about a "case" was not argued, it was assumed to be a case. On the other hand in the case of *Muhammad Ayub* v. *Muhammad Mahmood* (3) a Divisional Bench held that revision did not lie from an order granting leave to sue as a pauper. The subtle distinction relied upon is clearly set out in the judgment of the two Judges. Mr. Justice Chamier in particular says:—"It seems to be quite clear that the 'case' must have been decided before the High Court can interfere in revision....But giving the word 'case' the widest meaning...I am unable to hold that the order against which this application for revision is presented decided any 'case.' It appears to me that there is a clear distinction between the case of an application for permission to sue or appeal in *forma pauperis* being dismissed or rejected and case in which a similar application is allowed. In the former, it may be said that the case had been decided while in the latter the order appears to be merely interlocutory" I am unable to accept this subtle distinction, and it seems to me that on principle the whole controversy is wiped out and set at rest by the decision of the Full Bench. I adhere to what I said in the case of *Mahadeo Sahai* v. *Secretary of State for India* (4) though it was only a *dictum*, and as this application definitely raises the principle, I feel compelled to hold that no revision lies, and that this application must be dismissed with costs including in this Court fees on the higher scale.

R. L. *Application dismissed.*

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(1) 63 Ind. Cas. 15; 19 A. L. J. 558; 43 A. 564.

(2) 21 A. 133; A. W. N. (1898) 204; 9 Ind. Dec. (N. S.) 794.

(3) 6 Ind. Cas. 831; 32 A. 623; 7 A. L. J. 741.

(4) 65 Ind. Cas. 255; 20 A. L. J. 55; A. I. R. 1922 All. 1; 44 A. 248.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2898 OF 1925.
March 12, 1926.
Present:—Mr. Justice Zafar Ali.
BISHNA *alias* BISHAN SINGH—
DEFENDANT—APPELLANT
versus
NARAIN SINGH AND OTHERS—PLAINTIFFS
AND SUNDAR SINGH—DEFENDANT
—RESPONDENTS.

Adverse possession—Co-owners—Exclusive possession.

Jhanda Singh, Hira Singh and Jagat Singh were brothers and co-owners of a piece of land. The possession of the entire holding was with Jhanda Singh the others being absentees. In 1896 sons of Hira Singh sold off their share to a stranger which was successfully pre-empted by Gattu son of Jhanda Singh. In 1907 Jagat Singh died and his share was mutated in favour of Gattu no mention being made of Hira Singh's sons. On Hira Singh's sons bringing a suit for possession for half share of Jaggat Singh's share in 1923:

Held, that the plaintiffs' suit was barred by time for Gattu's possession since 1907 was exclusively on his own account and not that of co-owner and was, therefore, adverse to the plaintiffs.

Hardit Singh v. *Gurmukh Singh*, 47 Ind. Cas. 626; 64 P. R. 1918; 58 P. W. R. 1918; 24 M. L. T. 389; 28 C. L. J. 437; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.), distinguished.

Second appeal from a decree of the District Judge, Gurdaspore, dated the 13th August 1925, affirming that of the Subordinate Judge, Fourth Class, Gurdaspore, dated the 5th January 1924.

Lala *Fakir Chand*, for the Appellant.
Lala *Jamna Dass*, for the Respondents.

JUDGMENT.—The proprietary holding in which the plaintiffs claim a share appears to have descended from Jamiat Singh the common ancestor of the parties. Jamiat Singh had three sons, Jagat Singh, Jhanda Singh and Hira Singh. The defendant Bishan Singh is the grandson of Jhanda Singh and the plaintiffs are grandsons and representatives of Hira Singh. In the *jamabandi* of 1890 Jhanda Singh, the sons of Hira Singh and Jagat Singh were entered to be co owners of the holding but Jhanda Singh alone was in possession of the entire holding, and the other co-sharers were entered as absentees. In 1896 the sons of Hira Singh sold off their share in the holding to a stranger and thus ceased to be co-sharers therein. Jhanda Singh seems to have died before that and Gattu his son, pre-empted the share sold successfully and thus became owner of 2/3rds share in the holding and he was like his father in possession of the entire holding. Jagat Singh died in 1907 and his share was then mutated in the name of Gattu alone who was actually in possession. In the mutation proceedings no mention was made of the plaintiffs who were undoubtedly entitled to succeed to a moiety of Jagat Singh's share as his heirs, but they were absent in another village and did not come forward to claim it. They brought the present suit in 1923 for possession of half of Jagat Singh's share and the defendants pleaded, *inter alia* that the suit was time barred. This plea has been overruled by the Trial Court as well as the learned District Judge who has disposed of it thus:—

"Jagat Singh had been recorded as an absentee ever since 1890. In 1907 Gattu (appellant's father) made a report to the *patwari* setting forth Jagat Singh's absence and his own possession and requesting that Jagat Singh's name might be removed and his own substituted. Before the mutation came before the Revenue Officer Jagat Singh died or Gattu became aware of his death and he claimed the land as Jagat Singh's heir. Mutation was sanctioned in his favour as Jagat Singh's heir.

"Appellant's Counsel relies on this long absence and especially on the statement to the *patwari* in 1907 as proving the appellant's adverse possession. In my opinion this case is governed by the general principles of joint possession of property as laid down by their Lordships of the Privy Council in Appeal Case No. 230 of 1912 and *Hardit Singh* v. *Gurmukh Singh* (1). No doubt Gattu manifested to the *patwari* his intention to hold adversely in future, but how was that communicated to the other heirs of Jagtu. If he had succeeded as the sole heir of Jagtu, the result might have been different, but he succeeded simply as heir."

This reasoning of the learned District Judge is obviously erroneous and the rulings cited by him are not in point. The plaintiffs and the defendant were neither co parceners nor members of a joint family and the former were not co-sharers in the holding with the latter. The possession of Gattu was not as one of the co-owners but in his own right exclusively which he asserted in 1907. The plaintiffs' right to sue for possession accrued in that very year on the death of Jagat Singh and as they brought the present suit in 1923 the suit is clearly time-barred because defendant has been in possession adversely to them in his own right and not as a co-owner on behalf of himself and other co-owners.

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(1) 47 Ind. Cas. 626; 64 P. R. 1918; 58 P. W. R. 1918; 24 M. L. T. 389; 28 C. L. J. 427; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).

I, therefore, accept the appeal and reversing the decree of the Court below dismiss plaintiffs' suit with costs throughout.

R. L. *Appeal accepted.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 74 OF 1924.
November 13, 1925.
Present:—Mr. Justice Devadoss and
Mr. Justice Waller.

THE MADURA HINDU PERMANENT FUND, LTD., THROUGH ITS SECRETARY—
APPELLANT
versus
KAMAKSHI AMMAL AND ANOTHER—
RESPONDENTS.

Hindu Law—Will, construction of—Disposition to named person and 'his male heirs'—Estate-in-tail.

When a Hindu bequeaths property to some one and his male heirs, he means that the property should devolve upon the legatee and the male heirs in succession and thereby creates an estate-in-tail in favour of male heirs. Such a Will fails in its entirety, the estate created being unknown to Hindu Law. [p. 487, col. 2; p. 488, col. 1.]

When a person devises property to a person and "his male heirs" and then lower down, instead of repeating the expression uses the expression "aforesaid person and his heirs" it cannot be said that he intended to change the course of devolution of the property already provided for in the preceding clause of the Will. [p. 488, col. 1.]

Doe v Fyldes, (1778) 2 Cowp. 833; 98 E. R. 1387, referred to.

Letters Patent Appeal against the judgment and decree of Mr. Justice Phillips, passed in Second Appeal No. 1450 of 1921, preferred against a decree of the District Court, Madura, in A. S. Nos. 260 and 263 of 1920, preferred against that of the Court of the Subordinate Judge, Madura, in O. S. No. 130 of 1918.

Mr. *K. V. Krishnaswami Iyer*, for the Appellant.

Mr. *T. M. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.—This appeal is against the judgment of our learned brother Phillips, J., and relates to the construction of a Will. The clause of the Will to be construed reads as follows:—

"The under mentioned house................ and all the rights accruing thereunder, shall after me, devolve absolutely on my natural father Pichuvayyar and his male heirs. My aforesaid natural father and heirs shall maintain my adoptive mother Kamakshi Ammal during her life and shall perform the obsequies to be done to her and to me; and the aforesaid Pichuvayyar and his heirs shall get the under-mentioned house belonging to me, absolutely with right to alienate the same by gift, exchange sale, etc." It was held by Mr. Justice Phillips that the Will created an estate unknown to Hindu Law and, therefore, the disposition was invalid.

The first contention of Mr. K. V. Krishnaswami Aiyar for the appellant is, that there are two dispositions in the Will and as they are inconsistent dispositions they must be construed in such a way as not to give rise to an intestacy. The Will does not contain two distinct dispositions but only one disposition in favour of the father and his male heirs in the first clause and in the second clause a condition is attached as to what should be done for the maintenance of the adoptive mother and for the performance of the funerals. The second clause is only explanatory of the first and does not contain a disposition different from that contained in the first. In this view it is unnecessary to consider whether the principle of s. 75 of the Indian Succession Act should be applied to the case of a Hindu Will. Section 75 has not been enacted in the Hindu Wills Act and even if the principle of s. 75 is to be applied to Hindu Wills, it cannot be applied to a Will executed in the *Mofussil* to which the Hindu Wills Act does not apply. It is unnecessary to consider this question further.

The real question is whether the words "My natural father Pichuvayyar and his male heirs" means Pichuvayyar and the male heirs in succession. The contention of Mr. K. V. Krishnaswami Aiyar is, that the *tamil* words "*Yen Janakapitah Pichuvieravergalum Avarudya Anuvarsuka um*" should not be translated as "my father Pichuvayyar and his heirs male." But the correct translation of *Anvarsugal* is only "male heirs" and when a person bequeaths property to some one and his male heirs, he means that the property should devolve upon the legatee and the male heirs in succession The words, therefore, create an estate-in-tail in favour of male heirs and according to the principle laid down in the well-known Tagore case, such an estate is unknown to Hindu Law, and such bequests cannot, therefore, be valid.

The next contention of Mr. K. V. Krishnaswami Aiyar is that the first clause of the Will should be interpreted in the light of the second clause. In the first clause the words are "My natural father and his male heirs" and in the second, the words are, "My aforesaid natural father and heirs" and lower down "aforesaid Pichuvayyar and his heirs." Strong reliance is placed on the expression "Pichuvayyar and his heirs" and it is said that the testator meant to dispose the property to 'Pichuvayyar and his heirs.' This argument overlooks the use of the expression 'aforesaid.' When a person devises property to a certain person and certain heirs and when he lower down, instead of repeating the expression uses the expression 'aforesaid person and his heirs' it cannot be said that he intended to change the course of the devolution of the property already provided for in the preceding clause of the Will. The observations of Lord Mansfield in *Doe* v. *Fyldes* (1) apply to this case. The learned Lord observes "If the word 'heirs' is so used in the first place, it must be so used in the several other places that follow. Nothing is to be implied from the additional words 'for ever' because that expression is repeated by the testatrix in the devise of each of the estates tail. The nature of the provision affords a strong argument that she did not mean to change the sense of the word 'heirs' in this part of the Will, and to give a fee simple." In that case the testatrix bequeathed her property to her elder daughter Alice Scolefield and the heirs of her body lawfully to be begotten for ever and in the latter portion of the Will repeated the expression "the heirs of Alice Scolefield" three times in the Will. The question was whether the words 'the heirs of Alice Scolefiield' thrice repeated relative to the redemption of the term vested in the executors shall be construed to refer to the special designation of the heirs, to whom the estate is devised in the beginning of the Will, or to introduce a new and more general denomination of heirs and to amount to a revocation of the expression "estate tail" given in the beginning of the Will. Lord Mansfield held that the expression "heirs of Alice Scolefield" though thrice repeated, did not create a fresh bequest in favour of the heirs of Alice Scolefield but left the bequest in favour of Alice Scolefield and the heirs of her body to be lawfully begotten unaffected. In this case the testator devises the property to his father and his male heirs and in a later clause uses the expression "father and his heirs." It cannot be said that the later clause has in any way changed the nature of the disposition or the nature of the estate created in the previous clause. Mr. K. V. Krishnaswami Aiyar tried to get over the aforesaid decision of Lord Mansfield in *Doe* v. *Fyldes* (1) by contending that none of the text books except Jarman on Wills, gives any reference to this case. But we find that this case was referred to as an authority though on an another point by Crompton, J., in *Good* v. *Good* (2).

It is next contended by Mr. K. V. Krishnaswami Aiyar that if the bequest in favour of heirs even if held to be bad, the bequest in favour of the father should be held to be good. This contention is against the principle of the decision in the Tagore case. When a testator devises property to his father and male heirs, the Court is not justified in creating a new Will for the testator by giving the property absolutely to the father and overlooking the intention of the testator to bequeath the property to father 'and his male heirs.' This is not a case where Pichuvayyar is given a life-estate and the remainder over to the male heirs The bequest is to the father and the male heirs. The Court would not be justified in treating the bequest as one to the father alone. The judgment appealed against is right. We, therefore, dismiss the appeal with costs.

V. N. V. *Appeal dismissed.*
R. L.

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(1) (1778) 2 Cowp. 833; 98 E. R. 1387.

(2) (1857) 119 E. R. 1256; 7 El. & Bl. 295; 3 Jur. (N. S.) 536; 110 R. R. 600.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 104 OF 1924.
November 18, 1925.
Present:—Mr. Justice Ramesam.
TADANKI BRAHMAYYA AND OTHERS —DEFENDANTS NOS. 1 AND 2 AND LEGAL REPRESENTATIVES OF DEFENDANT NO. 1 —APPELLANTS
versus
PUVVALA MADHAVAN AND ANOTHER— PLAINTIFF AND DEFENDANT NO. 3 —RESPONDENTS.

Trust—Inam—Sarva Dambala inam—*Non-performance of services*—De facto *trustee, powers of—Transfer of trusteeship—Adverse possession.*

A trust shall not fail for want of a lawful trustee and where a person is doing something unlawful or something to the detriment of the trust, even a *de facto* trustee is entitled to maintain a suit against him for the benefit of the trust or institution. [p. 492, col. 1]

But where certain lands were granted as *Sarva Dambala inam* to certain dancing girls long before the Permanent Settlement for the purpose of rendering service, it is not competent to a *de facto* trustee to call upon the service-holders to perform the services, and in default of performance to dismiss them and appoint other persons in their places. [*ibid.*]

The phrase "*Sarva Dambala inam*" only means that no money payment is insisted on the holding of the *inam* and it does not necessarily show that it is not a service *inam*. [p. 490, col. 2.]

A transfer of trusteeship of a temple is invalid. [p. 491, col. 1.]

Rajah Vurmah Valia v *Ravi Vurmah Kunhi Kutty*, 1 M. 235; 1 Ind. Jur. 134; 4 I. A. 76; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156 (P. C.), followed.

But such a transferee of trusteeship can prescribe for a lawful title by adverse possession of the office for more than 12 years. [p. 492, cols. 1 & 2.]

Appeal against a decree of the District Court of Kistna at Masulipatam, in A. S. No. 11 of 1922, preferred against that of the Court of the Principal District Munsif, Gudivada, in O. S. No. 435 of 1919.

Mr. *S. Varadachariar*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.—The facts out of which this second appeal arises may be stated as follows:—

In the *zemindari* of Telaprolu there is a village called Pamulapadu. In that village there is a temple dedicated to Sri Chidanandeswara Swami and it is said that the suit *inam* was granted to certain dancing girls long before the Permanent Settlement for the purpose of rendering services in the temple. In the year 1904, the Tahsildar of Nuzvid started an inquiry on the question whether the services were being properly performed by the dancing girls in the temple and whether, therefore, the Government ought not to resume the *inam*. The correspondence dealing with this matter consists of Exs. C to G during the years 1904 and 1905. Finally the Government placed the *inam* under attachment and began to collect assessment on the *inam*. Exhibit G is the final order of the Collector. It appears from it that at that time, the services were not being rendered for the preceding 15 years. The manager of the Telaprolu estate says in Ex. F: "There is little or no probability of the Kalyanothsavam in the Pamulapadu temple being performed in the near future." Exhibit G shows that the service was not rendered by the dancing girls for some time because the Utsavam at which such services had to be rendered was not performed. They were willing to render service if the Utsavam is resumed. In 1911 the *zemindar* of Telaprolu executed a deed of gift (Ex. G) giving the suit village of Pamulapadu in favour of his brother-in-law Gangadhara Ram Rao and his sons. The gift was followed by a Sub-Division and now the donee is regarded as the proprietor of the village paying a separate *peishkush*. He then began to take steps to get the services in the temple properly rendered and to revive the Kalyanothsavam issued two notices on 23rd August 1912 and 21st October 1912 to the representatives of the service-holders, namely, the present defendants Nos. 2 and 3. To these they replied by Exs. H and J denying that the land was a service *inam* and that they were liable to render service in Kalyanothsavam, etc., festivals. After this denial the proprietor appointed the plaintiff for the purpose of rendering service in the temple. This was in June 1913. Meanwhile in 1913 by Ex. K the Government released the *inam* from attachment and informed the trustee that he could take such action as he thought fit to secure the revival of the services. In 1915 by Ex. (F) the proprietor called upon the defendants Nos. 2 and 3 to render services in the temple. In this notice he says that as he entertained some doubt as to the legality of the prior notices, a fresh notice was issued. He also calls upon them to appear before the Tanadar of Pamulapadu on 8th May 1915 to show cause why they should not be dismissed from service. He entertained doubts as to the legality of the earlier notices, apparently because they were issued at a time when the *inam* was under the attachment of the Government and when the Government was collecting assessment on the *inam*. Soon after the notice, Ex. P, the proprietor seems to have filed a suit to recover possession of the suit *inam*. That suit was dismissed on the ground that the right of resumption was not in the *zemindar* but in the Government and that the proper person to recover the *inam* from the defendants would be the new appointed to the office. Thereupon the present plaintiff who was appointed in June 1913 filed this suit in August 1919. Both the lower Courts decreed the suit and the defendants have filed this second appeal.

Mr. Varadachari who appears for the appellants raises four points:—

1. Whether the *inam* was a service *inam* held on condition of rendering service in the temple?
2. Whether the donee under Ex. Q was the lawful Dharmakartha of the temple and was entitled to call upon the defendants to perform service and dismiss them on disobedience and appoint the plaintiff or other person to the office?
3. Whether the plaintiff is entitled to mesne profits?
4. Whether the *inam* consisted of Melwaram only or both Melwaram and Kudivaram?

On the first question as to the nature of the *inam* I will refer to the documents not with a view to give any finding but merely to show that probably there was a genuine doubt in the minds of the defendants as to the nature of the *inam*. The earliest document Ex. XIV which is an extract from Oake's Register of *inams* for *Fasli* 1177 shows that the suit *inam* was described as Mokhasa It was granted to one Balaguruvai in *Fasli* 1172 by Narasimha Appa Rao, the *zemindar* of Nuzvid. The other documents, Exs. XIV series, also extracts from Oake's Register of *inams*, show that in the case of other service *inams*, they were not shown as Mokhasa but as *inam* expressly describing the service. For instance in Exs. XIV (*b*), XIV (*e*) and XIV (*h*), the *inam* is described as *inam* to carpenters and blacksmiths for repairing the Vahanams of Swamivaru. In Exs XIV (*c*), XIV (*d*) and XIV (*f*), the services are described as Bajanathri, etc., for the performance of Ootasavaram in Ayilur Swami temple. Then another set of documents Exs. II, III and IV were also relied on. In Ex. II the suit *inam* appears under the head "*Sarva Dambala inams*" so also in Exs III and IV. The phrase "*Sarva Dambala inam*" was also relied on in the lower Courts and before me to show that it was an absolute *inam* and not subject to any service and I am merely expressing an opinion and not giving a finding on the issue. I rather think that the phrase "*Sarva Dambala inam*" was only meant to show that no money payment was insisted on the holding of the *inam* and it does not necessarily show that it was not a service *inam* and this opinion is supported by the contents of Ex. XII. The *inam* came up before the Inam Commissioner in 1860 for consideration and it was held that the land was *inam Devadayam* service and it was confirmed to the then holders under r. III, cl. I., to be held so long as the service was rendered. Of course no quit rent was imposed. In col. 8, it is stated that the *inam* is held for service as dancing girls. Govindamma the grandmother of the present defendants, was then mentioned as the present owner. It is said that she was aged 70 and the present 2nd and 3rd defendant's names do not appear as members of the family. Exhibits. V, VI, VII and VIII are Cowles relating to *inam* in the suit village after the *inam* Settlement and here again the *inam* is described under the heading "*Sarva Dambala*." I need not make any further comment on this phrase "*Sarva Dambala*" as I have expressed my opinion in the matter.

In the year 1905, the defendants Nos. 2 and 3 seem to have expressed their willingness to render service when the Kalyanothsavam was performed (Ex. G). Somehow they did not then raise the question as to the nature of the tenure. But when they thought that they may well raise the question as to the nature of the tenure on which the *inam* was held, they sent Exs. H and J in reply to the notices of the proprietor, denying that it was a service *inam*. In Ex. L, however, they seem to be more guarded in their tone than in Ex. H and J their previous replies. In Ex. L they say :—

"We shall act in whatever manner the Court may decide. As it is a dispute relating to liability to do service, we will not get any justice by an enquiry by our officials I, therefore, pray that justice may be got rendered through Court. We have, therefore, submitted this." It seems that they would not be satisfied with the result of an enquiry by the Tanadar before whom they were asked to appear by Ex. L. They wanted the decision of a Court. If the Court was of opinion that it was a service tenure, they were willing to render service. Though this intention was not expressed in so many words, it is clear from their attitude in their written statement in the suit that such was their intention.

In para. 5 they say:—

"While the defendants are raising *bona fide* contentions to the effect that it is not service *inam*, he (the Dharmakartha) should get it established, through Court, that the suit *inam* is a service *inam* and then he should give the defendants an opportunity to serve and if they (defendants) fail to do so, he should get them (defendants removed from service through Court and should appoint another. The appointment of plaintiff made without having recourse to the above procedure is not proper. If in this suit, the Court is of opinion that it is a service *inam*, the defendants are ready to do service or get service done." Therefore, their willingness to render service after decision by the Court is expressly stated.

I now pass on to the second point raised by Mr. Varadachari, namely, whether the proprietor is the lawful Dharmakartha of the suit temple. The deed of gift Ex. Q does not expressly purport to transfer the legal rights of trusteeship in respect of the suit temple in the village to the donee. It is unnecessary to observe that even if it purports so to transfer, it is invalid: see *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (1). It may be that there was an impression in the minds of the donor and of the donee that the trusteeship has passed to the donee along with the gift.

The Courts below in dealing with this point find that the Archakas in performing the Svasthivachakam are now mentioning the name of Gangadhara Rama Rao. This is, of course, a finding of fact. But if there is no valid transfer of the trusteeship, the fact that the Archakas thought that the present proprietor of the village was the Dharmakartha and mentioned his name at the time of Svasthivachakam does not make him a Dharmakartha. It is said that the Government recognised the present proprietor as the Dharmakartha, but this is not very clear. The District Munsif erred in saying that in Exs. C to K the Government recognised the donee as the Dharmakartha, for Exs. C and G were addressed to the *zemindar* of Telaprolu. Exhibits H and J had nothing to do with the Government. Only Ex. K was addressed to the present proprietor by Government. But it can scarcely be relied on as the considered opinion of the Government on a question of this kind which was never raised before them and was neither discussed nor adverted to in the letter, the only object of which was to release the *inam* from attachment. It is also said that the defendants themselves recognised the present proprietor as Dharmakartha in Exs. H and J. But Exs. H and J are mere replies to notices in which the proprietor described himself as Dharmakartha. The same remark applies to Ex. L. All those documents show that the defendants merely repeated the description which the proprietor applied to himself. But even assuming that they intended anything more, their admission that he was Dharmakartha cannot make him Dharmakartha, if otherwise he was not the Dharmakartha. These transactions would not estop them from raising that point, for it cannot be said that these letters induced him to change his position for the worse. It follows that the proprietor was not the *de jure* Dharmakartha of the temple. Mr. Ramadas says that even if he was not the *de jure* Dharmakartha, he was certainly the *de facto* Dharmakartha and, therefore, he was entitled to appoint. He relies on the decisions in *Benarsi* v. *Altaf Husain* (2), *Muiz ud-din* v. *Muhammad Ekhlaq* (3) an unreported judgment in Second Appeal No. 107 of 1923 and the observations at page 82 in *Sheo Shankar Gir* v. *Ram Shevak Chowdhri* (4).

In *Benarsi* v. *Altaf Hussain* (2) it was held that the *de facto* Muthavalli of mosque can sue to remove a person who is infringing on the rights of the mosque and the defendant who is infringing on the rights of the mosque could not challenge the position of the *de facto* Muthavalli. In *Muiz-ud-din* v. *Muhammad Ekhlaq* (3), it was held that the son of the prior *de facto* Muthavalli could obtain refund of a payment made by the father, provided he credits it to the trust and uses it for the purpose of the trust. In Second Appeal No. 107 of 1923 it appears that the point taken for the defendants was that the plaintiff was not the sole trustee. It was found that the plaintiff's father and grandfather were looking after the Pallivasal from 1869 onwards and though it was not very clear, it looked as if the plaintiff was one of the persons who might have acquired the trusteeship by prescription or by exercising the right for a long time, *i. e.*, from 1867 onwards. But the suit was only against the tenant for possession of the site leased. The principle in all these three cases seems to be that a trust shall not fail for want of a lawful trustee and that where the defendant is doing something unlawful or something to the detriment of the trust, even a *de facto* trustee should be allowed to maintain a suit for the benefit of the trust or institution. In the present case the suit is not on behalf of the trust or institution, nor is there any question of a *de facto* manager maintaining a suit on behalf of the trust. All that can be said is that the *de facto* Dharmakartha called upon the defendants to perform the services dismissed them and appointed the plaintiff in the interests of the institution. The question, therefore, is whether the *de facto* Dharmakartha can put an end to the tenure which was being held by the defendants and give it to another. I, therefore, think these decisions relied on do not apply here. In *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* (4) it was held that where there was an alienation on behalf of an institution for the purpose of the institution, the alienee dealing with the *de facto* manager *bona fide* ought to be protected, and reference was made to *Hunooman Persaud case**. It has only to be observed that no question of that kind arises in the present case.

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(1) 1 M. 235; 1 Ind. Jur. 134; 4 I. A. 76; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156 (P. C.).

(2) 63 Ind. Cas. 171.

(3) 74 Ind. Cas. 756; 21 A. L. J. 516; A. I. R. 1924 All. 59.

(4) 24 C. 77; 12 Ind. Dec. (N. S.) 717.

I, therefore, think that the proprietor was not entitled to dismiss the defendants and appoint the plaintiff. I have no doubt that by 1923 or 1924 by adverse possession the present proprietor has completed his right as trustee by prescription and probably he would be entitled to call upon the defendants to render service hereafter. But it cannot be said that he was entitled to do this in 1912. When he issued notices to which Exs. H and J were replies or in 1915 when he issued Ex. P and I may express the hope that the defendants would not take the risk of denying their liability to service hereafter if the present proprietor calls upon them to render services again. But so far as the present suit is concerned, on this ground I think the appeal has to be allowed.

Though no doubt their attitude in Exs. H and J may be said to be the cause of the whole trouble, they assumed a much better attitude in Ex. L and also in the written statement and though it looks as if they have succeeded by a fluke which somewhat looks like a technical point, there has been no misconduct during the trial of the case. With regard to the nature of the tenure, as I have set forth in the beginning of this judgment, I think there is very good justification for their being anxious to have the decision of the Court on the nature of the *inam*, and it cannot be said that their conduct was contumacious whatever might be said as to the result of their denial that the suit land is service *inam*. I express no opinion on the point *i.e.*, how far their attitude while denying the service tenure would have helped them, if the suit is otherwise maintainable. Seeing that they have succeeded on the other point, I do not see why they should be deprived of their costs. It is unnecessary to express any opinion on the 3rd and 4th points raised by Mr. Varadhachari.

The result is this appeal is allowed and the suit is dismissed with costs throughout.

V. N. V. *Appeal allowed.*
R. L.

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*See *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree*, 6 M. I. A. 393; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J, 29; 1 Sar. P. C. J. 552; 19 E. R. 147—[*Ed.*]

LAHORE HIGH COURT.

First Civil Appeal No. 1439 of 1920.
March 19, 1926.
Present:—Mr. Justice Zafar Ali and
Mr. Justice Campbell.
WAZIR SINGH—Plaintiff—Appellant
versus
Sodhi MOTI SINGH and others—
Defendants—Respondents.

Hindu Law—Alienation—Will—Self-acquisitions—

*Pension—*Jagir*—Priestly income—Sikh Sodhi Khatris of Anandpore, District Hoshiarpore—Law of inheritance.*

The father of an undivided family subject to Mitakshara Law has full powers of disposition over his self-acquired property. [p. 498, col. 1.]

Balwant Singh v. *Rani Kishori*, 20 A. 267; 2 C. W. N. 273; 25 I. A. 54; 7 Sar. P. C. J. 279; 9 Ind. Dec. (N. S.) 533 (P. C.) and *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy*, 10 B. 528; 5 Ind. Dec. (N. S.) 742, followed.

Jagir money as well as pension is the self-acquired property of each recipient though the *jagir* or the pension may have continued from father to son. [p. 497, col. 2.]

Income from priestly source is the self-acquired property of the man who receives the offerings though the offerings are made to him for his being a member of a ancient priestly family. [p. 500, col. 2.]

Sodhis of Anandpore, District Hoshiarpur, do not follow Hindu Law in matters of inheritance. Therefore, there is no presumption that an Anandpore Sodhi family constitutes a co-parcenary body in accordance with Hindu Law of Mitakshara. [p. 497, col. 1.]

Dr. *Gokal Chand Narang* and Lala *Fakir Chand*, for the Appellant.

Bakhshi *Tek Chand* and Lala *Badri Dass*, R. B., for the Respondents.

JUDGMENT.

Zafar Ali, J.—The suit which gives rise to this first appeal is based on a Will under which Wazir Singh, the plaintiff-appellant, is the principal legatee, the other legatees and beneficiaries being defendants Nos. 4 to 9.

The properties willed away are of four kinds described in the petition of plaint under heads A, B, C and D and Wazir Singh sues for possession of properties A and B and for a declaration that he is entitled to realise the *talukdari* dues, etc., set forth under the heads C and D.

The testator Narindar Singh was a Sodhi Khatri by caste and was one of the family of Sodhi Khatris of Anandpore in the Hoshiarpore District. These Sodhis of Anandpore are treated as Gurus or spiritual guides and are held in great esteem by Sikhs because they (the Sodhis) are lineal descendants of Ram Dass, the fourth Sikh *Guru* and the common ancestor of the remaining Sikh Gurus who succeeded him one after the other (see the pedigree table Ex. A-8).

Narindar Singh had an only son Moti Singh but the father and son fell out in about 1897 and ever since remained at daggers drawn. Wazir Singh was an old servant of Narindar Singh but could have no family relationship with him because he is a *jat* by caste. He had ostensibly no claim on Narindar Singh but his long and faithful services. As stated in the Will, Narindar Singh had a two-fold object in making it (1) to disinherit Moti Singh whom he characterised as disobedient, undutiful and worthless and (2) to reward Wazir Singh for his good services. He bequeathed all his self-acquired estate to Wazir Singh and left his ancestral property to his two grandsons the sons of Moti Singh to the exclusion of the latter. But on the death of Narindar Singh which occurred on the 15th December 1912 Moti Singh quietly succeeded to his entire property both ancestral and self-acquired.

The Will is dated the 15th April 1908 and it was duly proved by the evidence of the Scribe (P. W. No. 3) and an attesting witness (P. W. No. 4). It was further proved that it was deposited by Narindar Singh with the Registrar in a sealed cover and that after his death the cover was opened and the Will was duly registered.

The only contesting defendant in the case is Moti Singh who impugned the Will on various grounds, but his plea that the Will was made under undue influence was overruled by the learned Senior Sub-Judge who tried the case and it is not pressed before us. It is, therefore, not necessary to detail here all the facts and evidence on which this plea was based but a few facts which throw a side light on the other aspects of the case may be stated here very briefly. Moti Singh stated that after the death of his mother an illicit intimacy sprang up between his father and *Musammat* Raj Mani, the married daughter of Wazir Singh and that the boy named Hari borne by her was the issue of this illicit connection, Moti Singh further asserted that he alienated from himself the affection of his father by objecting to his liaison with *Musammat* Raj Mani which was creating a scandal and that Narindar Singh made the bequest to Wazir Singh not in recognition of his services as a menial servant for which he had already been sufficiently remunerated but to make a provision for the boy Hari Singh. *Musammat* Raj Mani had, however, died on the 13th April 1906 full two years before the date of the Will and her son Hari did not survive her long, the date of his death being 28th September, 1908. But the deaths of these persons led to no reconciliation between Narindar Singh and Moti Singh and there was nothing in evidence to indicate that Wazir Singh exercised an undue influence over his master and induced him by the use of it to make the Will.

The main pleas of Moti Singh, however, were (1) that the Will had been revoked by Narindar Singh and (2) that the Will was invalid and not binding on them.

The findings of the Court below on both these points are in favour of Moti Singh but after a careful consideration of the evidence on the record we came to contrary conclusions.

As regards the alleged revocation of the Will the defendant relied in the first place as a codicil or supplementary Will made by Narindar Singh only about three weeks after the Will in question *i. e.*, on the 5th May 1908. There is, however, nothing in this codicil to indicate that Narindar Singh intended thereby to revoke the Will previously made. He described it as a supplementary Will, repeated therein that his object was to disinherit Moti Singh and nominated three persons as managers of his property, *i e.*, presumably the property bequeathed to his grandsons that might in the event of his early death devolve on them during their minority. According to the learned Senior Sub-Judge also this document does not expressly revoke the first Will. But he was of opinion that it nullified the Will by implication. It is difficult to see how nullification by implication could be inferred from the context of the Will. In his letters of the 10th May and 20th July 1912 Narindar Singh mentions having appointed managers to administer his property after his death and the learned Senior Sub-Judge rightly observes that this lends support to the evidence relating to the codicil but there is nothing to show that the property for which managers were appointed included the property that had already been bequeathed to Wazir Singh.

Narindar Singh has been described by some of defendant's witnesses also as an intelligent man who could not be duped. He was moreover a *Rais* (a man of position). A person of his standing in society could not be oblivious of the consequences of making a Will and depositing it with the Registrar (who was also the Deputy Commissioner of the District). If he had made the supplementary Will with the intention of revoking the previous Will he would have withdrawn the latter from the Registrar's office at the earliest opportunity. But this he never did though the alleged object of his affection, namely, Hari, who was to be ultimately benefited had also passed away not long after the making of the Will, *i. e.*, in September 1908. That Narindar Singh did not withdraw the Will is a circumstance which strongly militates against the theory of annulment of the Will.

Secondly it was pleaded that Narindar Singh had executed a new Will a few days before his death revoking the old one and acknowledging Moti Singh as his heir. This Will was said to be in the possession of Rala Singh defendant No. 5 but Ralla Singh was not only not called upon to produce it but was not even questioned about it when examined as a witness by the defendant. The secondary evidence produced about this alleged Will consists of the testimony of only one witness, namely, Daulat Ram (D. W. No. 17) who passed as one of the two attesting witnesses. The other though named was not produced. The scribe was not even named. The question is, was the testimony of this witness worthy of credit He is no doubt a respectable man, inasmuch as he is a banker and a Municipal Commissioner and pays Rs. 850 as income-tax but he is very much interested in the result of this litigation. Among the properties bequeathed to the plaintiff are certain *taluqdari* rights of the value of Rs. 36,000. This witness had obtained a money decree against Moti Singh defendant and the estate of his father and in execution of that decree these *taluqdari* rights were attached and sold for Rs. 30,000 Wazir Singh (plaintiff) having objected to the attachment and sale the decree-holder was ordered to furnish security for the amount so that if the plaintiff should succeed in his suit this witness may have to discharge Rs. 30 000. The evidence of this witness is to the following effect:—

Rala Singh (defendant No. 5) took him one night at 2 or 3 A. M to Narindar Singh who was lying on his death bed in a Seari. There Rala Singh produced a Will and read it out and said that it was made by Narindar Singh and asked him (Daulat Ram) to attest it. He (witness) asked Narindar Singh, whether he should do so. Narindar Singh replied that he should. He then attested it and came away. Narindar Singh died two or three hours after he had left. The Will was in favour of Moti Singh and revoked a previous Will. The other attesting witness was probably Naubat Rai and he was perhaps present there but he did not attest the Will in his presence. The Will was in Gurmukhi perhaps. Narindar Singh did not write or read the Will in his presence. The scribe was not mentioned. He (witness) found the signature of Narindar Singh on the Will. He knew his signature and thought that the signature on the. Will was his. The ink of the signature was blue black, or red. The Will was in red or blue black ink.

It was not explained why the witness was called at that hour of the night to attest the alleged Will, and interested as he is, his vague description of the document, etc., renders his testimony of little value. He could not positively say in what characters the document was. According to the testimony of Thakar Dass (P. W. No. 4) who is the owner of the Seari, Narindar Singh died in his *baithak* in the Seari at 1 or 2 A. M. If he died at about that hour, he was hardly likely to have been in a fit condition to make any statement to Daulat Ram when he came to him. Further it is clear that Thakar Dass was present when he died and even during his illness. It is, therefore, very strange that instead of having the Will attested by him Daulat Ram was called at the eleventh hour to attest it. Thakar Dass did not depose to the making of a Will in his presence.

The defendant Moti Singh sought to corroborate the testimony of Daulat Ram by the evidence of a Naib Tahsildar (D. W. No. 19) which was to the effect that on the 11th April 1913 Ralla Singh and Moti Singh produced before him respectively a Will and a power-of attorney for registration, that he registered the power-of-attorney but returned the Will because its attesting witnesses were not present. It is difficult to believe that this Naib Tahsildar could re-collect after the lapse of six years and eight months the purport of a document that was presented to him for registration but was returned by him without making an endorsement on it or making any entry about it anywhere. It may be noted here that this witness could not identify Narindar Singh's signature on the said document and that according to him the Will was in Persian characters while Daulat Ram stated that it was in Gurmukhi perhaps. This Naib Tahsildar and Moti Singh had been school-fellows and were consequently friends, and it can be argued with some show of reason that he is not an impartial witness. Further his story appears to be an improbable one if looked at from another point of view. Ralla Singh was not interested at all in having the Will registered. If he did produce the Will for registration he must have done so for the benefit of Moti Singh Why then did he not make it over to Moti Singh himself to produce it for registration with the attesting witnesses? Moti Singh failed to explain why he did not receive the Will at that time from Ralla Singh.

In view of all that has been said above, the evidence of these two witnesses fails to satisfy me that any subsequent Will was made by Sodhi Narindar Singh.

Thirdly, it was urged that the first Will was a sham and was made only to coerce Moti Singh into submission to his father There is some evidence in support of this though there is nothing to show that the Will was a sham The scribe Tulsi Ram, who is related to Moti Singh through his (Moti Singh's) mother deposed that he enquired from Narindar Singh why he was disinheriting his son and received the reply that he would revoke the Will if Moti Singh would "re-gain himself" that is, would mend his ways. The marginal witness Thakar Dass also deposed to the same effect. Further in the letter Ex. D-30 of the 20th July 1912 already referred to Narindar Singh said that the writing (Will ?) made by him was made by way of a warning so that Moti Singh for fear (of it) might become submissive to him and that his object was that his son might come to the right path. All this indicates that Narindar Singh had the intention of revoking the Will on Moti Singh's submission to him. But the disputes between the father and son were not of an ordinary type and were pursued with bitterness until the end. Moti Singh proclaimed to the local authorities that his father was a man of a highly depraved character and a debauchee. In his application to the Deputy Commissioner dated the 1st January 1906 (Ex. P-48 Moti Singh wrote in clear terms that his father was a sodomite and passed days and nights in committing the unnatural offence with Pars Ram and Wazir Singh. Narindar Singh was the recipient of a *jagir* from the Patiala State and Moti Singh made similar complaints against him to the Patiala Durbar and also filed suits against him both at Patiala and at Hoshiarpore to recover maintenance from him. Further it was apprehended that the father and son would commit a breach of the peace and proceedings under s. 107 of the Cr. P. C. appear to have been taken against them. There is nothing to indicate that Moti Singh ever sought reconciliation with his father. The latter had, therefore, no cause to relent.

Fourthly, it was urged that the evidence as to revocation of the Will received support from the circumstance that Narindar Singh had subscribed to a statement of customs obtaining in the family of Sodhis of Anandpore, one of the custom stated therein being that no member of the family could alienate to an outsider any property ancestral or self-acquired. This statement of customs is appended to a genealogical tree of the Sodhis and according to the testimony of Tika Ram-Narayan Singh D. W. No. 7 who is a first cousin of Moti Singh and has been siding with him throughout this and other litigations, it was prepared under the following circumstances: "This genealogical table was prepared for supplying information about the family at the time of the Coronation Durbar of 1912 to people writing histories and 'who's who' and main customs applicable to the family were entered therein and are correct. Sodhi Narindar Singh also agreed to their correctness. But on cross-examination he stated that the customs of the family were not specially asked for on the occasion of the Durbar, and that they happened to be written out with the pedigree by the scribe of the pedigree-table. As they were not asked for and as the necessary document was the pedigree-table only, it cannot be said that Narindar Singh signed it in token of the correctness of the statement of customs but even if he did, the circumstance has no bearing on the question of revocation of his Will. If the alleged revocation were not proved, the defendant could fall back on the custom stated above, but he failed to prove it. We, therefore, come to the conclusion that Narindar Singh never revoked the Will or the codicil."

Turning now to the plea of invalidity of the Will, the defendant's contention is that Narindar Singh and his son, grand sons, etc. constituted a joint Hindu family and were co-parceners in all family funds and ancestral property, and that Narindar Singh was, therefore, not competent to will away the property which had been acquired by him with the income derived from the ancestral property. The, plaintiff's reply is (1) that Narindar Singh was not a Hindu but a Sikh; (2) that even if he was within the pale of Hinduism, he did not follow the Hindu Law and he and his son and grand sons did not constitute a family of co-parceners as contemplated by that law and (3) that in any case he had acquired the properties with the money earned by himself over which he possessed and enjoyed unrestricted power of disposal.

As regards (1) and (2) it is not denied that the Sodhis of Anandpore are followers of Guru Gobind Singh and are "*Kesadhari* Sikhs" or "Singhs." They are not only Singhs of Guru Gobind Singh but claim to be Gurus themselves and constitute the only priestly class among Sikhs whose function is to convert non-Sikhs to Sikhism by administering Pahul, *i e.*, baptism by the dagger and sweetened water. The rite called Pahul was initiated by Guru Gobind Singh when a person who receives the Pahul is made to declare that his birth place is Patna Sahib etc. (where Guru Gobind Singh was born), that his father is Guru Gobind Singh and that his mother is Mata Sahib Devi (wife of Guru Gobind Singh). In this way he renounces all connection with Hindusim and becomes a true Sikh or Singh. Guru Gobind Singh abolished caste and rejected the authority of Vedas and other Hindu sacred books and laid the foundation of a religion quite distinct from Hinduism *Kesadhari*. Sikhs of the present day generally say that they are not Hindus. In Civil Appeal No. 559 of 1923 it was asserted that Sikhs are not Hindus and the finding was that in view of the teachings of Guru Gobind Singh his followers may well say that they are not Hindus. But in the present case the Sodhis of Anandpore claim to be Hindus and this claim rests mainly on the circumstance that they intermarry with Hindu Khatris. That is the link which connects them with Hindus otherwise they are Sikhs as distinguished from Hindus and admittedly they do not follow the Hindu Law in many respects. For instance, they do not wear the sacred thread, do not follow the Hindu rules of adoption do not perform the tonsure ceremony, etc. Further, according to Tikka Ram-Narayan Singh (D W. No. 7) Anandpore Sodhis do not recognise a widow's right to a life-estate, nor do they allow a daughter or daughter's son to succeed even if the property were self-acquired. All this is contrary to Hindu Law. The defendant's principal witness Tika Ram-Narayan Singh (D. W. No. 7) stated that in his family a son has no share in the property of his father during his lifetime even if the property were ancestral, but has added that his heirs could restrain him from alienating his self-acquired property to non-Sodhis. No instance, however, could be cited in support of the latter proposition. Succession among the Sikh Gurus from Nank downwards was in several cases not from father to son or to the eldest. Further, there is nothing in evidence to show that the position of an Anandpore Sodhi father is the same as that of a father in a joint Hindu family. Narindar Singh was not subject to any restriction in disposing of his property. He gifted a shop to Ralla Singh as wlll appear from the judgment printed at pages 48-50 of the paper-book and he gifted to Wazir Singh plaintiff, by a registered deed dated the 19th April 1905, certain lands which he held in mortgage for Rs. 1358 *vide* Ex. P-111 at page 65 of the paper-book. According to the Mitakshara Law a son even if adult is entitled to maintenance out of the ancestral property but Moti Singh defendant did not succeed in getting maintenance from his father.

From all that has been stated above it follows that Hindu Law is not the personal law of the Sodhis of Anandpore and that they do not follow it in matters of inheritance, etc. This being so, there can be no presumption that an Anandpore Sodhi family constituted a co-parcenary body in accordance with the Hindu Law of Mitakshara. It, therefore, lay upon the defendant to establish that the constitution of his family was in accordance with that law, but he has failed to discharge it.

The learned Counsel for Moti Singh argued that though in the written statement filed by Moti Singh he had expressly stated that he and his father constituted a joint Hindu family this was nowhere denied by the plaintiff. But the replication if filed by the plaintiff has not been printed and it is clear that the point was raised by him as it was put in issue and both parties produced evidence thereon (*vide* Issue No. 3).

Now we will consider the nature of the property that was in the hands of Narindar Singh and his sources of income. He had a share in Chak Guru a village founded by Guru Tej Bahadur. From him it descended through several generations to Tilok Singh a brother of Narindar Singh's father Diwan Singh. On the death of Tilok Singh his widow succeeded to it and it was after her death that Diwan Singh's branch inherited it (see the pedigree table Ex. P-8). The Chak thus came to Diwan Singh's branch by collateral succession, that is to say it was according to Hindu Law obstructed heritage and was separate and self-acquired and not joint family property of the person on whom it devolved. His immoveable ancestral property as stated in the Will consisted of (1) a one-third share in a *haveli* situate at Hardwar; (2) certain residential houses situated at Anandpore (3) one-third share in a shop at Anandpore and (4) certain shares in certain Gurdwaras and the property attached thereto. It is not known what his income from these properties was, but there is nothing to show that it was considerable. Besides the income from the above properties, his other sources of income were three-fold :—

(1) A pension of Rs. 860 per annum from Government.

(2) A *jagir* of Rs. 2,878 per annum from the Patiala State (see Ex. D. W. No. 6 at page 223 of the printed paper-book and small *jagirs* from Bilaspore Tirathpore, Nalagarh and Kalsia States.

(3) Offierings from Sikhs generally.

These *jagirs* are no doubt described in the Will as ancestral property but the word "ancestral" is apparently used here as indicating that the *jagirs* had descended to the testator from his fore-fathers. It does not follow from this that the *jagir* moneys that he realised from time to time constituted ancestral property and the moneys received from any of the above sources can by no stretch of language be called ancestral property. A pension is always allowed on condition of good conduct and loyalty to Government as stated by Moti Singh in his application to the Deputy Commissioner, *vide* Ex. P-48 para. 5 and though it may be continued from father to son each recipient possesses unrestricted power of expending his pension. The same may be said of *jagir* moneys which were paid by way of charity or *dharamath*, see the evidence of Lala Bansi Lal of the Revenue Department of the Patiala State at page 231 and also Exs. D. W. No. 6 and D. W. No. 7 at pages 223 and 224 in which Narindar Singh himself described the *jagir* money as *dharamarth muafi*. In Ex. D-10 also at page 88 the *jagir* is stated to be *dharamarth*. The *jagir* was evidently liable to forfeiture at the will of the State and payment of the *jagir* from Patiala was once stopped as would appear from the order of the Patiala State (Ex. D-24 at pages 133-134) as regards the offerings even the ladies of the family receive the same and no recipient, therefore, is liable to account for them to any body. The income derived by Narindar Singh from all these sources was his own personal income and did not form part of his family funds, if any, and consequently the property acquired by him with that money was his own self-acquired property and he had full power of disposition over it even if it were assumed that his family was a joint Hindu family. In *Balwant Singh* v. *Rani Kishori* (1) Lordships of the Privy Council held that the father of an undivided family subject to the Mitakshara Law had full power of disposition over his self-acquired immoveable property. In *Jagmohondas Mangaldas* v. *Sir Mangaldas Nathubhoy* (2) it was held that a man is at perfect liberty to dispose of property which he has inherited collaterally.

It has been stated that Narindar Singh had an ancestral money-lending business, but the evidence as to his money-lending was that he lent money at a rate lower than that on which he borrowed it. It is, therefore, clear that he could have made no profit by money lending. Further it appears that the offerings that Narindar Singh received constituted the bulk of his income because he says in his letter (Ex. D-30) that he had acquired his property with the money earned by turning in pursuit of his ancestral (priestly) occupation (*apne abai peshe or phir kar paida ke hai*).

From all the evidence reviewed above the conclusions that follow are :—(1) That there could be no presumption that the testator and his son were co-parceners and that the defendant on whom the onus was shifted had failed to establish that they were, and (2) that as the testator's ancestral immoveable property was much as could build but little income and was not sufficient even for his household expenses as indicated by the fact that he had to take large advances of money from the Patiala State for celebrating the marriages of his children and as his income from other sources was large, the presumption is that the property willed away had been acquired by the testator with the income from those sources and that there was no evidence to rebut that presumption.

We, therefore, accept the appeal and reversing the judgment and decree of the Court below we decree the plaintiff's suit with costs throughout.

Campbell, J.—I have had the advantage of reading the judgment of my learned brother. It seemed to me at the argument that the learned Counsel for the respondents in supporting the Trial Court's dismissal of the suit relied mainly upon the finding that the property bequeathed to the plaintiff was ancestral property of the joint Hindu family and upon the reasons for that finding the decision that the Will of the 15th April 1908 was subsequently revoked before the testator's death was not defended with any great vigour and in my judgment that decision was incorrect.

The so-called supplementary Will of the 13th May 1908 is an obscure document and I venture to think that the learned Subordinate Judge has travelled some considerable distance out of the record and into the realms of conjecture in relating what he conceives to be the true history of its execution. If the document is genuine Sodhi Narindar Singh the executant definitely calls it a supplementary Will and definitely declares in it that the previous Will of the 15th April shall be acted upon after his death. It appears to me not unlikely that the document was written at the persuasion of Naurang Singh, the son-in law, who was not mentioned in the first Will and who may have complained of receiving no recognition in it. This man was nominated one of the managers of the property and he was given custody of the documents, which was not produced until after the suit was started. The scheme of management set forth was probably meant for the ancestral property in order to prevent control being taken by Moti Singh during his son's minority. In any case an implied revocation of the bequest to the plaintiff cannot be read into the document taking it as a whole.

As for the alleged third and death-bed Will it has not been proved. Lala Daulat Ram's evidence amounts merely to this. Ralla Singh purported to read out a paper which he said was Narindar Singh's Will. What he read was to the effect that the previous Will had been revoked and that a new Will had been made in favour of Moti Singh. Rala Singh asked the witness to attest the paper. The witness asked Narindar Singh if he should do so and Narindar Singh said yes. The witness thought the writing was in Gurmukhi characters. He did not read it, there was no other talk about the Will, and so Narindar Singh never said either that the document contained or that what Rala Singh recited was his Will and made no statement in the presence of witness of any testamentary disposition.

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(1) 20 A. 267; 2 C. W. N. 273; 25 I. A. 54; 7 Sar. P. C. J. 279; 9 Ind. Dec. (N. S.) 533 (P. C.).

(2) 10 B. 528; 5 Ind. Dec. (N. S.) 742.

Lala Gulzari Ram the Naib Tehsildar says that the document presented to him later by Rala Singh for registration was in Persian writing. Plainly then, it was not the Gurmukhi document signed by Daulat Ram for there is not the slightest resemblance between the two scripts and it is impossible to mistake one for the other. It is not easy to understand why the learned Sub-Judge assumed that the two papers were the same.

The person who could have cleared up the matter, Rala Singh was examined twice as a witness and was questioned on at most every other conceivable topic except this one. Why he was not given an opportunity by the defendant of confirming or denying what the other two witnesses said is incomprehensible. He was not even asked to produce the alleged Will and secondary evidence of its contents ought not to have been allowed without this having been done. The secondary evidence was apparently admitted without objection and hence it cannot be excluded on appeal. But, in my opinion, it is of value. The learned Sub-Judge has observed that Rala Singh has been won over by the highest bidder. This may be so but it was never suggested to the man in his two protracted appearances in the witness-box.

The following are the learned Subordinate Judge's grounds for deciding that the property bequeathed to the plaintiff was in reality ancestral property belonging to the joint Hindu family consisting of Narindar Singh and his son and grandsons. He has held first that Sikhs are Hindus secondly, that being Hindus and Khatris, there is a presumption that they follow the Hindu Law of the Mitakshara, thirdly, that where there is a joint ancestral nucleus the presumption is that subsequent acquisitions are acquired from the proceeds of the nucleus, fourthly, that Narindar Singh's *jagir* income was ancestral property and fifthly, that there was no proof of the amount of Narindar Singh's income from offerings or of how much was utilized in acquiring the property styled self-acquired in the Will.

The answer to the question whether a Sikh is a Hindu depends very much upon the sense in which the word Hindu is used. It is probably correct to say generally that Khatri Sikhs, who are not agriculturists and who do not follow agricultural custom observe the same principles of law as are observed by Hindu Khatris of the Punjab regarding rights in inheritance to property. It was observed *obiter* by Sir Meredyth Plowden in *Jowahir* v. *Chandi* (3) that in the Punjab at least generally the Mitakshara doctrine of a son being born with a share is not known, nor has a son a right to compel partition. This remark has been cited with approval in more than one later judgment but the first proposition as far as I am aware has never been laid down authoritatively and specifically. The second has and in *Hari Kishen* v. *Chandu Lal*(4) a Full Bench decided that in the Punjab the Mitakshara rule that a son can enforce partition during his partner's lifetime is not in force. It follows necessarily that in the Punjab a joint Hindu family consisting of a father and son or sons is something different from such a family under the Mitakshra Law.

In the present case we are dealing not merely with a Khatri Sikh family, but with members of the family of the tenth Sikh Guru whose mission in life is to preach and practise Guru Gobind Singh's doctrine of revolt from many essential beliefs and observances of the Hindu religion. A great deal of the evidence given about the rules and customs observed by this family is vague but it appears that many of their rules and ceremonies differ from those of orthodox Hindus. The witness who ought to have the best knowledge of the family rules of inheritance is Tikka Ram-Narayan Singh, Honorary Magistrate and Civil Judge Viceregal Durbari and head of the family. He was cited for his kinsman the defendant with whom inevitably all his sympathies must be and this is what he says:

"I have not studied the Hindu Law and, therefore, cannot say on what points our law resembles the law of other Khatris. I do not know what is the custom of the Khatris in our *ilaqa*. It two brothers are joint and third is separate and one of the joint brothers dies I cannot say if the separate brother will get a share or not.' No such instance has occurred in our family. No instance has occurred in our family in which the nephew and a brother have been left by a third brother who died leaving property. I cannot say whether the nephew will succeed with the uncle or not. I cannot say if any difference would be made if all the brothers were joint."

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(3) 90 P. R. 1892.

(4) 43 Ind. Cas. 667; 105 P. R. 1917.

"The son has no share in the property of the father during his lifetime even though the property is ancestral. Adoption is admissible only of agnatic by male, the female cannot adopt even with the permission of the husband. Two adoptions took place before me. No ceremonies were performed. In one case a deed also was written and in both declarations were made before *baradri* and the adopted son was taken by the adoptive father. I cannot say if any limit is fixed as to the age of the adopted boy or whether there is any restriction as to the adoption of the only, or eldest son. I do not know any instance in which a daughter's son was adopted or a suit brought for the cancellation. I cannot tell any instance in which the self-acquired property of a person was not inherited by a daughter or daughter's son nor is there any instance on the other side. My heirs whoever they may be can restrain me from alienating any self acquired property in favour of non-Sodhis. No instance of this sort can be cited."

It seems to me impossible that this important witness contemplated the existence in the Anandpore Sodhi family of the strict Mitakshara co-parcenary system with all its technical incidents and presumptions.

In the written statement the defendants pleaded that Narindar Singh, his son and his grandsons constituted a joint Hindu family, that the entire property was joint acquired with ancestral funds, that all the members were owners of it, and that it belonged only in name to Narindar Singh because he was the manager of the family. The plaintiff's reply given orally and briefly was that Narindar Singh was joint with his grandsons but not with his son and that the property willed to the plaintiff was self-acquired by Narindar Singh. This was no admission of the existence of the Mitakshara co-parcenary and the pleadings do not take us any further.

I cannot agree with the Trial Court that the deceased Narindar Singh's *jagir* has been shown to be ancestral family property. The fact that he calls it ancestral in the Will does not make it ancestral in the technical sense and means nothing. The so-called Patiala *jagir* is stated by the defendant's witness Lala Bensi Lal Assistant Superintendent Revenue Department to have been a charitable allowance and there is evidence that at one time payment of it was stopped. There is no evidence about the character of the allowances received from other States or of the pension stated to have been given by Government and although all the allowances may have been granted because Narindar Singh was a member of the Anandpore Sodhi family; they were his separate property in default of proof that the grants were for the benefit of his own joint family. These *jagir* allowances amounted annually to a substantial sum and were enjoyed by Narindar Singh for many years.

The offering by disciples were no doubt made because the recipient was a member of this priestly family but they were manifestly personal gains acquired without the aid of joint family property. There is evidence that the deceased's income from this source was considerable. The witness speaks of thousands of rupees. The deceased Narindar Singh and his son are on the worst of terms. The learned Subordinate Judge has found that since 1897 until his father's death the son was refused maintenance and the fact is clear indication that there was no blending of self-acquired property with ancestral property of Narindar Singh.

The issues drawn by the Trial Court were as follows:—

The first was on a preliminary point and is omitted.

(2) Did Sodhi Narindar Singh make a Will in favour of plaintiff on 15th April 1919? On plaintiff.

(3) Is the Will valid in law and custom and was deceased Sodhi Narindar Singh competent to make it in the presence of his son and grandson? On plaintiff.

(4) Is the bequeathed property ancestral and was Sodhi Narindar Singh not competent to bequeath the same in favour of plaintiff? On defendant.

(5) If the existence of the Will is established was the Will made under undue influence and did he make the Will on account of immoral connection with the daughter of the plaintiff and the Will was,

therefore, invalid and inoperative? On defendants.

(6) Did Narindar Singh make any partner (?) and subsequent Will cancelling the previous one, one if he did when did he do it? On defendants.

(7) Did plaintiff so conduct himself as to show that he treated the Will as fictitious and practically cancelled and is, therefore, estopped from bringing this suit? On defendants.

(8) Is there any custom of *riwaj* amongst Sodhis which disabled Sodhi Narindar Singh to make a Will in favour of a stranger and a man of low position? On defendants.

The Trial Court found in favour of the plaintiff-appellant on Nos. 2 and 7 and the findings are not disputed on No. 3. I hold that the Will was valid since the property bequeathed to the plaintiff was not that of a co-parcener under the Mitakshara Law but was self-acquired separate property which belonged exclusively to Sodhi Narindar Singh and which under Hindu Law and general custom he could gift or bequeath to any person he chose, No. 4 is covered by the same decision. The property was not ancestral. It was not interested from an ancestor and the means of acquisition were Sodhi Narindar Singh's separate property. On No. 5 I hold that the Will was not invalid for any of the reasons suggested and on Nos. 6 and 8 in the negative. There was no clear finding by the Trial Court on No. 8 but no claim that such a custom has been proved was made in the lengthy argument addressed to us in support of the lower Court's decree. The signature by several members of the family of a statement of custom appended to the genealogical tree, to which Mr. Justice Zafar Ali has referred could have been at the very most an attempt to create customs and in the circumstances in which the signatures were obtained, was not even this. There is no evidence whatsoever of the existence of the particular custom propounded in the 8th issue.

As a result I concur in the order accepting the appeal and decreeing the suit with costs throughout.

R. L. *Appeal accepted.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

January 18, 1926.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.

SRI MIRZA RAJA SRI PUSHAVATI ALAKH NARAYAN GAJAPATIRAJ MAHARAJ MANYA SULTAN BAHADUR GARU, SUBSTITUTED FOR RAI SAHEB V. T. KRISHNAM CHARI—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF GODAVARI—RESPONDENT.

Evidence Act (I of 1872), s. 115—Litigant changing position—Estoppel—Madras Land Encroachment Act (III of 1905), ss. 2, 16—Submission—Rights of tenure-holders, effect on—Government's right to deal with property.

A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted, when he fails upon that branch, to withdraw from the position and assert the contrary, more especially when he thereby places his opponent at a great disadvantage. [p. 503, col. 2.]

Mere submergence of land held under *ryotwari* tenure does not infer a relinquishment by the holder. On the other hand, if he wishes to retain his right to the submerged lands on the off-chance of their being re-formed *in situ* at some future date, he must continue to pay year by year the assessment or rent which is due to Government. The Government may from humanitarian motives remit the rent and such remissions are provided for by the standing orders. But such remissions can only be made by the authority of the Board of Revenue and the inferior officials including the Collector have no power at their own instance to make them. [p. 504, cols. 1 & 2.]

Where rights in a Government land on its submersion are relinquished by the tenure-holders, the Government are free to deal with it as they please and s. 16 of the Madras Land Encroachment Act has no application. [p. 505, col. 1.]

Appeal from the judgment and decree of the Madras High Court (Sir Abdur Rahim, Acting C. J., Ayling and Seshagiri Aiyar, JJ.), dated the 18th March 1920, which substantially affirmed the decree of the Subordinate Judge, Cocanada, dated the 31st December 1915.

Messrs. *W. H. Upjohn*, *K. C.*, *K. V. L. Narasimham* and *P. K. Subba Rao*, for the Appellant.

Messrs. *L. De Gruyther*, *K. C.*, and *Kenworthy Brown*, for the Respondent.

JUDGMENT.

Lord Salvesen.—This is an appeal from the High Court of Judicature at Madras, dated the 18th March, 1920, which substantially affirmed a decree in judgment dated 31st December, 1915, of the Subordinate Judge at Cocanada in a suit at the instance of the appellant against the respondent. This suit arose out of a dispute as to the ownership of a Lanka in the river Godavari in the Province of Madras, the extent of which was estimated, at the commencement of the suit, at 247 acres. The appellant is the owner of large estates, including the village of Kotipalli, situated on the banks of that river. The respondent is the Secretary of State for India, represented by the Collector of Godavari. It is common ground that in 1862 there existed a Lanka which was Government property, and for the cultivation of which *pattas* were issued by the Government of the day to *ryots* connected with the village of Sanapalli, which lies in the neighbourhood of Kotipalli. This Lanka was cultivated under these *pattas* for a number of years thereafter, and the Government assessment was duly paid by the cultivators. An example of such a *patta* has been produced in the present suit. It is dated in 1869, and indicates that erosion on a somewhat minute scale had already commenced to affect the area of the lands in question. Gradually the river encroached more and more upon these lands until, some time between 1880 and 1885, the whole of the lands had been totally submerged. After some years of total submergence a new Lanka appeared in the river which, by 1894, was of an area substantially the same as the lands in suit. At that time one, Mudragada Nagayya, was a lessee of the Kotipalli Lanka, under a lease granted by the owner of the estate, now represented by the appellant, the duration of which was 10 years from 1892. Nagayya took possession of the re-formed lands as forming an accretion to the Kotipalli Lankas and paid rent to the appellant for these lands as well as for those originally embraced in his lease and cultivated, through sub-lessees of his own. He did not, however, do so without objection and, from 1897 onwards, petitions were presented by the *ryots* of the Government village of Sanapalli complaining to the Government that the suit lands formed part of the old Sanapalli village, and requesting the Government to recover them from the appellant and grant them back to the *ryots*. The Government directed a survey of the lands and, after a lengthy correspondence between the appellant and the Government, the latter claimed the suit lands as Government property. In 1911 the Government sent notices to the appellant under s. 7 of the Madras Act III of 1905. These were followed by a notice dated 3rd February, 1912, demanding payment of Rs. 74,971.86, representing the penalty and block rates for the years 1900 to 1911, during which the appellant was alleged to be in unauthorised occupation of the suit lands.

On the 30th July, 1912, the appellant's predecessor-in-title instituted the present suit. In this he prayed for a judgment declaring his right to the 247 acres already referred to and to all accretions that might be made thereto, and for a permanent injunction against the Government restraining them from interfering with him in his ownership and enjoyment of the same by levying a penal assessment or by other steps. An immense amount of evidence was tendered at the trial, which it was stated occupied over 50 days of judicial time. The issue of fact which was responsible for most of the time occupied was whether the re-formed lands in question were an accretion to the appellant's lands of Kotipalli or constituted a re-formation *in situ* of the lands which had been formerly cultivated by the *ryots* of the Gevernment. This issue of fact has been decided by both Courts against the appellant and is no longer in controversy.

The issues which still fall to be dealt with concern the legality of the penal assessment imposed on the appellant in 1911, and, as the case was presented to the Board, this assessment was challenged upon three grounds :—

(1) That an assessment, whether penal or otherwise, can only be imposed under the terms of this Act on "any person who shall unauthorisedly occupy any land which is the property of the Government." The appellant conceded that it must be now taken to be a fact that the land in suit is the property of Government and that it had been unauthorisedly occupied, but he maintained that the only persons upon whom the assessment could be levied were those in physical occupation of the land and not upon the owner of the estates of Kotipalli, who had merely granted leases of these lands under a *bona fide* belief that they formed accretions to his property. He founded this particularly upon s. 6 (1), which makes the crops or other produce of the lands liable to forfeiture, which provision, he contended, could only be applicable to the actual cultivator and not to the landlord who, by

the very fact of granting a lease of the lands, had excluded himself from occupation Whatever force there may be in this contention, their Lordships do not propose to express any opinion upon it. Their Lordships hold that this contention is not open to the appellant in view of his actings before and throughout the litigation. The plaint contains the following passages :—

"The Lanka in dispute has been in possession and enjoyment of the plaintiff's predecessors and plaintiff for several years," and in para. 8 the plaintiff also submits that:—

"Madras Act III of 1905 is not retrospective in its operation and does not entitle the Government to recover assessment from the plaintiff, as he was in possession and occupation long prior to the coming into force of Madras Act III of 1905." Not merely is there no reference to the construction which is now proposed to be put upon the Act in the plaint (which, indeed, in terms directly negatives the view now presented), but there is no trace of the contention being tabled throughout the voluminous proceedings in the Courts below. Even the appellant's case, although it is directed entirely to the legality of the penal assessment, does not contain a challenge of it upon this ground. There may have been occasions when the Board have entertained an argument on a pure question of law, although it has not been presented in the lower Court, where all the facts on which the contention depended had been definitely ascertained, but the objection to doing so in the present case goes very deep. The whole controversy between the appellant's predecessor and the Government which preceded the actual imposition of the penal assessment proceeded upon the admission or the tacit assertion, of the appellant that he was in occupation of the lands, or at all events, that he took upon himself the burden of vindicating the action of his own lessees or sub-lessees in cultivating it. Had this point been, at any time, mooted the Government would have had an opportunity of considering upon whom the notice of assessment which they ultimately sent to the appellant should have been given, and upon whom the penal assessment should have been levied. After a period of nearly 25 years has elapsed between the date when the Government first definitely intimated their claim to the lands in suit, their Lordships are clearly of opinion that it is too late for the Board to entertain this contention. A litigant who has all along maintained a position in support of one, and in this case the more important, branch of his suit cannot be permitted, when he fails upon this branch, to withdraw from the position and assert the contrary, more especially when he thereby places his opponent at the great disadvantage. There could be no clearer case for the application of the doctrine of estoppel owing to the conduct of the litigant.

(2) The second ground of attack by the appellant is based upon s. 2 of the Madras Act III of 1905. By that section all lands, wherever situated, are thereby declared to be the property of the Government, subject to the large exceptions enumerated under five heads which expressly preserve private rights. The exception founded on is contained in sub-section (c), which exempts from the operation of the clause all lands which are the property "of any person holding under *ryotwari* tenure...............or in any way subject to the payment of land revenue direct to Government." The respondent conceded that, before the submergence of the lands in suit, they came within this exception. He also conceded that, after a *durkhast* is made and a *patta* granted by Government, the interest of the *ryot* holding under this form of tenure is permanent, hereditary and transferable, that no ejectment at the instance of the Government is competent for arrears of rent, and that such arrears can only be recovered, as in the case of all Government revenue, by sale of the property held under this tenure. On the other hand, it is common ground that the holder of land under *ryotwari* tenure is entitled, at any time, to relinquish it, and the standing orders of the Board of Revenue applicable to Madras contain elaborate provisions dealing with this particular kind of tenure, and also with questions relating to the form of relinquishment, remission of rent and the like.

The High Court have dealt very exhaustively with the numerous points which have been argued on the question whether the relinquishment by the *ryots* of Sanapalli village who held the *pattas* before their respective lands became submerged can be inferred from the whole circumstances of the case, including a vast amount of documentary evidence. They drew the inference that it must be held as a fact that the *ryots* did relinquish their holding (and thereby secured immunity from further assessment in respect of them) as and when the lands became submerged and no longer capable of cultivation, and that, when the lands were re-formed *in situ*, they were the property of the Government and at their absolute disposal. Their Lordships agree with the reasoning of the High Court, and they will only summarise some of the considerations to which they attach most weight.

Mere submergence of land held under *ryotwari* tenure does not infer a relinquishment by the holder. On the other hand, if he wishes to retain his right to the submerged lands on the off-chance of their being re-formed *in situ* at some future date, he must continue to pay year by year the assessment or rent which is due to Government. There are instances referred to in the documentary evidence in which some of these *ryots*, whose lands were only partially eroded, continued to do so and so kept alive their rights, but, in the ordinary case, the poor cultivator's interest is to relinquish the lands so as to escape paying the annual rent in the hope that, at a future date, should the lands be re-formed *in situ*, he may obtain a new tenure from the Government. On the other hand, according to the standing orders, all land for which a stipulated rent continues to be paid must be entered in the registers which these orders prescrible. The registers contain not merely an enumeration of all the lands in the district to which they apply in individual numbers, but they specify the acreage of the individual plots and also contain a record of the amount of rent leviable from each *ryot* in respect of the plot or plots he holds. In the case of Sanapalli village it has been found by concurrent findings of the Courts below that, when the land in question became submerged, it was not merely omitted from the *ayacut* or acreage of the village, but also from the *gudikat* or rental roll. The submerged land was likewise struck out of the *pattas* which constitute the evidence of title given to the holders under *ryotwari* tenure. These *pattas* are subject to revision from time to time when changes of circumstances occur ; thus, if part of the land to which a *ryot* has right is eroded and relinquished by him, the rent corresponding to the part relinquished is deducted from the rent previously payable. In the case of the submerged lands the *pattas* appear to have been surrendered and, at all events, not one of them has been produced. It is common ground that none of the *ryots* who held *pattas* of the lands prior to submersion has paid any rent to the Government on these lands. These circumstances support the inference that the ryots concerned relinquished their holdings, which had indeed, in the then existing circumstances, become valueless. The only possible alternative is that we are to infer that the Government, from humanitarian motives, had remitted the rent due by the *ryots*. Such remissions are competent under the standing orders, but they can only be made by the authority of the Board of Revenue, and the inferior officials, including the Collector, have no power at their own instance to make them. No evidence is adduced of any such remission having been asked or having been granted spontaneously. Further, in the petitions presented to the Government in 1897 and onwards, although in one or two of them there are statements to the effect that the former *ryots* had not relinquished their holdings, there was no claim ever made by any individual *ryot* to the effect that an identifiable portion of the re-formed lands was his property. On the contrary, the petitions proceeded on the footing that it was the duty of the Government to recover the lands in the illegal occupation of the appellant and to re-settle them upon the *ryots* of the village of Sanapalli without reference to the particular *ryots* who held the lands before the submergence. One suggested method of the Government so settling them was that the lands should be exposed to auction so that those *ryots* of Sanapalli who were prepared to pay most for the lands would obtain *pattas* from Government at the rents which they offered. The evidence to be derived from the petitions points to the *ryots* of Sanapalli village accepting the position that the Government was entitled to resettle the lands, but urging that a preference should be given to the *ryots* of the village by whose inhabitants the lands had formerly been cultivated. A review of the whole facts disclosed by the evidence leads irresistibly to the conclusion that the lands in suit on their re-emergence from the river became once more the absolute property of the Government both under the Madras Act III of 1905, and at Common Law exactly as they had been in 1862 when the *ryotwari* tenures were first instituted

(3) Lastly, it was maintained by the appel-

lant that s. 16 of the Madras Land Encroachment Act III of 1905 exempted the lands in question from its operation. The section is in these terms:—

> "Nothing in this Act shall apply to any lands claimed by right of escheat, resumption or reversion until such lands have been reduced into possession by Government."

It was argued for the appellant that, as the lands had been throughout occupied by himself or his tenants, they had never been reduced into possession by the Government, and that they were lands claimed by Government within the meaning of the clause. Their Lordships are unable to take this view. They are clearly of opinion that these lands were not claimed by Government within the meaning of the section. Before submersion these lands were the property of the Government, subject only to the rights of the *ryotwari* tenures which they had created. The moment these rights were relinquished by the *ryots* the Government were free to deal with them as they pleased. The effect of the relinquishment was to restore to the Government full freedom to dispose of what was originally their own. The appeal on this ground also fails. It is right to note that the apparent hardship of the appellant being subjected to a penal assessment in respect of the unauthorised occupation of lands of which, on plausible grounds, he believed himself to be the owner, has in this case been largely if not entirely obviated by the judgment of the High Court declaring the levy illegal for the years prior to the coming into force of the Madras Act III of 1905. This part of the judgment has not been challenged by either party.

Their Lordships will, therefore, humbly advise His Majesty that the decision of the High Court of Judicature at Madras should be affirmed and the appeal dismissed with costs to the respondent.

R. L. *Appeal dismissed.*

Solicitor for Appellant:—Mr. *H. S. L. Polak.*

Solicitor for Respondent:—Solicitor, India Office.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 282 OF 1925.

March 12, 1926.

Present:—Mr. Justice Walsh and Mr. Justice Dalal.

THE COLLECTOR OF MORADABAD—DECREE-HOLDER—APPELLANT

versus

MOHAMMAD HIDAYAT ALI KHAN—OBJECTOR—RESPONDENT.

Mortgage—Several mortgages—Priority—Presumption.

A prior mortgagee is not barred from putting forward his claim where the prior mortgage was not impugned in the suit by the subsequent mortgagee and the latter had not sought to displace the prior title of the prior mortgagee and postpone it to his own. [p. 506, col. 1.]

Sri Gopal v. *Pirthi Singh*, 24 A. 429; 29 I. A. 118; 4 Bom. L. R. 827; 6 C. W. N. 889; 8 Sar. P. C. J. 293 (P. C.), distinguished.

Radha Kishun v. *Khurshed Hossein*, 55 Ind. Cas. 959; 47 C. 662; 18 A. L. J. 401; (1920) M. W. N. 308; 38 M. L. J. 424; 11 L. W. 518; 22 Bom. L. R. 557; 47 I. A. 11; 28 M. L. T 425; 25 C. W. N. 417, followed.

Where a subsequent mortgagee fails to mention a prior mortgage in his plaint the presumption is that he does not question the priority of the prior mortgage. [p. 506, cols. 1 & 2.]

Execution first appeal from a decree of the Subordinate Judge, Moradabad, dated the 14th March 1925.

Mr. *G. W. Dillon*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—The dispute has arisen in the execution of a decree for sale on foot of a mortgage. The property is situated in village Jalalabad. On 27th August 1901, two mortgage-deeds of 8 *biswas* property out of 20 *biswas* was executed by the owner in favour of Sahu Ganpat Rai and subsequently in 1909 the entire village was mortgaged to Sahu Parshadi Lal whose estate is now under the Court of Wards. Subsequently in 1912 12 *biswas* out of the village was again mortgaged to Ganpat Rai.

In 1913 Ganpat Rai obtained two decrees for sale on foot of the two mortgages in his favour. Parshadi Lal was made a party to the suit but on objection as to notice being raised by the Court of Wards, Parshadi Lal and the Court of Wards were exempted from the suit and the decree for sale was not passed against them. The decree resulted in a sale in favour of the objector Hidayat Ali Khan in 1916.

In 1914 the Court of Wards sued the mortgagor for sale on foot of the mortgage of 1909 in favour of Parshadi Lal. Ganpat Rai was made a party to the suit but no mention was made in the plaint of his prior mortgage of 1901. It was stated in the plaint that Ganpat Rai was a subsequent mortgagee under the mortgage of 1912 and had, therefore, a right to redeem. It is also admitted that in the plaint there was no specific prayer that the property should be sold free of encumbrances.

In the execution department Hidayat Ali Khan objected and pleaded that the village should be sold subject to the mortgage of 1901. This objection was granted by the learned Subordinate Judge and from that order the present appeal is filed by the Court of Wards.

The learned Government Advocate argued the matter with considerable ingenuity but we think that the opinion of the lower Court is correct. He relied on the Privy Council ruling reported as *Sri Gopal* v. *Pirthi Singh* (1). That ruling, however, is distinguishable on the ground that in that case the prayer of the subsequent mortgagee was that the property should be sold free of encumbrances. The prior mortgagee, therefore, had notice that his priority was attacked and, in consequence, the prior mortgagee was bound to plead priority and having failed to do so was barred from putting it forward in a subsequent suit or subsequent proceeding in execution.

The facts of the present case are similar to those of the Privy Council case reported as *Radha Kishun* v. *Khurshed Hossein* (2). Their Lordships held that the prior mortgagee was not barred from putting forward his claim, when the prior mortgage was not impugned in the former suit and the subsequent mortgagee had not sought to displace the prior title of the prior mortgagee and postpone it to his own. To raise the plea of *res judicata* it would be necessary for the subsequent mortgagees as plaintiffs in the former suit to allege a distinct claim in the plaint in derogation of the priority of the prior mortgage. This was not done in the present case. In fact, the appellant omitted to make any mention of the prior mortgage in his plaint, thereby leading the subsequent mortgagee to believe that the appellant, who was well aware of the prior mortgage, accepted its priority. It was argued that the appellant having ignored the prior mortgage, it was the duty of the prior mortgagee to plead his priority. There was no such duty cast on Ganpat Rai. He was not a necessary party except as subsequent mortgagee and when the appellant failed to mention his prior mortgage, the presumption would be that its priority was not questioned by the appellant.

We dismiss the appeal with costs here on the higher scale.

R. L. *Appeal dismissed.*

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(1) 24 A. 429; 29 I. A. 118; 4 Bom. L. R. 827; 6 C. W. N. 889; 8 Sar. P. C. J. 293 (P. C.).

(2) 55 Ind. Cas. 959; 47 C. 662; 18 A. L. J. 401; 1920) M. W. N. 308; 38 M. L. J. 424; 11 L. W. 518; 22 Bom. L. R. 557; 47 I. A. 11; 28 M. L. T. 425; 25 C. W. N. 417.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 48 OF 1925.

February 15, 1926.

Present:—Mr. Justice Das and Mr. Justice Foster.

GOBARDHAN DAS AND ANOTHER—
—APPELLANTS
versus
JAGAT NARAIN—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 4, 5, 56—Ad interim Receiver, appointment and powers of—Receiver in insolvency, duty of Court to appoint, before realisation of property—Removal of possession of property from person other than insolvent—Proper authority—Procedure.

The Insolvency Court before taking any action under s. 56 (3), Provincial Insolvency Act, in the way of realisation of property must appoint a Receiver and that means a Receiver in insolvency and not a Receiver *ad interim.* The power to remove property from the possession of any one other than the insolvent is reserved to the Court. [p. 507, col. 1.]

The Court can before adjudication depute an *ad interim* Receiver to collect evidence as to the assets of the insolvent but such a Receiver cannot pass a final order in a claim by a creditor to a property. [*ibid.*]

Section 4 read with s. 5 of the Insolvency Act requires a Court in matters of forcible realisation of property to act with the procedure and with the judicial caution of a Civil Court. [p. 507, col. 2.]

Appeal from an order of the District Judge, Saran, dated the 5th December 1924.

Mr. *Hareshwar Prasad Sinha*, for the Appellant.

Mr. *Ram Prasad*, for the Respondent.

JUDGMENT.

Foster, J.—It appears to me to be beyond question that the appellants have right on their side in the matter before us, They are the sons of one Girdhar Das, who came into Court, so far as the papers before us indicate, as early as 29th March 1924. He as a creditor lodged an objection to the application of another creditor for the adjudication of insolvency of Gobardhan Das. It was not till the 2nd August 1924 that Gobardhan Das was adjudged an insolvent. Meanwhile a local Pleader Babu Jagat Narayan had been appointed *ad interim* Receiver. Unfortunately the Court overlooked at the time of the adjudication the necessity of the formal appointment of a Receiver in insolvency invested with the powers and duties indicated in ss. 56 and 59 of the Provincial Insolvency Act. Three days after the adjudication, the present appellants, who are sons of Girdhar Das, although they had not been substituted in place of their father, put in a petition asking that an enquiry be held as to the ownership of a house in Mohalla Ratanpura in Chupra town by the Receiver. It appears that this house had been recorded by the Receiver as the property of the insolvent and in fact as his only immoveable property. The substitution of the present appellants in the place of their father took place a few days later, and when they next appeared before the Receiver they undoubtedly appeared as party-creditors and they were claiming the house to be their own. Now, it is quite clear that the Court could before adjudication depute the Receiver *ad interim* to collect evidence as to the assets of the insolvent, but it is clear that the Receiver could not in a claim case of this nature pass the final order. In s. 56 (3) of the Act it is laid down that when "the Court appoints a Receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof: Provided that nothing in this section shall be deemed to authorise the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove." Two inferences seem to be deducible from the phraseology of this enactment. The Court before it takes any action under this sub-section in the way of realisation of property must have appointed a Receiver; and that means a Receiver in insolvency and not a Receiver *ad interim* before the adjudication. Secondly, the power to remove property from the possession of any person is reserved to the Court. Another matter to be noticed in the new Insolvency Act is that the new s. 4 read with s. 5, which was the old s. 47, apparently intends that the Court in such matters of forcible realisation of property is to act with the procedure and no doubt with the judicial caution of a Civil Court. Under s. 4 the decision of a dispute between the debtors and the debtor's estate on the one hand, and claimants against it on the other, is to be final and binding; and under s. 5 the Court in regard to the proceedings under the Act is to have the same powers and to follow the same procedure as it has and follows in the exercise of original civil jurisdiction. Now, what I deduce from this is that the claimants who are here in appeal have a right to be heard judicially and to have from the Court a final decision before the property is wrested from their possession. No doubt after the order under appeal the property has been taken possession of. But if that act has been *ultra vires*, it can only be ignored. The appellants did, as I have said, put in a petition before the "Receiver" in August last after they had been substituted in place of their father as creditors and as claimants. They applied for time continually, and in fact they do not appear to have taken any active step in the presence of the so-called Receiver. So in November we find that the so-called Receiver reported the fact to the Court. The Court then had the responsibility before it of carrying out the law which I have quoted from ss. 56 and 4 and 5 of the Provincial Insolvency Act. But instead of holding an enquiry the Court passed an order on the 15th November 1924 to the effect that the possession of the house with all other things mentioned in the insolvency petition be given to the Receiver through the Nazir. This order was passed without the slightest attempt at making an enquiry. Again on the 5th December the District Judge passed the second order which is the order under appeal. He mentioned that the present appellants had prayed that they might be allowed to adduce evidence in support of their claims, having been unable to do so previously on account of malarial fever: as he was not satisfied with this explanation of the appellants' previous conduct, he rejected the application.

Now it is perfectly obvious that the learned Judge had no power under the law to reject that application on these grounds. An enquiry by the so-called Receiver would not after adjudication be an enquiry of a person having authority under the Act. The Court had no evidence whatever before it, and had never in fact taken measures to hear the evidence in respect of this claim. The so-called Receiver had no power to make any such decision as is mentioned in s. 68 of the Act, nor, as I have said before, would a Receiver in insolvency have power under s. 56 to remove property from the possession of others than the insolvent.

It appears to me, therefore, that the order under appeal was one which was entirely without jurisdiction. It is now the Court's duty to appoint a Receiver in the regular manner; and in regard to the claim before it to pass a judicial decision as if this claim was a question agitated in an original Civil Court, following the same procedure so far as it can be followed. The decision thus arrived at after hearing the appellants' evidence and such evidence as the Receiver may adduce will obviously have the force of a decree under s. 4 and will be appealable to the High Court under s. 75. As the case stands there has as yet been no judicial treatment of this claim. I would, therefore, order accordingly allowing the appeal. The appellants will get their costs out of the estate.

Das, J.—I agree.

R. L. *Appeal allowed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 61 OF 1925.
November 25, 1925.
Present:—Mr. Justice Waller and
Mr. Justice Madhavan Nair.
PAYOTH RANDUPURAYIL SARA
UMMA AND OTHERS—PLAINTIFFS Nos. 1 & 2
—APPELLANTS
versus
KIDANGUKITTIYA RUNDUPURAYIL
KUNHAMMAD AND OTHERS—DEFENDANTS
Nos. 4, 2, 3 AND 5—RESPONDENTS.

Malabar Law—Maintenance karar *with* tarwad karnavan—*Allotment of properties to members of* tavazhi *in lieu of maintenance—Subsequent suit for maintenance against succeeding* karnavan—*Parties, necessary.*

A *karnavan* of a Malabar *tarwad* cannot set aside an existing maintenance arrangement made by his predecessor with the members of the *tarwad* unless he makes some other suitable arrangement. [p. 510, col. 1.]

A maintenance arrangement, however, is usually subject to modification if there is an appreciable or material change in the circumstances of the family. [p. 509, col. 2.]

Kelu Achen v. *Lakshmi Nethyar Ammal*, 18 Ind. Cas 234; (1913) M. W. N. 379, followed.

Where the *karnavan* of a Malabar *tarwad* entered into a *karar* with its members by which properties were allotted to various *tavazhis* for maintenance and it was provided that the *karar* was to be operative only during the lifetime of the *karnavan* although on the terms of the *karar* it was open to the *tarwad* as a whole by its conduct to adopt the *karar* as binding on its members even after the *karnavan's* death:

Held, that the *karar* was not a bar to a subsequent suit for maintenance by some of the members of one of the *tavazhis* against a succeeding *karnavan* of the *tarwad*. [p. 509, col. 2; p. 510, col. 1.]

Where the claim for maintenance is made not only against the *karnavan* but also against the *tarwad* properties, the *karnavans* of the various *tavazhis* who were under the prior *karar* in possession of the properties of the *tarwad* must also be impleaded as parties. [p. 510, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Phillips, dated the 17th February 1925, in S. A. No. 1635 of 1923 and printed as 90 Ind. Cas. 849, preferred to the High Court against a decree of the Court of the Subordinate Judge, Tellicherry, in A. S. No. 170 of 1922, preferred against that of the Court of the Additional District Munsif, Tellicherry, in O. S. No. 346 of 1920.

Mr. *K. P. M. Menon*, for the Appellants.

Mr. *T. S. Viswanatha Iyer*, for the Respondents.

JUDGMENT.—The suit out of which this Letters Patent Appeal arises was instituted by some of the junior members of a Malabar *tarward* against the *karnavan* for maintenance. The 1st defendant, the *karnavan*, died in the course of the suit and defendants Nos. 2 to 5, the respondents before us, have been added as his legal representatives. The suit was to recover a money allowance from the 1st defendant personally and as *karnavan* of the *tarwad*. In defence it was pleaded that Ex. I was a bar to the plaintiffs' claim. Exhibit I is a *karar* of 1886 between the then *karnavan* of the *tarwad*, Kunhi Thoopar, and the members mentioned in it according to which properties were allotted to various *tavazhis* for maintenance. The present plaintiffs are the descendants of one Ummathal, No. 4 in Ex. I. It is admitted that they were not born at the time of the *karar* and the records do not show that their mother was a party to it. The *tarwad* at that time consisted of 69 members of whom 33 were adults and the rest minors. No one represented the minors in the *karar*. At present the *tarwad* consists of about 364 members living in 10 or 12 different houses. The District Munsif and the Subordinate Judge holding that the *karar* was only a temporary arrangement intended to have effect only during Kunhi Thoopar's lifetime, gave a decree in favour of the plaintiffs at the rate of Rs. 5 per mensem per adult and Rs. 3 per mensem per minor. This decree was set aside by Phillips, J. The learned Judge held that the *karar*, Ex. I, was intended to enure for the benefit not only of the members then in existence but also of persons born subsequently, that the plaintiffs had been obtaining the benefit of the *karar* until shortly before the suit and if the plaintiffs wanted enhanced maintenance they must bring a suit in proper form impleading all the necessary parties. Inasmuch as that was not done, he dismissed the plaintiffs' suit.

We cannot agree with the learned Judge's view. Admittedly Ex. I is a very inartistically drawn up *karar*. The paragraphs in it referred to by the respondent's learned Vakil and the words "*thavazhi*" and "etc.," found in those paragraphs do not by any means establish beyond doubt that it evidences a permanent family arrangement; but, in our opinion, the question whether Ex. I was intended to bind future members of the *tarwad* is not very material in this case in view of the express provision in para. 5 thereof that "the stipulations according to this *karar* shall hold good until your death." The *karar* was clearly intended to be operative only during the lifetime of Kunhi Thoopar. The sentence immediately following this express stipulation, *viz.*, "afterwards when affairs are managed with the co-operation of all the adult male members, relief is to be granted when demand is made for increase of maintenance" does not in any way limit the significance of the stipulation just referred to, nor does it show that the arrangement was intended to be permanent. It only means "you may continue in the very same manner as heretofore, or you may ask for an increase in maintenance," in other words, for an alteration of the *karar*, after the death of Kunhi Thoopar, when affairs are managed by those who succeed him. This clause as the learned Judge himself thinks, only lays down what the parties are entitled to do under the law even without a special stipulation. The next sentence in that paragraph, *viz.*, "we and our *tavazhis* shall not be entitled to claim from you any maintenance until your death," also shows that the parties contemplated the *karar* to last only during the lifetime of the then existing *karnavan*. It may, however, be open to the *tarwad* as a whole by its conduct subsequent to Kunhi Thoopar's death to adopt the *karar* as binding on its members. Even so, mere maintenance arrangements are usually subject to modification if there is an appreciable or material change in the circumstances of the family [see *Kelu Achen* v. *Lakshmi Nethyar Ammal* (1).] Apparently the learned Judge seems to be of the view that the express stipulation in para. 5 is not of much importance as the *karar* seems to have continued in force after Kunhi Thoopar's death in the case of some of the *tavazhis*. That question was not raised in the Courts below and we do not express any opinion on it, though we may say in passing that some documents with reference to it were brought to our notice from the list of plaintiffs' exhibits found in the District Munsif's judgment. The real question would be whether the plaintiffs or the *tavazhi* along with the other branches can be understood to have tacitly adopted the *karar* as binding on them having regard to the general administration of the affairs of the *tarwad* and the *tavazhies* subsequent to the death of Kunhi Thoopar and have thereby lost their rights to claim maintenance. This question also was never raised in the lower Courts and has not been considered. Exhibit VIII referred to by the learned Judge admittedly does not refer to the plaintiffs or to the plaintiffs' *tavazhi*. In this connection the learned Judge states that "it appears from the District Munsif's finding on issue No. II that the plaintiffs have been obtaining the benefit, at any rate until shortly before suit." We find, and it is conceded that there is no such finding by the learned District Munsif, what he finds being only this, *viz.*, "Even if the persons who are in actual enjoyment of the properties give anything gratuitously to plaintiffs, they will not be deprived of their right to get maintenance from the *tarwad*." The point is not even referred to in the judgment of the lower Appellate Court. From these considerations the conclusion is inevitable that Ex. I does not bar the plaintiffs' right to claim maintenance from the *tarwad.*

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(1) 18 Ind. Cas. 234; (1913) M W. N. 379.

This being so, Mr. Menon argues that the appellants are entitled straightway to get a decree for maintenance and the decree of the Subordinate Judge confirming the decree of the District Munsif should be restored. In our opinion, this consequence does not necessarily follow from our conclusion. In the way we look at the case, the plaintiffs have to surmount certain obstacles before they can ask for a decree. Barring the personal relief, the relief claimed is against the *tarwad* property. This admittedly is in the hands of the various *tavazhis* managed by the *tavazhi karnavans.* In the absence of those persons as parties, obviously no decree can be given against the property in their hands. The decree directed against the properties in the hands of the *karnavan* alone as has been given by the lower Courts is unjustifiable, in view of the fact that he has not the entire *tarwad* property in his possession. Further as pointed out by Mr. Viswanatha Aiyar on behalf of the *karnavan* representing the *tarwad,* in order to give effect to the plaintiffs' right to maintenance, it may be necessary to subsitute a new arrangement in the place of the existing one. The law is well-settled that a *karnavan* cannot set aside an existing maintenance arrangement unless he makes some other suitable arrangement. The plaintiffs' right to maintenance may be given effect to possibly without altering the present arrangements or by some slight adjustment. These and other necessary relevant questions can be considered and decided only in a suit in which the entire *tarwad* is properly represented. Such is not the framework of the plaintiff's suit, but we think this is a proper case in which they may be given a chance to proceed with the suit after making the necessary persons parties to it. The learned Judge, Phillips, J., apparently did not allow them this indulgence because in his view the suit which the plaintiffs could bring was one for increased maintenance; while this one instituted by them was for maintenance only. As we have held that Ex. I does not bar the plaintiffs' suit for maintenance, we think they are entitled to proceed with the suit.

We, therefore, set aside the decree of the learned Judge and remand the entire case to the District Munsif for fresh disposal according to law and in the light of our observations. All the new defendants will be entitled to file written statements, if they desire to do so, and the plaintiffs may amend the plaint, if necessary, to meet the new contentions which may be urged by the defendants.

If the plaintiffs had framed the suit in proper form, there would have been probably no need for this remand. The defect was pointed out to them by the defendant in the first Court though the omission does not seem to have been referred to in the Court of Appeal. In these circumstances we have decided that each party should bear its own costs up to date.

V. N. V. *Case remanded for re-trial.*

PATNA HIGH COURT.

CIVIL REVISION NO. 114 OF 1925.

June 11, 1925.

Present:—Justice Sir John Bucknill, KT.

THE MADRAS AND SOTUHERN MARHATTA RAILWAY COMPANY—DEFENDANT No. 2—PETITIONER

versus

FIRM GOPAL RAI-RAM CHUNDER—PLAINTIFF—OPPOSITE PARTY.

Carriage of goods—Railway Company—Risk Note—Delay in delivery—Railway, liability of.

Where a consignee of goods in consequence of obtaining the carriage of his goods at low rates signs a Risk Note thereby absolving the Railway from liability for loss under certain circumstances, he is bound by the terms of the note. [p. 511, col. 1.]

Where a suit as framed is not one brought in tort for damages due to loss occasioned to the plaintiff on account of retardation in delivery but simply for compensation for the loss of the articles which were found missing, it cannot succeed on the ground of delay in delivery of goods, where the goods were consigned to the Railway under Risk Note Form H. [p. 511, col. 2; p. 512, col. 1.]

Application against a decision of the Small Cause Court Judge, Bhagalpur, dated the 4th December 1924.

Messrs. *N. C. Sinha, N. C. Ghosh* and *B. B. Ghose,* for the Petitioner.

Messrs. *B. C. Sinha* and *R. A. N. Sinha,* for the Opposite Party.

JUDGMENT.—This is an application in Civil Revisional Jurisdiction made under somewhat peculiar circumstances.

The matter relates to a suit brought by the opposite party here against among other defendants the Madras and Southern Marhatta Railway Company on behalf of which Company the present application has been made. The facts in the case were very simple.

The plaintiffs in the suit were con of some packages of cloth; these packages of cloth were despatched from Bangalore City in the south of India to Bhagalpur Station on the Bengal and North-Western Railway Company's system. The route by which the goods were actually to travel was not, of course, indicated in any of the papers which formed the contract between the consignors, the consignees and the Railway Companies over whose systems the goods might travel. There might have been a variety of Railways over the lines of which the packages might have gone; at any rate we know the East Indian Railway Company, the Bengal and North-Western Railway Company, and Madras and Southern Marhatta Railway Company were or might have been concerned. Now there is no doubt that when the consignees came to take delivery of the packages there was a shortage of 21 seers of cloth in one package; no one knows and no one can tell where or how this missing cloth was abstracted or why the shortage existed. The plaintiffs in due course brought a suit for compensation for the loss of these articles and it was heard before the Small Cause Court Judge at Bhagalpur. The action, of course, was for damages for breach of contract and on the face of the contract had there been no intervening circumstances the suit would, no doubt, have been impossible to defend; but as is so often the case in these cases relating to the carriage of goods by Railways in India the Company, that is to say, the applicants here, had contracted with the party for whom they were carrying these goods under special terms. These special terms are contained in what is known as Risk Note; the person on behalf of whom the goods are carried obtains there carriage at a low rate or what is frequently termed a special reduced rate; but in consequence of obtaining the carriage of his goods at this low rate he absolves specifically the Railway Company from responsibilty for loss under certain circumstances. The principal points of importance in the present Risk Note which covered the articles in question in this case are to the effect that the Railway Company is to be held not responsible for any loss, destruction, deterioration or damage to any of the goods consigned except in the event of any complete parcel being lost under circumstances which could be shown to be due to the wilful neglect of the Railway Administration or to other circumstances, such as, theft and the like to which I need not here refer as they are not material. The defence, therefore, of the Railway Company was simply that they were protected from the claim made by the plaintiffs by virtue of the exemptions from liability contained in this Risk Note to which I have referred. It is very difficult to see how the Small Cause Court Judge came to the conclusion that the plaintiffs could succeed. However, he seems to have arrived at this conclusion on grounds which, I must say, appear to me to be erroneous. In the first place, he seems to think that, because the goods did not travel so far as they possibly could on the Bengal and North-Western Railway Company's system, they had been despatched or carried on what he calls a wrong route. There is, however, to my mind no force in such a suggestion; there was no contract on behalf of the Railway Company that they would carry the goods by any particular route; there is nothing except the name of the place of despatch and the name of the place of consignment contained in the contract between the parties concerned; it appears to me that so long as the goods were delivered at the place of consignment and so long as they were delivered in due course, *i. e.*, within a reasonable time, it mattered not to the plaintiffs or to any one else by what particular route the goods may have been, for the convenience of the Railway Company or for what other reason we do not know, despatched by the carriers. The Small Cause Court Judge has also based his finding in favour of the plaintiffs upon another ground and that there was delay in delivery of the goods. As a matter of fact it does not appear to me that there was any undue delay in the delivery of goods: the plaintiffs could have obtained delivery earlier than they did; but there was considerable correspondence and discussion as to whether the plaintiffs would take delivery without conditions or what is known as open delivery, that is to say, delivery under protest. There is, however, a far more important objection to the case being decided in favour of the plaintiffs on the ground of delay and this is that the suit as framed was not as one brought in tort for damages due to loss occasioned to the plaintiffs on account of the retardation in delivery but simply for compensation for the loss of the articles which were found missing. Certainly the action was founded on breach of contract and in no sence on tort based upon the delay. There were no damages proved to have been sustained by the delay in the delivery and the action was brought simply upon the question of whether or not there had been breach of the contract and whether or not the Company was liable in view of the exemptions which were contained in the Risk Note Form H. I am quite unable to see how the plaintiffs can in this case succeed. I think the decision of the Small Cause Court Judge was wrong in law. The route was immaterial and the idea that there were any damages, due to delay, appears to me to be quite untenable. The action should have been dismissed, and although one must feel some sympathy with the plaintiffs in respect of their loss it is quite clear to my mind that if they accepted the provisions of the Risk Note Form H they must put up with the loss.

Under these circumstances the decision of the Small Cause Court Judge of the 4th of December last must be set aside and the suit must be dismissed. There will be no order as to costs of this Court.

R. L. *Suit dismissed.*
N. H.

MADRAS HIGH COURT.

CIVIL SUIT No. 114 OF 1926.
March 3, 1926.
Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice.
Seth CHAND MULL DUDHA
—PLAINTIFF
versus
PURUSHOTHAMADOSS—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 94, O. XXXVIII, r. 1—Arrest before judgment, principles of—Suit founded on proceedings of special Tribunal created by firman *of Nizam—Plaint disclosing highly contentious questions—Arrest before judgment, whether can be ordered.*

Before ordering arrest before judgment a Court should be satisfied (1) that the plaintiff's cause of action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint and (2) that there is reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court. [p. 513, col. 1.]

A suit was filed on the Original Side of the High Court of Madras for recovery of a sum of 5½ lakhs of rupees and the plaint was founded on the proceedings of a special tribunal created under a *firman* of the Nizam of Hyderabad and described as a decree of that commission. On an application by the plaintiff for arrest before judgment of the defendant and for an order that he should be made to show cause why he should not give security for his appearance:

Held, that it was at least highly arguable that the proceedings before the Commissioners terminated not in anything that could be called a decree or a foreign judgment within the meaning of s. 13 of the C. P. C. but a report submitted to the Nizam to guide him as to what action he should take; [p. 514, col. 1.]

(2) that it was equally arguable that the order to pay passed by the Nizam though binding on the defendant as a subject, was not a foreign judgment but an executive act; [*ibid.*]

(3) that the plaint, therefore, disclosed highly contentious matters, obviously doubtful and arguable and the application for arrest before judgment and for security must be rejected. [*ibid.*]

When the jurisdiction of a British Court is invoked against a subject of a foreign state on the ground that by coming within the physical boundaries of the jurisdiction of that Court he is liable to be sued as if he were a subject of His Majesty, a duty is cast upon the Court to be as jealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty. [p. 514, cols. 1 & 2.]

Notice of motion under O. XXXVIII, r. 1, C. P. C., for arrest before judgment of the defendant.

Mr. *Nugent Grant*, for the Plaintiff.
Mr. *S. Varadachariar*, for the Defendant.

JUDGMENT.—This is an application under O. XXXVIII, r. 1, C. P. C., for arrest before judgment of the defendant and an order that he should be made to show cause in compliance with s. 94 (*a*), C.P. C., why he should not give security for his appearance. At the close of the argument, I intimated what I proposed to do in the matter but as it is one of considerable general importance I thought it best to state my reasons formally. The facts are shortly as follows: The suit was brought on the Original Side of the Court for a sum of very nearly 5½ lakhs and it was founded upon what he, the plaintiff, described as "the decree dated 19th December 1925, at Hyderabad Deccan, of the Court of the Judicial Commissioner in the State of His Exalted Highness the Nizam of Hyderabad", that suit is not before me but will be tried in the ordinary course by a Judge sitting on the Original Side of this Court and I desire to say nothing that would in any way seem to anticipate that decision. But I am asked here to exercise a jurisdiction the effect of which might be to compel a man either to furnish security in a very large sum of money or possibly on his failure to do so to undergo imprisonment. I think it is desirable that I should state what are the principles which, in my opinion, should guide me in exercising that jurisdiction. It appears to me that before exercising the powers conferred by O. XXXVIII, a Court should be satisfied on two points. The first is that the plaintiff's cause of action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint. The second is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court. For the reasons which I am about to give I do not think it necessary for me to go into the second point in this case as I do not think that the plaintiff has succeeded in establishing his position on the first point. The debt on which the Hyderabad proceedings were founded was incurred about 50 years ago before the present defendant was born, in any event before the year 1877, because in that year a suit of some sort was launched for this very debt against Hargopaldoss, the brother of the present defendant's grandfather. It appears to have been started in a Tribunal called the Court of Bankers which ceased to exist before any conclusion was arrived at; and according to the plaintiff, the suit was then transferred to the High Court of Hyderabad which I take to be the ordinary and regular tribunal in that State for the disposal of Civil cases. No final judgment was ever delivered in that Court because owing to some failure by the plaintiff to pay stamp-duties or fees in the regular course, the High Court ordered the suit to be taken off its list of pending cases. This statement I take from the affidavit of the plaintiff himself. The defendant says that that order was passed as long ago as 1881, and his statement is uncontradicted. In March 1922 a petition was addressed by the plaintiff to His Exalted Highness the Nizam of Hyderabad and in response to that petition a *firman* was issued by His Exalted Highness appointing a special Commission to hear and report to him upon the claim and apparently some special directions were given in the *firman*, a complete copy of which has not been put before me, as to how the plea of limitation which, it was doubtless anticipated, the defendant would set up was to be dealt with. The Commissioners were two Judges of the High Court and a gentleman who is described as holding the office of Sadrul Maham which is translated as Head of the Department of Commerce and Industries. That Tribunal issued a report a copy of which is before me furnished by the plaintiff. The Commissioners framed issues, heard evidence, and examined accounts. The wording of a portion of the *firman* is quoted to the effect that the suit is to be heard by the Commission "irrespective of limitation." The issue that was framed is this; "Is this case different from the case of Amersi Sejan Mal and Mahanand Ram Puran Mal (that is apparently the original suit in the Court of Bankers) and is it not covered by the *firman* and is it not exempt from limitation" with a note "onus on the defendant"? The reason for framing this issue in this form appears to be as follows, that the plaintiff contended that the proceedings before the Commissioners were a mere continuation of the old suit that was filed before the defunct Court, the Court of Bankers, in 1877, and it was alleged that in that Court no question of limitation was ever entertained and no such plea was ever open to a defendant there.

I have not had put before me any information as to how the Courts of Ordinary Civil Jurisdiction in Hyderabad are constituted nor under what authority the ordinary Law of Limitation is in force as it undoubtedly appears to be in the Ordinary Civil Courts of the State. I have no information as to how far the prerogative of His Exalted Highness extends and I am not suggesting any doubts that His Exalted Highness was acting entirely within his constitutional powers in issuing the *firman* of 1923. So far as I can ascertain from perusing the document, the proceedings of the Commission really amounted to what I should call a report to be laid before His Exalted Highness and I gather that the mandate to pay a sum of money issued to the defendant took the form of an order passed by His Exalted Highness in the amount reported by the Commissioners to be the sum in their opinion due. I may add that the principal debt was found by them to be a sum of about 2¾ lakhs and that interest at the rate which is alleged to have been originally agreed upon between the parties would on a rough calculation, appear to amount to nearly 8 lakhs at simple interest and to the stupendous figure of about half a crore at compound. Such a conclusion obviously staggered the Commissioners and they cut down the interest to the exact sum of the principal, I do not know on what legal basis.

I have already said that I do not propose to say anything about the merits of this case but I think before I make an order under O. XXXVIII I must at least be satisfied that the plaint does not reveal on the face of it any matter which is obviously doubtful and arguable. In my opinion this plaint discloses highly contentious matters. Assuming as I do for the purposes of this case that the acts of His Exalted Highness as a Soverign Prince cannot be questioned in these Courts and that his subjects cannot be heard to say that any orders passed by him in relation to them are not binding upon them or that he has not power to take away any matter from the jurisdiction of the ordinary Courts, to be dealt with by himself or anybody appointed for the purpose by them, it nevertheless seems to me that there are two matters apparent on the face of this plaint which preclude me from exercising the jurisdiction conferred on me by O. XXXVIII. The plaint is founded on the proceedings of the Special Tribunal created under the *firman* and describes it as a decree of that Commission. As I have already pointed out, it is at least highly arguable that the proceedings before the Commissioners terminated not in anything that could be called a decree or a foreign judgment within the meaning of s. 13 of the C. P. C., but a report submitted to His Exalted Highness to guide him as to what action he should take. It is also obvious that it is highly arguable that the order to pay passed by His Exalted Highness, though binding on the defendant as a subject, is not a judgment but an executive act. I pass no opinion as to whether those arguments are sound or unsound but it appears to me that it would be wrong for me to subject this defendant to any process before he has had an opportunity of urging them. It is inapposite to speak in this case of safeguarding the liberty of the subject because the matter comes before me on the footing that the defendant is not a subject of His Majesty the King-Emperor but of His Exalted Highness the Nizam. But at the same time when the jurisdiction of this Court is invoked against a subject of a Foreign State on the ground that by coming within the physical boundaries of the jurisdiction of this Court he is liable to be sued as if he were a subject of His Majesty, a duty is cast upon me to be as jealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty. I do not think it necessary to refer to the provisions of s. 13 of the C. P. C., except in so far as inferentially I may be taken to have founded myself on cl. (*a*) of that section as being a provision which it will be open to the defendant to invoke in his favour and I do not feel called upon to pay any attention to the argument about natural justice which is referreed to in cl. (*d*). It would obviously be grossly disrespectful of this Court to entertain any argument to the effect that an order passed by a Sovereign power by virtue of its prerogative was opposed to natural justice; nor for the matter of that am I able to see how natural justice, whatever the expression may mean, can be said to include the right of a defendant to plead limitation, unless it is granted to him by a Statute acknowledged by the Sovereign Prince to be binding upon him and to limit by its terms the exercise of his prerogative. I may add that the impossibility of this Court taking upon itself to question the act of a Sovereign Prince on any such ground adds additional force to the defendant's contention that the act of His Exalted Highness was an executive act performed by him by virtue of his prerogative as a Sovereign Prince and not in any sense a judgment or a judicial decree. In conclusion, I wish to repeat once more that all these matters which I have discussed are ultimately matters for the Judge before whom the suit will come for trial, and that I need say no more than this; that they raise to my mind sufficient ground for my refusing to act in anticipation of that determination by that Tribunal. The summons will be dismissed with defendant's taxed costs in any event.

V. N. V. *Summons dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2603 OF 1925.
March 26, 1926.
Present:—Mr. Justice Jai Lal.
NAWAB AND ANOTHER—DEFENDANTS—APPELLANTS
versus
ARURA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77—Suit *for possession of land—Defendant's plea as to right of occupancy—Jurisdiction.*

Where in a suit for possession on the allegation of defendant's trespass, it becomes necessary on the plea of the defendant that he is an occupancy tenant, to adjudicate as to the status of the defendant as occupancy tenant, the jurisdiction of the Civil Court is ousted and the suit becomes one cognizable by a Revenue Court only.

Second appeal from a decree of the District Judge, Jhelum, dated the 30th April 1925, modifying that of the Subordinate Judge, Fourth Class, Gujrat, dated the 27th February 1424.

Malik *Ram Lal*, for the Appellant.

JUDGMENT.—The plaintiffs instituted the suit out of which this second appeal has arisen for possession of land. The defendants were alleged to be trespassers. *Inter alia* the plea of the defendants was that they were occupancy tenants and that, therefore, the suit was not cognisable by the Civil Courts. It appears that the defendants were held to be occupancy tenants by Revenue Courts in 1900. Subsequently disputes arose between the parties and the plaintiffs alleging to have purchased the occupancy rights from the defendants got the names of the latter removed from the column of cultivation in the revenue records. But this order was set aside by the Commissioner on the 31st June 1920. The result is that the defendants are shown as occupancy tenants in the revenue records. On the 9th May 1921 by virtue of a compromise which was attested before the Naib-Tahsildar and has been proved by Nawab defendant the plaintiffs agreed to allow the defendants to continue as occupancy tenants. The present suit by the plaintiffs under the circumstances was clearly cognizable by the Revenue Courts because the pleas of the defendants made it necessary to adjudicate as to their claim of the status of occupancy tenants. The plaintiffs-respondents have not appeared before me in this appeal and consequently accepting the appeal I order that the suit be dismissed with costs throughout.

R. L. *Appeal accepted.*

MADRAS HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL No. 35 OF 1924.

October 28, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

ADDEPALLI VENKATA GURUNADHA RAMA SESHAYYA—PLAINTIFF—APPELLANT

versus

Sri TRIPURASUNDARI COTTON PRESS, BEZWADA, REPRESENTED BY THE SECRETARY, ADDEPALLI VENKATAPPAYYA—DEFENDANT No. 2—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 115, 161, 120—Dividend payable by company—Suit for recovery by share-holder—Limitation.

A suit by an auction-purchaser of a share-holder's rights to receive dividends of a Company for recovery of dividend declared and payable by the Company is governed by Art. 120 of Sch. I to the Limitation Act and not by either Art. 62, 115 or 116. [p. 521, col. 1]

A debt created by the declaration of dividend by a Company in favour of a share-holder, whether or not in certain circumstances and for certain purposes it may be regarded as a contract, is not a contract such as is contemplated by Arts. 115 and 116 of Sch. I to the Limitation Act. [p. 520, col. 2.]

In re Artisans Land & Mortgage Corporation, (1904) 1 Ch. D. 796; 73 L. J. Ch. 581; 52 W. R. 330; 12 Manson 98, relied on.

Ripon Press & Sugar Mill Co. Ltd. v. *Nama Venkatarama Chetty*, 48 Ind. Cas. 903; 42 M. 33; 35 M. L. J. 253; 8 L. W. 354; 24 M. L. T. 246, overruled.

Letters Patent Appeal against the judgment of Mr. Justice Wallace, in Second Appeal No. 593 of 1921, dated the 14th February 1924, and printed as 79 Ind. Cas. 947, preferred to the High Court against a decree of the Court of the Subordinate Judge, Bezwada, in Appeal Suit No. 22 of 1920, preferred against the decree of the Court of the District Munsif, Bezwada, in Original Suit No. 112 of 1917.

This Letters Patent Appeal coming on for hearing on the 24th February, and the 5th, 6th, 10th and 19th March 1925, respectively, upon perusing the grounds of appeal, the judgment and decree of the High Court, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the arguments of Mr. *K. N. Rajagopala Sastri*, for the Appellant, and of Mr. *P. Satyanarayana*, for the Respondent, and the case having stood over for consideration till this day, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

Venkatasubba Rao, J.—This is a

Letters Patent appeal from the judgment of Wallace, J. One Subba Rao was a share holder of the 2nd defendant Company. A money decree was passed against him and in execution of it certain shares belonging to him together with the dividends that had accrued were attached and sold. The plaintiff who became the purchaser at the Court-sale has instituted the present suit for the recovery of the dividends The short question to be decided is: What is the Article of the Limitation Act that is applicable to the case? The defendant Company contends that the period of limitation is three years, whereas the plaintiff urges that the period is six years. Wallace, J., was of the opinion that the suit would have been in time had the plaintiff been a share-holder but that the plaintiff would not fall under that Article. The ground of his decision is that *Ripon Press & Sugar Mill Co, Ltd.* v. *Nama Venkatarama Chetty* (1) which lays down that a suit for return of deposit is governed by Art. 116 is inapplicable, if the suit is brought not by a share-holder between whom and the Company there is a contractual relation but by a transferee from such a share holder. With great respect, I am unable to agree. Article 116 applies to a suit "for compensation for the breach of a contract in writing registered." The Article does not say that the suit must necessarily be by the promisee against the promisor; if, for instance, the claim is founded upon a registered bond, can it be said that a suit by a transferee from the payee under the bond does not come under this Article? The suit being for a dividend that has accrued, is in the nature of a claim for money due and the position of the transferee for this purpose cannot be different from that of the share-holder himself.

The case cannot, therefore, be distinguished as has been done by Wallace, J., from *Ripon Press & Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1).

In my opinion the real question that arises is: Does Art. 116 apply at all? In other words, does *Ripon Press & Sugar Mill Co., Ltd* v. *Nama Venkatarama Chetty* (1) correctly state the law.

Sir John Wallis, C. J., and Seshagiri Ayyar, J., held in it that a suit by a share-holder against a Company is governed by Art. 116. With the utmost respect for the learned Judges I feel bound to say that this decision is based on a fallacy. Article 116 applies to contracts in writing registered. Is the contract between the share-holder and the Company a contract of this description? The learned Judges having held that the memorandum and the articles of association constitute the contract between the share-holder and the Company, took the view that these two documents must be deemed to be registered within the meaning of Art 116. Is this construction correct? The word "registered" has not been defined in the Limitation Act but its definition is to be found in the General Clauses Act of 1897. Section 3, cl. (45) of that Act says:—"'Registered' used with reference to a document, shall mean registered in British India under the law for the time being in force for the registration of documents." Can it be said that the Indian Companies Act embodies any portion of "the law for the time being in force for the registration of documents?" The Act deals with the registration of companies and not registration of documents. Section after section refers to the registering of a Company. Section 2, cl. (2), defines a Company as one registered under the Act. Section 2, cl. (15), defines the "Registrar" as a Registrar performing under the Act the duty of registration of Companies. Section 4 prohibits certain partnerships unless they are registered as Companies. Section 11 aims against the registration of Companies by names identical with those of Companies already in existence. Section 248 provides for the establishment of registration offices and deals with the offices where Companies shall be registered. It is unnecessary to refer to further sections, but it is clear beyond doubt that it is the registration of Companies and not of documents that is within the purview of the Indian Companies Act.

It is no doubt true that in a few sections the word 'registered" is used with reference to the memorandum and the articles of association. After dealing with the registration of these documents (sections 17, 18, 22 and 23), the Act proceeds to enact in s. 24 that a certificate of incorporation shall be conclusive evidence that the association is a company registered under the Act. But registration of the articles and memorandum is merely incidental and the object to be achieved is the registration of the Company. It is not sufficient to say that in the Indian Companies Act there are some stray provisions that deal with the registration of certain documents. The real question is: Does the Indian Companies Act contain any portion of "the law" as contemplated by the General Clauses Act "for the time being in force for the registration of documents?"

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(1) 48 Ind. Cas. 903; 42 M. 33; 35 M. L. J. 253; 8 L. W. 354; 24 M. L. T. 246.

I have so far applied a negative test. Where is this law then contained? If we now turn to the Registration Act of 1908 we find the preamble running thus:—

"Whereas it is expedient to *consolidate* the enactments relating to the registration of documents. It is hereby enacted as follows."

It is the Indian Registration Act, therefore, that contains "the law for the time being in force for the registration of documents." It is needless to point out that this Act does not deal with the registration of memoranda or articles of association.

The view I have taken derives some support from Art. 112 of the Limitation Act which gives the period of limitation as three years for a suit to enforce a call by a registered Company. If in the opinion of the Legislature, enforcing a call is enforcing an obligation arising under a registered contract, a period of three years would not have been prescribed; for, under Art. 116 when any contract (whatever its nature may be) is in writing registered, the period of limitation is six years See *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur* (2). The general policy of the Act is to prescribe the longer period in the case of obligations arising under a registered contract. If, therefore, Art. 112 in truth refers to such an obligation, the position will be this: Article 112 will stand apart and be inconsistent with the general scheme and policy of the Act. From this it is a fair inference that the idea underlying Art. 112 is that the obligation in respect of a call does not arise under a registered contract. This Article also incidentally shows by its wording that what is registered is the Company and not the Articles or memoranda.

Article 116, therefore, of the Limitation Act cannot apply to a suit by a share-holder against a registered Company. The learned Judges who decided *Ripon Press & Sugar Mill Co., Ltd.*, v. *Nama Venkatarama Chetty* (1) came to the opposite conclusion as they felt that a narrow interpretation should not be put upon the words in the General Clauses Act. When two interpretations are possible, one narrow and the other a liberal one, I should certainly not have the slightest hesitation in adopting that interpretation which accords with justice. But I cannot help feeling in the present case that the construction suggested on behalf of the plaintiff is utterly unsound. It is with the greatest reluctance that I feel compelled, departing from the authority cited, to adopt a view which gives the shorter period of limitation.

The plaintiff's learned Vakil suggests that if Art. 116 does not apply, Art. 120, the residuary Article, governs the case. I cannot accept this contention. Article 115 applies to suits for compensation for the breach of a contract not in writing registered. It is contended that the memoranda and Articles do not constitute a contract between the Company and its members. In *Ripon Press & Sugar Mill Co. Ltd.* v. *Nama Venkatarama Chetty* (1), it was held that the obligation to pay a dividend arises from the contract evidenced by these documents. I am prepared to follow this decision in this respect. Section 21 of the Indian Companies Act runs thus:—

"The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act."

This section is almost identical with s. 14 of the English Act, The Companies (Consolidation) Act, 1908. The contention is that although the section says that there shall be deemed to be a covenant on the part of each *member*, it does not say that the *company* is bound by reason of a contract entered into by it.

There has been a good deal of conflict of opinion in England on this point and Palmer in his "Company Law" deals in Ch. IV with this subject.

In *Welton* v. *Saffery* (3) Lord Herschell observed: "It is quite true that the articles constitute a contract between each member and the Company."

Stirling, J., in *Wood* v. *Odessa Water-*

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(2) 39 Ind. Cas. 156; 44 C. 759; 1 P. L. J. 262; 15 A. L. J. 217; 25 C. L. J. 279; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 363; 5 L. W. 654; 19 Bom. L. R. 450; 44 I. A. 65 (P. C.).

(3) (1897) A. C. 299 at p. 315; 66 L. J. Ch. 362; 76 L. T. 505; 45 W. R. 508; 4 Manson 269.

works Co. (4) said: "The articles of association constitute a contract not merely between the share-holders of the Company, but between each individual share-holder and every other."

James, L. J., in *Johnson* v. *Lyttle's Iron Agency* (5) referred to the articles as a contract between the Company and the share-holders. It is unnecessary to multiply references and it is sufficient to refer to the following passage in Buckley's Companies Acts, 1924 Edition, page 28:—

"All the authorities as to whether the articles constitute a contract as between the Company and its members were reviewed by Astbury, J., in the recent case of *Hickman* v. *Kent or Ramney Marsh Sheepbreeder's Association* (6) who decided that the result of the apparently conflicting decisions and *dicta* referred to above was that though the articles can neither constitute a contract between the Company and an outsider nor give any individual member of the Company special contractual rights beyond those of the members (or, *quære*, any particular class of members) generally, they do in fact constitute a contract between a Company and its members in respect of their ordinary rights as members."

If the articles and memoranda constitute, therefore, a contract binding on the Company as well as on each member, Art. 115 clearly applies to the case and a suit for the recovery of the dividend must be brought in three years from the date when payment becomes due.

As the view I am taking is opposed to that adopted by a Bench of this Court in *Ripon Press & Sugar Mill Co. Ltd.* v. *Nama Venkatarama Chetty* (1) and as the point, I understand, is likely to frequently arise in connection with a Company which is now under liquidation, I would refer the following question to a Full Bench:—

Is a suit by a share-holder against a Company for recovery of a dividend governed by Art. 115 or 116 of the Limitation Act?

If neither Article applies, which is the Article applicable?

Madhavan Nair, J.—For deciding this Letters Patent appeal, it has become necessary to consider the question, what Article of the Limitation Act governs a suit by a share-holder against a Company. In *Ripon Press & Sugar Mill Co., Ltd.*, v. *Nama Venkatarama Chetty* (1) it was held by Sir John Wallis, C. J., and Seshagiri Ayyar, J., that Art. 116 applies to such a case. Under this Article a period of six years is fixed for suits "for compensation for the breach of a contract in writing registered." The learned Judges in *Ripon Press & Sugar Mill Co., Ltd* v. *Nama Venkatarama Chetty* (1) took the view (1) that the memorandum and articles of association constituted the contract between the share-holders and the Company and (2) that these two documents must be deemed to be registered within the meaning of Art. 116. Accepting the soundness of the view that the two documents constitute the contract, the learned Vakil for the respondent has argued that these two documents cannot be considered to be registered within the meaning of Art. 116. "Registered" according to the General Clauses Act, s. 3, cl. (45), when used with reference to a document, means "registered in British India according to the law for the time being in force for the registration of documents." According to its preamble, the Indian Registration Act contains the law for the time being in force for the registration of documents. That Act does not contain any special provision for the registration of "memorandum and articles of association." Sections 17 and 18 of the Indian Companies Act refer to the registration of these documents and s. 22 says that the Registrar of the Province in which the registered office of the Company is situate shall retain and register them. The Registrar means a Registrar or Assistant Registrar performing under the Indian Companies Act the duty of registration of Companies [see s. 2, cl. (15)]. Section 23 refers to the effect of registration and s. 24 says that a certificate of incorporation given by the Registrar should be conclusive evidence that the association is a company registered under the Act. As pointed out by my learned brother, ss. 2, cls. (2) and (15), 4, 5, 11 and 248 indicate that the Indian Companies Act embodies only the law for the "registration of Companies" and not any portion of the law for the "registration of documents," for which provision is made in the Indian Registration Act. The wording of Art. 112 of the Indian Limitation Act suggests that what is registered is the "Company" and not the "memorandum" or "articles of association." No doubt, there are sections, as already mentioned, in the Indian Companies Act relating to the registration of these two documents, but on the strength of those sections which deal only with what may be described as matters incidental to the registration of Companies, I do not think it can be said that any portion of the law for the registration of documents for the time being in force is contained in the Indian Companies Act.

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(4) (1889) 42 Ch. D. 636; 58 L. J. Ch. 628; 37 W. R. 733; 1 Neg. 265.

(5) (1877) 5 Ch. 687; 46 L. J. Ch, 786; 36 L. T. 528; 25 W. R. 548.

(6) (1915) 1 Ch. 881; 84 L. J. Ch. 688; 113 L. T. 159; 59 S. J. 478.

If this view is accepted, then Art. 115 of the Indian Limitation Act would be the Article applicable to a suit by a share-holder against a Company, but the learned Vakil for the appellant argues that that Article is inapplicable because the memoranda and the articles of association do not constitute a contract between the Company and its members and that, therefore, the proper Article which would govern the case is Art. 120. As regards the question whether the memoranda and the articles of association constitute a contract, there has been some conflict of opinion in England, but the weight of authority is *decidedly* against the view put forward on behalf of the appellant. I think it has been rightly held in *Ripon Press & Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1) that the right to receive a dividend arises out of the contract evidenced by the memorandum and the articles of association.

In the circumstances pointed out by my learned brother, I agree that the opinion of the Full Bench may be invited on the questions proposed by him.

Mr. *K. N. Rajagopala Sastry*, for the Appellant.

Mr. *P. Satyanarayana Rao*, for the Respondents.

This Letters Patent Appeal came on for hearing yesterday and this day in pursuance of the order contained in the said Order of Reference to the Full Bench. The Court expressed the following

OPINION OF THE FULL BENCH.

Coutts Trotter, C. J.—In this case the appellant bought up at a Court auction sale the rights of the judgment-debtor to receive dividends accrued in a limited Company of which he was a share-holder. The question that we have to determine, now that the auction-purchaser is seeking to enforce his right against the Company, is what period of limitation is applicable to such a claim.

The Indian Limitation Act is one of those unfortunate pieces of Indian legislation which by trying to provide for everything conceivable very often ends by leaving out cases of the most glaring description. I might take this as a very good instance, for there is no Article which provides simpliciter for a debt due, such a debt as would have been the subject of the old Common Law action in debt, although, oddly enough, provision is made by Art. 63 "for money payable for interest upon money due from the defendant to the plaintiff; " so that a special Article is enacted for the interest and nothing is said whatever about the principal of the debt. It is suggested that to such cases as this, art. 62 might apply which is "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." The fact is that the money out of which the dividend has to come is received by the Company for its own use and put into its own coffers. Then at a later stage in accordance with the Article a dividend is declared by the Company in a general meeting on the advice and recommendations of the Directors. The very ingenious argument put forward was that as soon as the declaration was made, there must be taken to be a notional second receipt by the Company, as it were from its right hand to its left, the second receipt to be deemed to be for the use of the share-holders who will be entitled to the dividend. It is sufficient to say that that is a line of argument which seems quite in conflict with the enactment of the Statute as to when the time begins to run and that is when the money is received, the clear implication being—and it is not inconsistent with the frame of the English cause of action for money had and received—that the money must at the time it came into the hands of the defendant have been there and then put into his hands for the use of the plaintiff. It is quite true that in cases where the party aggrieved is ignorant of the facts, the time will only begin to run, not when the money was in fact received by the defendant, but when the plaintiff first became aware of it; but that is a matter of procedure which really does not, except for a special purpose, fix the time when the money is to be deemed to be received. I think we are constrained to hold that the original receipt by the company is the only receipt upon which art. 62 would operate and that as that receipt is not for the use of the plaintiff he cannot be brought within Art. 62

I now pass to the next suggested alternative which is Art. 115, and that is worded as follows: "For compensations for the breach of any contract, express or implied, not in writing registered and not herein specially provided for" and if the defendant Company can bring itself within the four walls of that Article, that carries them home in this case and this action is statute barred. Were the matter *res integra*, I should myself be strongly inclined to say that an action such as this was not an action for compensation for the breach of any contract. The English and the Irish Courts have quite clearly laid it down that upon the declaration of a dividend a debt immediately becomes payable by the Company to each share-holder in respect of the amount of dividend represented by the amount of his holding in shares, and I should have thought, therefore, that it was not correct to describe the obligation to pay a debt as being compensation for the breach of a contract. But that matter is not *res integra* because it has been dealt with in a decision under the following Article, 116 of the Limitation Act, by the Privy Council. That is the case of *Tricomdas Cooverji Bhoja* v. *Gopinath Ji Thakur* (2) and the judgment of the Board was delivered by Lord Sumner. Now the words of Art. 116 are as follows:—"For compensation for the breach of a contract in writing registered." In *Tricomdas' case* (2) the sum of money in issue was arrears of rent due under a registered lease, and the argument that was put forward and which the Board refused to accept was that Art. 110 of the Act specifically provided a period of limitation for arrears of rent and, that being so, it was immaterial whether the rent was due under a registered or an unregistered lease. The Board rejected that argument on the ground that the words of Art. 116 were not incapable of covering a case of rent due and that a long *cursus curiæ* of Indian decisions and the decisions of the Board had construed every possible section that they could with a view to giving favour to registered instruments and prolonging the period of limitation. That appears to us to be a method of approaching the case which is binding on us, and I think we have to say in the case of a debt such as the debt created between Company and share-holder on the declaration of a dividend that, if it is a contract at all, the remedy sought is aptly described as compensation for the breach of a contract, express or implied.

The matter does not rest there, however, because a very learned argument has been put forward before us, the effect of which is to show that although the declaration of a dividend creates a debt, yet the relation between share-holder and Company is not a relationship which could be described as a contractual one. On that point there has been a very great conflict of opinion and divergent views in the English and Irish Courts. I am not a company lawyer and I do not propose to do more than refer very briefly to the main views that have been expressed. The whole matter is summed up in the judgment of Astbury, J., in the case of *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association* (6) where he comes to the conclusion that although the articles cannot be held to constitute a contract between the Company of the one part and an outsider in his capacity of outsider of the other part, yet as between share-holder and share-holder and company, a contract is in fact constituted. There were many weighty expressions of opinions to the contrary. We have come to the conclusion that the safest course to adopt here is to take the view that the declaration creates a debt. Byrne, J., in *In re Artisan's Land and Mortgage Corporation* (7) after reviewing the very weighty pronouncements in Irish cases which he refers to, holds that it not merely creates a debt but by virtue of the share certificates and the memorandum of articles it creates a specialty debt. Although the Irish Courts, not, I think, Byrne, J., do use language which seems to imply that it is not merely a specialty debt but it is a debt arising out of a specialty contract, we are not really bound to go so far as that. We think that this debt created by the declaration, whether in certain circumstances and for certain purposes it might be regarded as a contract, is not a contract such as was contemplated and envisaged by Art. 115 of the Limitation Act. It is difficult enough to regard that form of words as applicable to a claim for rent. It seems to me clumsy beyond anything that is legitimate to allow the claim of a share-holder for his dividend to be regarded as aptly described by "compensation for breach of contract, express or implied." In our opinion, it is merely a claim for debt and as, unfortunately, the Limitation Act does not contain a section applicable to debts, all we can do is to fall back on the omnibus Art. 120 and treat this case as one for which no Article specifically applicable is prescribed under the Schedule.

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(7) (1904) 1 Ch. D. 796; 73 L. J. Ch. 581; 52 W. R. 330; 12 Manson 98.

There is only one other matter that we have to deal with which, in essence, was the start of this whole business. We were referred to a decision of this Court reported as *Ripon Press & Sugar Mills Co., Ltd,* v. *Nama Venkatarama Chetty* (1) a decision of Wallis, C. J., and Seshagiri Iyer, J., That was a suit for dividend and it was decided that the suit fell within Art. 116. Article 116 of course speaks of registered contracts and there is no doubt that the learned Judges held not merely that registration of a contract, in the ordinary sense was covered by the Article, but the deposit of the memorandum and articles of association of a limited Company with the Registrar of Joint Stock Companies under the direction of the Act. That seems to us to be putting an intolerable strain upon the word "registered" and one which the draftsman of this Statute could not possibly be thought to have contemplated. Of course the decision amounts to this, and we find ourselves unfortunately in disagreement with it even on the minor point, that the relation constituted between the share-holder and the company is a contractual relation. We do not even go so far as that, as we wish to limit ourselves carefully, if 'contractual' is taken to mean, contractual in the sense contemplated by Arts. 115 and 116 of the Limitation Act. We, therefore, are of opinion that *Ripon Press & Sugar Mills Co., Ltd*, v. *Nama Venkatarama Chetty* (1) is incorrectly decided and we think we ought to say so.

The reply to the question submitted to us is that in our opinion Art. 120 is the Article that applies.

Krishnan, J.—I agree.

Beasley, J.—I agree.

V. N. V. *Answered accordingly.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 221 OF 1924.
February 18, 1925.
Present :—Mr. Justice Martineau and Mr. Justice Scott Smith.
FIRM PARJA MAL-CHANDI MAL OF FAZILKA, DISTRICT FEROZEPORE THROUGH MOHAR CHAND OWNER OF THE FIRM—DEFENDANT—APPELLANT
versus
FIRM MUL CHAND-MURARI LAL SITUATE AT FAZILKA, DISTRICT FEROZEPORE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90 Letters Patent (Lah.), cl. 10—Execution of decree—Sale, application to set aside, dismissal of —Appeal, second, whether lies—Revision—Appeal under Letters Patent, whether competent.

An application to set aside an auction-sale was dismissed as barred by time. In appeal the District Judge held that as the necessary deposit under O. XXI, r. 84 (1) of the C. P. C., had not yet been made the sale was not complete and the application was within time. He remanded the case to the first Court for a fresh decision. In revision a Single Judge of the High Court set aside the order of the District Judge and restored that of the first Court dismissing the application. The judgment-debtor filed an appeal against the order of the Single Judge under cl. 10 of the Letters Patent and contended that the order of the first Court was passed under s. 47, C. P. C., and was, therefore, a decree and consequently open to second appeal, and that the order of the Single Judge must be treated as having been passed in a second appeal and was appealable under the Letters Patent:

Held, (1) that the order of the first Court was passed under O. XXI, r. 90, C. P. C., and was not open to second appeal;

(2) that the order of the Single Judge was passed in revision and was not open to appeal under the Letters Patent.

Letters Patent Appeal against an order of Mr. Justice LeRossignol, in Civil Revision Case No. 627 of 1923, dated the 27th February 1924.

Lala *Jaggan Nath Aggarwal*, for the Appellant.

Lala *Ram Chand Manchanda* and Lala *Anant Ram Khosla*, for the Respondent.

JUDGMENT.—In execution of a decree land belonging to the judgment-debtor was sold by auction by the Tahsildar on the 21st March 1923 and was purchased by the decree-holder, who had obtained permission to bid. Objections to the sale were lodged on the 21st April 1923, but the Subordinate Judge dismissed them as time-barred and confirmed the sale. On appeal the Additional Judge held that as a deposit of Rs 25 per cent. of the purchase-money had not been made, as required by O. XXI, r. 84 (1) of the C. P. C., the sale was not complete on the 21st March 1923, and the judgment-debtor's application for having the sale set aside was, therefore, within time, and he set aside the order of the Subordinate Judge and remanded the case for a fresh decision. The decree-holder applied to this Court for revision of the order of the Additional Judge, and the application was accepted by a Judge in Chambers and the order of the Subordinate Judge restored.

The judgment-debtor has preferred an appeal under the Letters Patent, and it is contended on his behalf, that there was no complete sale, that the Subordinate Judge's order was consequently not one passed under O. XXI, r. 90, C. P. C., but was one under s. 47 and amounted to a decree, and that, therefore, a second appeal lay to this Court and the order of the Judge in Chambers should be treated as one passed in a second appeal and is appealable under the Letters Patent.

It is pointed out that the only bidder at the sale was the decree-holder, and that the Tahsildar in his report to the Court did not say whether he accepted the decree-holder's bid; but we think it is clear enough that he did accept the bid even though he did not say so in express words. With regard to the omission to make the deposit of 25 per cent. of the purchase-money, the Court is empowered by O. XXI, r. 84 (2), as observed in the order of the learned Judge in Chambers, to dispense with the requirements of sub-r. (1) regarding the payment of the deposit when the decree-holder is the purchaser and is entitled to set off the purchase-money, so that we do not think that the omission to make the deposit renders the sale incomplete. Moreover, it was not urged in the Executing Court that the sale was not complete on account of that omission.

We are clearly of opinion that the order of the Subordinate Judge was one passed under O. XXI, r. 90, of the C. P. C., and was not a decree, and that, therefore, no second appeal lay to this Court. The order of the learned Judge in Chambers was an order passed on an application for revision and no appeal lies from it under the Letters Patent. The appeal is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 106 OF 1925.
November 24, 1925.
Present:—Mr. Justice Devadoss and
Mr. Justice Wallace.

TAMBI REDDI VIRAREDDY—APPELLANT
versus
DEVI REDDY PATTABHIRAM REDDY
AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 145, O. XXI, r. 2—Surety for payment of decree—Uncertified payment, whether can be pleaded by surety—Surety, application of, under O. XXI, r. 2, maintainability of.

So long as there is an executable decree against the judgment-debtor, a surety who executes a bond undertaking to discharge the decree is not relieved from his liability to pay the decree amount under the security bond executed by him. [p. 524, col. 2; p. 525, col. 1.]

Where, therefore, payments to the decree-holder are not certified to the Court executing the decree, an application for execution is maintainable against the surety. [p. 525, col. 1.]

Onkarmal Agarwala v. *Nritya Gopal Chaki*, 67 Ind. Cas. 885; A. I. R. 1923 Cal. 313, relied on.

A surety though he is not a party to the decree has an interest in showing that the decree has been satisfied and may, therefore, ask the Court to hold an enquiry as to the same. [p. 523, col. 2.]

Ramanathan Pillai v. *Doraiswami Ayyangar*, 55 Ind. Cas. 363; 43 M. 325; 38 M. L. J. 65; 11 L. W. 45; (1920) M. W. N. 114; 27 M. L. T. 207, referred to.

Appeal against an order of the District Court, Nellore, dated the 26th January 1925, in E. P. No. 44 of 1924, in O. S. No. 2 of 1923.

Mr. *B. Somayya*, for the Appellant.

Mr. *T. V. Venkataramier*, for the Respondents.

JUDGMENT.—The plaintiffs who are respondents Nos. 1 and 2 herein arrested the 2nd defendant, the 3rd respondent herein, in execution of a money-decree. The appellant executed a security bond on 11th December 1923 undertaking to produce and hand over the 2nd defendant whenever the Court passed an order to produce him. The bond also provided that in default of the surety producing the second defendant and handing him over to the Court, the amount of decree interest, and costs shall be recovered by the plaintiffs from the surety personally. On the execution of the bond, the second defendant was released from arrest. The plaintiffs applied to the lower Court for an order that the surety be directed to produce the second defendant and in default of producing him, the decree amount be realised from him. The appellant contended that the decree of the plaintiffs against the second defendant had been satisfied and that no execution could issue against him in execution of a decree already satisfied. The District Judge overruled the objection of the appellant and directed him to produce the second defendant on or before a certain date and on his failure to do so that execution should issue against him. The appellant has preferred this civil miscellaneous appeal.

Two points arise for consideration in this case one of fact and the other of law.

The first point is whether the decree has been satisfied. Mr. Somayya for the appellant relies very strongly upon Ex. II which is the defendant's ledger, in the account book of plaintiffs. From the entries in the ledger, it is found that a nil balance is struck. And Mr. Somayya's contention is that the decree debt has been wiped off by payment. There are entries on both sides of the ledger and the balance is zero. In Ex. III, the ledger of the 3rd defendant, there is a debit entry of Rs. 5,000. It is argued for the appellant that the 3rd defendant paid Rs. 5,000 in discharge of the decree-debt and thereby the decree-debt has been fully satisfied.

Exhibit I is the day-book and in it there is an entry that the decree in O. S. No. 2 of 1923 has been transferred to Adapala Varada Reddi for Rs. 5,000 and a promissory note for the sum of Rs. 5,000 has been obtained this day from him.

Mr. T. V. Venkataramier for the respondents Nos. 1 and 2 contends that there was no transfer of the decree in favour of Adapala Varada Reddi, the 3rd defendant in the case, but there was only an agreement to transfer the decree to him. Exhibit A, pro-note executed by Varada Reddi in favour of the plaintiffs on 10th January 1924 contains a recital but Varada Reddi had arranged to take a transfer of the decree-debt for the plaintiffs. The entry in the day-book is of the same date as that of the pro-note. The 3rd defendant was only a surety for defendants Nos. 1 and 2, and in the *razinama* decree, he is made liable only for 2/5ths of the decree amount in case the plaintiffs were unable to realise the decree-amount from defendants Nos. 1 and 2. It is unlikely that when he was made liable only for 2/5ths of the amount in case the plaintiffs were unable to obtain satisfaction from defendants Nos. 1 and 2 that he would discharge the whole of the decree amount by undertaking to pay Rs. 5,000. There is no evidence that the decree has been transferred to the 3rd defendant. The appellant's contention is, that the decree has been transferred should be taken to mean that the decree was transferred on the 10th January 1924. Taking the entry alone, in Ex. A, it cannot be said that the decree has been transferred to the 3rd defendant. The onus is upon the appellant to show that the plaintiffs have transferred the decree and that they could not apply for execution. On a consideration of the evidence we have no hesitation in holding that the decree was not transferred to nor was any amount paid towards the decree by the 3rd defendant. The appellant has not shown that the decree has been satisfied by any amount being paid by the 3rd defendant Varada Reddi.

The next question is granting for argument's sake, that the decree amount was paid by the 3rd defendant can the appellant take advantage of the payment, when the payment has not been certified by the Court as required by O. XXI, r. 2. The appellant's argument is that the surety is not a party to the decree and he could not apply to the Court to enter up satisfaction of a decree which has been satisfied by payment by the 3rd defendant. The surety is not a party to the decree but becomes a party only for a limited purpose that is for purpose of appeal when an order is made against him under s. 145, C. P. C. *vide Ramanathan Pillai* v. *Doraiswami Ayyengar* (1). The fact that he is not a party to the decree is no ground for getting round a definite provision of law under O. XXI, r. 2, cl. (3).

Mr. Somayya strongly urges that the said provision is contained in processual law and should not be held to override positive law and under the law of contract a surety is not bound to pay when the debt which he undertook to pay in case of default of the principal debtor has been paid off or adjusted.

Whatever may be the policy of the Legislature in enacting cl. (3), the Court is bound to give effect to it. Where the decree is adjusted wholly or in part the judgment-debtor should apply within three months to the Court and that such adjustment or payment should be recorded as certified and if he fails to do so, he cannot plead adjustment or payment in answer to the execution of the decree against him. Considerable reliance is placed by Mr.

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(1) 55 Ind. Cas. 363; 43 M. 325; 38 M. L. J. 65; 11 L. W. 45; (1920) M. W. N. 114; 27 M. L. T. 207.

Somayya on the interpretation of O. XXI, r. 16 by the Madras High Court that the Executing Court has a discretion to refuse execution at the instance of a transferee of a decree.

In *Rama Aiyen* v. *Sreenivasa Pattar* (2) the judgment-debtor transferred some of his immoveable properties to a person in consideration of his paying the judgment-debt to the original decree-holder. The vendee without paying the decree-holder the amount of the decree got a transfer of the decree to himself and, as assignee, applied for execution. It was held that he was not entitled to execute the decree when he himself inspite of his undertaking to discharge the decree had fraudulently obtained a transfer of the decree from the decree-holder. Mr. Justice Subramania Aiyar observed at page 232*, with regard to s. 258 of the old Code corresponding to O. XXI, r. 2 of the present Code "The last paragraph prohibits judgment-debtors, who omit to apply under the second paragraph or having applied fail to establish their case, from relying in execution proceedings upon any payment, satisfaction or adjustment not duly certified. Manifestly, therefore, the enquiry under the said paragraph can take place only between persons standing in the relation of judgment-debtor and judgment-creditor."

The surety not being a party to the decree could not apply under O. XXI, r. 2. I am unable to accept the argument that a surety though he is not a party to the decree could not ask the Court to hold an enquiry as to the decree being satisfied by payment or adjustment provided the application is made within the time allowed by the law. Though he has no *locus standi* to insist upon an enquiry he could apply to the Court to hold an enquiry inasmuch as he has an interest in showing that the decree has been satisfied. In *Ponnusawmi Nadar* v. *Letchmanan Chettiar* (3) there was a difference of opinion between Mr. Justice Adbur Rahim and Mr. Justice Sundara Iyer as regards the question whether the prohibition regarding uncertified adjustment will or will not apply while the adjustment is made by a third party.

In *Bayyana Ramayya* v. *Nidamarthi Krishnamurthi* (4) it was held that "O. XXI, r. 2 did not disentitle a judgment-debtor from proving facts that a transferee of a decree applying for execution was merely a *benamidar* for another judgment-debtor."

These cases have no application to the present question and they do not throw any light upon the point raised in this case. The real question is whether a surety can plead adjustment or the discharge of a decree when the judgment-debtor himself could not successfully put forward that plea. In this case the payment or adjustment was not certified by the Court as required by O. XXI, r. 2 and, therefore, execution could proceed against the second defendant.

When there is an executable decree against the second defendant, can it be reasonably contended that so far as the surety is concerned there is no executable decree? The Court cannot recognise any adjustment or payment out of Court unless certified as is required by law and in the absence of such certificate, a decree-holder, however, fraudulent his conduct may be is entitled in law to execute his decree against the judgment-debtor, and so long as he is entitled to execute the decree against the judgment debtor, a surety, who undertakes to pay the decree amount, cannot plead that there is no decree against the judgment-debtor and, therefore, he is released from liability under the bond. Section 145 says "Where any person has become liable surety...the decree or order may be executed against him to the extent to which he has rendered himself personally liable". On the failure of the surety to carry out the terms of the bond he makes himself liable for the amount of the decree or for such amount as he has undertaken to pay.

It is next suggested that the original decree is not executed against the surety but a second decree passed on his failure to carry out his undertaking and, therefore, that decree is different from the original decree. No second decree is passed against the surety. The order under s. 145 is passed when he makes himself liable by failing to carry out the terms of the bond to the extent to which he has rendered himself liable. The decree that is executed against him is the decree passed in the suit and, therefore, it cannot be said that a second decree is passed against him.

The contention of Mr. Somayya for the

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(2) 19 M. 230; 5 M. L. J. 218; 6 Ind. Dec. (N. S.) 835.

(3) 12 Ind. Cas. 657; 35 M. 659; 10 M. L. T. 442; (1911) 2 M. W. N. 568; 22 M. L. J. 170.

*Page of 19 M.—[*Ed.*

(4) 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133.

appellant that uncertified adjustment or payment could be pleaded by the surety, was specifically negatived in a recent case decided by a Bench of the Calcutta High Court in *Onkarmal Agarwala* v. *Nritya Gopal Chaki* (5). The learned Judges observe at page 886 "The surety is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made are not certified to the Court."

In the result we have no hesitation in holding that so long as there is an executable decree against the judgment-debtor the surety is not relieved from his liability to pay the decree amount under the terms of the security bond executed by him.

The appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*
R. L.

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(5) 67 Ind. Cas. 885; A. I. R. 1923 Cal. 313.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 433 OF 1919.
December 23, 1924.
Present:—Justice Sir Henry Scott-Smith, Kt., and Mr. Justice Fforde.
AMIR HAMZA—DEFENDANT—
—APPELLANT
versus
Musammat MURAD BIBI AND ANOTHER—PLAINTIFFS—MUHAMMAD SALIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Partition—Widow's right to claim partition Onus of proof.

A widow of a deceased co-sharer in a joint holding has a statutory right to demand partition of her share and the burden of proving that she cannot claim partition of her share is upon the person denying her such right.

First appeal from a decree of the Senior Subordinate Judge, First Class, Jullundur, dated the 30th November 1918.

Bakhshi *Tek Chand* and Mr. *Ghulam Mohi-ud-din*, for the Appellant.

Messrs. *Badri Das* and *Balwant Rai*, for the Respondents.

JUDGMENT.—The facts of the dispute out of which the present appeal arises are given in our judgment of to-day in Civil Appeal No. 386 of 1919. This is an appeal from the lower Court's order giving the plaintiffs *Musammat* Murad Bibi and her daughter *Musammat* Fatima a declaratory decree to the effect that they are entitled to partition of their share of the joint property. Mr. Ghulam Mohi-ud-din contended, in the first place, that the onus was wrongly placed on his client to prove that the widow was not entitled to partition. He referred to Art. 15 of Rattigan's Digest of Customary Law which states that, where a widow is permitted to succeed to her husband's share in a joint estate, she cannot ordinarily claim partition so as to constitute herself sole owner, though she may at times obtain separation of the share to secure her a full participation of the profits. The earlier rulings of the Chief Court were no doubt to the general effect that a widow is not ordinarily entitled to claim partition, but in *Bhag Bhari* v. *Wazir Khan* (1) a Division Bench held that a widow of a deceased co-sharer in a joint holding has a statutory right to demand partition and although a suit for a declaration that she is not so entitled is competent in a Civil Court, the plaintiff can only succeed by proving a custom by which widows are restrained from claiming partition, and no consideration of desirability or undesirability should have any weight with the Court. This decision was arrived at after a consideration of the previous decisions of the Chief Court which are quoted at page 268* of the report. In *Abdul Qadir* v. *Rabia* (2) a different view was taken, but we are not bound by that decision. Subsequent to *Bhag Bhari* v. *Wazir Khan* (1) there is no reported case of the Chief Court or of this Court to the effect that the onus in such a case is upon the widow to prove that she has a right to a separate partition of her share. In the case of *Parshotam* v. *Raj Devi* (3) a Division Bench of the Chief Court did take the view that the onus was on the widow, but that is not a reported case and, therefore, not of the same authority as *Bhag Bhari* v. *Wazir Khan* (1). On the other hand, in *Shadi* v. *Jeoni* (4) it was held that as the *Riwaj-i-am* of the Jullundur District to which the parties belong is in favour of a widow's right to claim partition of her husband's share in a joint estate the onus of proving the negative was on the plaintiff-collateral who alleged it. This decision was based on the same *Riwaj-i-am*

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(1) 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912.

(2) 41 Ind. Cas. 473; 4 P. R. 1917 Rev.; 1 P. W. R. 1917 Rev.

(3) 19 Ind. Cas. 702; 219 P. L. R. 1913; 129 P. W. R. 1913.

(4) 68 Ind. Cas. 553; 3 L. 236; A. I. R. 1922 Lah. 362.

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*Page of 70 P. R.—[*Ed.*]

as has been exhibited in the present case, and, therefore, is strongly in favour of the plaintiffs' right to claim partition.

Again, in *Ghansham* v. *Ramji Lal* (5), it was held that an entry in the *Riwaj-i-am* of the Gurgaon District favouring the widow's right of partition threw the onus that such a right did not exist upon the plaintiff who disputed the widow's right to obtain partition. Under these circumstances we see no reason for not following the decision in *Bhag Bhari* v. *Wazir Khan* (1) which throws the onus upon the person denying the widow's right to claim partition. Copies of certain decisions by the Revenue Courts and by the Chief Court prior to *Bhag Bhari* v. *Wazir Khan* (1) have been cited on behalf of the defendants, but we agree with the lower Court for the reasons given in its judgment at pages 128-129 of paper-book A that they do not in any way help the defendant to discharge the onus which lay heavily upon him.

We, therefore, dismiss the appeal but for the reasons given in our judgment in Civil Appeal No. 386 of 1919, we leave the parties to bear their own costs in this Court. The plaintiffs' appeal asking for their costs in the lower Court is also hereby dismissed.

S. D. *Appeal dismissed.*

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(5) 73 Ind. Cas. 441; 4 L. 344; 1923 A. I. R. Lah. 625; 5 L. L. J. 444.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 43 OF 1924.

September 7, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Madhavan Nair.

SETHU KONAR—APPELLANT

versus

RAMASAMI KONAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Party exonerated as misjoined—Name not removed from record—Party, whether ceases to be party to suit.

A party to a suit who has been exonerated on the ground of misjoinder but whose name appears in the decree without being struck off from the record is a defendant against whom the suit has been dismissed within the meaning of Explanation to s. 47, C. P. C. [p. 527, col. 2.]

The ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. [p. 527, cols. 1 & 2.]

Medisetti Venkatasami v. *Kunchalla Chidambaram*, 45 Ind. Cas. 671; 23 M. L. T. 206 and *Krishnappa Mudaly* v. *Perisawamy Mudaly*, 38 Ind. Cas. 297; 40 M. 964; 21 M. L. T. 121; 5 L. W. 369; 32 M. L. J. 532, relied on.

Appeal against an order of the Court of the Subordinate Judge, Negapatam, in A. S. No. 117 of 1923 (A. S. No. 323 of 1922, on the file of the District Court, Negapatam), preferred against that of the Court of the District Munsif, Tiruturaipundi, in E. A. No. 230 of 1922, in O. S. No. 320 of 1918.

Mr. *R. Ganapathi Iyer*, for the Appellant.

Mr. *K. S. Jayarama Iyer*, for the Respondent.

JUDGMENT.

Spencer, J.—Original Suit No. 320 of 1918 was a suit brought by the 1st respondent upon a mortgage. The suit was decreed and the plaintiff purchased some of the suit property in Court auction. The 2nd defendant in the suit thereupon filed an application to set aside delivery of the items purchased on the ground that he had a paramount title which prevailed over the title of the mortgagor in consequence of more than 16 years' possession after the property had been surrendered to him by the owner. The District Munsif found in favour of the petitioner and directed release of the property. On appeal to the Subordinate Judge by the decree-holder-purchaser, the District Munsif's order was set aside and the petition was dismissed. It is now contended that no appeal lay to the Subordinate Judge on the ground that the appellant, though made a party to the suit, was exonerated as he set up a title paramount to that of the mortgagor and consequently the decree-holder's remedy, if any, against the District Munsif's judgment was to bring a suit to set aside the order. The Subordinate Judge held that he could dispose of the appeal against the order under s. 47 as the claim petition was preferred by a party to the suit and he thought that the latest decision in *Medisetti Venkatasami* v. *Kunchalla Chidambaram* (1) was in favour of this view. Reliance is now placed upon *Krishnappa Mudaly* v. *Periaswamy Mudaly* (2). The learned Judges who decided that case were inclined to the view that if a party was exonerated from a suit on the ground of misjoinder he would not remain a party to the suit for the purpose of s. 47 and that it was immaterial whether his name was actually removed from the record in pursuance of the order exonerating him. In *Medisetti Venkatasami* v. *Kunchalla Chidambaram* (1) Sadasiva Iyer, J., and Phillips, J., took the view that the plain words of the Code were intended to give legal effect to the decision of the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma* (3) and to overrule the previous decisions which had decided that a defendant whose name appears in the decree without being struck off was not a party to the suit, if he had been exonerated by the decree passed in the suit. In *Vaddali Sannamma* v. *Kaduganti Radhabhayi* (4) this case is quoted in the foot-note and Abdur Rahim, J., who was one of the referring Judges, expressed a doubt as to the correctness of *Krishnappa Mudaly* v. *Periaswamy Mudaly* (2) and thought it requires to be overruled, as it did not give sufficient effect to the plain language of the section. The decision of the Full Bench did not actually overrule *Krishnappa Mudaly* v. *Periaswamy Mudaly* (2) as it was not necessary to do so in order to answer the questions referred to the Full Bench. The opinion of the Full Bench was that if a person had been properly impleaded as a defendant in a suit and if the plaintiff abandoned his claim against him and the suit was dismissed as against him such a person would be still "a defendant against whom a suit has been dismissed" within the Explanation to s. 47 of the C. P. C. In *Krishnappa Mudaly* v. *Periaswamy Mudaly* (2) the previous decision in *Venkatapathi Naidu* v. *Subraya Mudali* (5) was quoted with approval. This is a judgment of a Single Judge given before the amendment of the Code. With due respect I am unable to follow the learned Judge when he says that a party against whom a claim has been abandoned is clearly not a party to the suit. The mere exoneration of a party does not have the result of making him cease to be a party. It may mean only that the plaintiff does not want a decree against him as was the case in *Ramaswami Sastrulu* v. *Kameswaramma* (3). In my opinion the ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. In *Krishnappa Mudaly* v. *Periaswamy Mudaly* (2) the learned Judges were evidently impressed with the anomaly that might arise out of the Court having to decide in execution proceedings questions which it had refused to determine in the suit. That might be the consequence of exonerating a person who had a superior title to the principal defendant; but the obvious remedy would be for the Court to adopt the procedure provided in s. 47 of treating the petition in execution as a suit and trying it in the regular manner if it had not already taken the simpler course of removing the party from the record under O. I, r. 10 (2) at an earlier stage. As the appellant in the present case was a party to the suit and the final decree merely states that he is exonerated without removing his name from the record, I think that his remedy lay only by a petition under s. 47, which was the course he adopted, and as the Subordinate Judge has decided against the claim on a question of fact, no second appeal will lie. The appeal is dismissed with costs of the respondent. We direct each party to bear his own costs in the Courts below.

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(1) 45 Ind. Cas. 671; 23 M. L. T. 206.

(2) 38 Ind. Cas. 297; 40 M. 964; 21 M. L. T. 121; 5 L. W. 369; 32 M. L. J. 532.

Madhavan Nair, J.—I agree. In *Ramaswami Sastrulu* v. *Kameswaramma* (3) it was decided that the defendant, in whose favour a suit is dismissed, he being exonerated from the suit, must be regarded as a party to the suit within the meaning of s. 244 of the old Code. The Explanation to s. 47 of the present Code, *viz.*, "for the purpose of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit", gives effect to this decision; an appeal, therefore, clearly lies in the present case. The question raised before us was, no doubt, left open in the Full Bench decision reported as *Vaddali Sannamma* v. *Kaduyanti Radhabhay* (4). But it appears to me that the opinion of the learned Chief Justice is to the effect that, in cases of this description, unless a party's name has been struck out and removed from the records he would remains "a party to the suit". That has not been done in this case and, therefore, though the 2nd defendant (appellant) has been exonerated in the judgment, in my opinion, he must still be regarded as a party to the suit within the meaning of s. 47, C. P. C.

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(3) 23 M. 361; 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653.

(4) 43 Ind. Cas. 935; (1918) M. W. N. 23; 22 M. L. T. 532; 34 M. L. T. 17; 7 L. W. 234; 41 M. 418.

(5) 17 M. L. J. 416.

As the other question raised is one of fact, I agree that this civil miscellaneous second appeal should be dismissed with costs.

V. N. V. *Appeal dismissed.*
R. L.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL (MATRIMONIAL) SUIT
No. 21 OF 1922.
November 20, 1925.
Present :—Mr. Justice Chotzner.
R. M. WATSON—PETITIONER
versus
F. E. WATSON AND ANOTHER—
RESPONDENTS.

Divorce—Misconduct, proof of—Burden of proof—Withdrawal of charge—Condonation.

In a proceeding for dissolution of marriage, the burden of proving the respondent's misconduct lies heavily upon the petitioner. In such a proceeding the duty of the petitioner is to show that on or between the dates specified in the petition, the respondent was guilty of misconduct with the co-respondent, and that must be a matter of proof upon evidence which, though it may not be direct, must at all events be so clear and cogent, both as to inclination, opportunity and conduct as to lead to the inevitable inference that the offence has been committed. [p. 528, col. 2; p. 529, col. 2; p. 530, col. 1.]

A withdrawal of a charge of adultery amounts in law to a condonation of such offence, if any, committed prior to the date of the withdrawal. [p. 528, col. 2.]

Messrs. *R. C. Bonerjee* and *N. M. Chatterjee*, for the Petitioner.

Mr. *A. A. Avetoom*, for the Respondent.

JUDGMENT.—The petitioner, Robert Watson, applies to the Court for the dissolution of his marriage with his wife, Frances Watson, on the ground of her adultery with the co-respondent Samuel Mac Farlane. The respondent has filed an answer denying the charge.

The co-respondent has not appeared.

The admitted facts of the case are that the petitioner and the respondent were married on the 18th July 1914 according to Christian rites and forms at the "Sacred Heart of Jesus" Church at Dhurrumtollah Street in Calcutta. They lived together after the marriage and had issue, a son, born on the 25th January 1915.

About the end of 1920 difficulties arose between husband and wife and matters went so far that the petitioner brought a criminal charge against the present co-respondent in the Police Court. A charge was framed by the Magistrate but before the case came to trial it is said that friends of the parties intervened and their differences were adjusted. The Magistrate's order dated 19th January 1921 records: "Complainant does not wish to proceed with the case as all differences have been settled. Complainant is fully satisfied with the explanation given by his wife. Accused undertakes not to interfere with the complainant and his wife in the future."

Strictly speaking, this evidence is only relevant in the present suit as showing that the petitioner at one time had reason to suspect the co-respondent's relations with his wife but as it is admitted that subsequent to the withdrawal of the case, husband and wife again lived together for about a year, any misconduct which may have been charged at the time of the Police case was evidently condoned by the reconciliation.

On 21st January 1922 according to the petitioner and a month later, according to the respondent, a second rupture took place. The petitioner says that his wife left him in order to be free to see the co-respondent. The respondent says that she was driven out of the house by the violence, abuse and drunken habits of her husband.

The petitioner charges that the respondent while living in Woodburn Court committed adultery with the co-respondent between 14th May 1922 and 7th June 1922.

The present suit was filed on 1st August 1922 but owing to causes over which apparently the parties had no control it did not come up for hearing although on the board on several occasions, till to-day.

It is plain upon the pleadings that the burden of proving the respondents' misconduct is heavily upon the petitioner. As I have already said the withdrawal of the previous charge amounts in law to a condonation of such offence if committed prior to that date. The duty of the petitioner here is to show that on or between the dates specified in the petition, the respondent was guilty of misconduct with the co-respondent and that must be a matter of proof upon evidence which though it may not be direct must at all events be of such a character as would lead the Court to the conclusion that no other inference than that of misconduct can be derived from it.

The petitioner in the box very frankly stated that he himself had no personal knowledge of any misconduct on the part of the respondent; and his information came from two persons whom I understood him to describe as private detectives. The evidence of these two persons, therefore, is, for the petitioner's purpose, of the utmost importance and it is necessary when the interests at stake are so high to scrutinise their statements closely.

The first of them is a man named Badri Singh. He was, according to his statement, formerly a *durwan*. When he came to Calcutta he had no employment. His evidence is that he first came into touch with the petitioner through the petitioner's *durwan*, a man who comes from the same village as himself. He says that the *durwan* told him that Watson Saheb wanted a man for some work or other and upon this he called upon Watson who told him that he would engage him to follow the *Memsaheb*, meaning Mrs. Watson, and report to him daily what he saw and for his services he was to get Rs. 25 a month. His position is not that of the "private detective" spoken of by the petitioner. He was simply picked up by the petitioner's *durwan* apparently by chance and for no better reason than that the *durwan* wished, to do him as a co-villager a good turn and find him some employment.

Badri Singh says that he only did the work of watching for one month and received pay from the petitioner for two months, and that the petitioner told him that any further reward would depend upon the rasult of the case.

It is, I think, plain that a witness who is paid to get evidence will get evidence, and it is also plain that a witness who has not been paid in full will give such evidence as will ensure, as far as it is possible, that he will be paid in full. It would, therefore, be unsafe to rely upon a witness who has so obvious an interest in manufacturing evidence, whether it be recorded in a notebook or in the presence of an attorney, and repeating such evidence in Court when it is called for.

What he says is that on two occasions on the 21st and 22nd May he saw a man enter the respondent's room about midnight and stay there in one case to 4-30 A. M. and in the other case to 5 A. M. He says this man was the co-respondent. He does not say how the co-respondent entered the room on the first occasion, but on the second occasion he says that the co-respondent removed his shoes and climbed up to her room by a spiral staircase outside the house. It is very difficult to believe that he saw anything of the kind. A person who was going to take a risk such as the co-respondent is said to have taken would not be so obvious in his methods; he would be more likely to attract than to escape attention by climbing up a staircase whence he would be visible to every passer by. I think no reliance can be placed upon this witness.

The second witness Khan Mahammad Khan has his shop at the gate of Woodburn Court. He is not quite so fortunate as Badri Singh, because he says that so far as he has had nothing from the petitioner, though he too has his promise that he will be paid by results.

Here then is a witness who is in the unhappy position of having to give his evidence not knowing whether he is going to get anything for his trouble or not, but at the same time fully realising that if he does not help the petitioner he will get nothing at all. In this state of mind his testimony will inevitably be coloured to suit the petitioner's case, and to accept evidence of this kind would seem to me to involve a risk which no Court would be justified in taking.

The story he tells that he was awakened one night by the respondent tripping over him on her way in and that he saw co-respondent close by does not seem to me probable. He has further stated that on another night he carried her food up to her room and there found the co-respondent with her in his night apparel. This also appears to be equally fantastic. I do not see why a shop-keeper should feel it necessary to act as a table servant or why he should take the trouble to perform this service for her unasked and without expectation of a reward.

I feel bound to say that this man did not impress me as a truthful witness.

Learned Counsel for the petitioner has relied upon certain statements made by the respondent in her evidence as supporting the testimony given by these witnesses, and he has pointed to the undoubted fact that the respondent has frequently seen co-respondent both at Allahabad and in Calcutta. Assuming that the parties have been on friendly terms, it is still a long stage to travel before misconduct can be held to be proved. It is not to be expected that in cases of this kind direct evidence will ordinarily be available, but there ought to be such clear and cogent evidence both as to inclination, opportunity and conduct as to lead to the inevitable inference that the offence has been committed. After giving my best attention to the evidence in the case, I feel bound to say that I do not think the petitioner has succeeded in establishing his case.

The result, therefore, is that the petition is dismissed with costs on scale No. 2. So far as the co-respondent is concerned, the petition is dismissed without costs.

Z. K. *Application refused.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1440 OF 1920.

March 24, 1926.

Present:—Mr. Justice Campbell and Mr. Justice Zafar Ali.

Sodhi KISHEN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sodhi MOTI SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Death of one of several appellants—Legal representative not brought on record—Partial abatement—Decision in favour of all.

Where an appeal has partially abated in consequence of the death of one of the appellants without his legal representatives being brought on the record, it is competent to the Court to accept the appeal in favour of all the appellants including the legal representatives of the deceased appellants not brought on the record. [p. 530, col. 2.]

Mr. *Gullu Ram* and Lala *Fakir Chand*, for the Appellants.

Bakhshi *Tek Chand* and Lala *Badri Dass*, R. B., for the Respondent.

JUDGMENT.—The suit was by Sodhi Moti Singh for possession of certain land and house which he alleged had been mortgaged to his father Sodhi Narendra Singh by Sodhi Kishen Singh defendant. Sodhi Kishan Singh pleaded that the plaintiff was not his father's heir that he had been disinherited and that Sodhi Narendra Singh's all self-acquired property including the property in suit had been bequeathed to one Wazir Singh. Wazir Singh was then impleaded as a defendant and issues were struck of which we are concerned with the first two (1) did the plaintiff's father voluntarily and in full senses execute the registered Will dated 8th April 1908, whereby he disinherited the plaintiff from all self-acquired property which was thereby bequeathed to defendant No. 2 and (2) if so, did the plaintiff's father acquire the mortgage rights in suit from the income of the ancestral estate and, therefore, the same should be considered to be ancestral property.

When Sodhi Narendra Singh died, his son Sodhi Moti Singh took possession of all his property and subsequently Wazir Singh instituted a Suit (No. 33 of 1915) for possession of the self-acquired property left to him by the Will of the 8th April 1908. That suit was pending at the same time as the one with which we are dealing and all the parties to the present suit agreed that they would not produce any evidence on the above issues and that the questions would be decided on the evidence given in Wazir Singh's suit for possession. Both suits were before the same learned Sub-Judge and he decided the suit in which Wazir Singh was the plaintiff against him with the result that the present suit was decreed in favour of the plaintiff Moti Singh.

The defendants have appealed that Sodhi Kishen Singh died during the pendency of the appeal on the 12th August 1922 and his appeal has abated, since the application to substitute his legal representatives was made some 15 days after the expiry of limitation. No application for setting aside the abatement has been presented to us.

Wazir Singh's appeal remains for disposal and together with it has come before us his appeal in the other suit (No. 1439 of 1920) *Wazir Singh* v. *Sodhi Moti Singh* (1). In that appeal we have reversed the decision of the Trial Court and have held that the Will in favour of Wazir Singh bequeathing property including the mortgagee rights now in question to Wazir Singh was valid. It has been conceded that the decision in that appeal settles the fate of the present appeal in favour of Wazir Singh. Although Kishen Singh's appeal has abated we have decided to exercise our powers under O. XLI, r. 33 and to dismiss the suit against all the defendants. We accept the appeal and order that the suit be dismissed.

The plaintiff-respondent must pay the costs of Wazir Singh in this Court. Kishen Singh's representatives are not appellants and hence they must pay their own costs in the lower Court. The plaintiff-respondent also must pay his own costs there. It has been urged before us that the plaintiff should not be called upon to pay Wazir Singh's costs in the lower Court, because he did not make Wazir Singh a defendant and because Wazir Singh did little or nothing to defend this particular suit and for a time proceedings were *ex parte* against him. In our view Wazir Singh was a necessary party who was properly joined as such and ordinarily he was entitled to have his costs from the unsuccessful plaintiff. The Trial Court's decree, however, has awarded the defendants the large sum of Rs. 424 as Counsel's fee. We do not consider that Wazir Singh has earned this in the present suit, since practically all the proceedings were taken in the other suit. We direct that the plaintiff shall pay the costs of Wazir Singh in the Trial Court, but that the sum recoverable as Counsel's fee shall be Rs. 82 only.

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(1) 94 Ind. Cas. 492.

R. L. *Appeal accepted.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NO. 202 OF 1924.
January 12, 1925.
Present:—Mr. Justice Pratt.
U TUN GYWE—APPELLANT
versus
KO KO GYI—RESPONDENT.

*Buddhist Law, Burmese—Inheritance—*Orasa *son—Minor, whether can claim rights of* orasa *son—Death of husband—Widow, rights of—Alienation by widow.*

The whole doctrine of the *orasa* son under the Burmese Buddhist Law is based on the eldest son being in a position to take his father's place as head of the household in the event of his father's death. The eldest son, therefore, can on the death of his father claim one-fourth share in his property from his mother only if he has attained the full status of an *orasa* son at the time of his father's death. A minor son cannot be regarded as having attained the full status of *orasa* and cannot, therefore, claim one-fourth share of the estate on his father's death. In such a case the widow who owned half of the joint property in her husband's lifetime, inherits his half when he dies and thus becomes possessed of the whole and is competent to alienate the whole of it. [p. 531, col. 2; p. 532, col. 1.]

Mr. *Thu Gywe*, for the Appellant.

Mr. *S. Mukerjee*, for the Respondent.

JUDGMENT.—The District Court has held on the authority of *Arunachellam Chetty* v. *Maung San Ngwe* (1) that the mortgage by the widow of estate property is not valid to the extent of the one-fourth share in which the *orasa* son has a vested interest. It is contended by Mr. Tha Gywe on appeal that as the so-called *orasa* son was a minor at the time of his father's death, he had not attained the full status of *orasa*, not being competent to take his father's place, as head of the family, and that he had not, therefore, a vested interest in one-fourth of the estate. The fact of the minority of the eldest son was not considered as an influencing factor by the First Appellate Court. It is pointed out that the passage of the judgment on page 178* implies that unless the eldest son is of age he would not be entitled to one-fourth share at the time of his father's death. It was, therefore, observed that "it has not yet been decided that Maung San Ngwe is the *orasa* son or that if he is, he was at the time of his father's death of an age to be entitled to a one-fourth share." This observation was made after considering rr. 11 and 5 of Book X of the Manugye, which, as Carr, J., pointed out, are conflicting and cannot be relied on safely to any great extent. The judgment relied is certainly not an authority for a minor son being entitled *qua orasa* to one-fourth share on his father's death.

In *Nga E* v. *Nga Aung Thein* (2) it was held by the learned Judicial Commissioner that the eldest son being a minor, the right to claim one-fourth did not accrue, and the whole estate was the property of the widow. I am not aware that this ruling has been dissented from or overruled and if followed it is decisive. The doctrine of the *orasa* was examined and expounded at length by the Judicial Commissioner, Lower Burma, in *MaYa* v. *Maung Po Thin* (3) where it was laid down after discussion of the Dhammathats that the eldest son, *if competent*, is the representative of his father and in that capacity is entitled to one-fourth of the inheritance on the death of his father. By "competent" is clearly implied of an age to take his father's place. At the time of his father's death, Ko Ko Gyi was only 11 years old and obviously not competent to take his father's place as head of the household. As I understand it, the whole doctrine of the *orasa* son is based on his being in a position to take his father's place as head of the household in the event of his father's death. For the respondent, Mr. S. Mukerjee relies on the case of *Maung Shwe Ywet* v. *Maung Tun*

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(1) 83 Ind. Cas. 550; 2 R 168; A. I. R. 1924 Rang. 323.

(2) 28 Ind. Cas. 804; U. B. R. (1914) II, 37.

(3) S J. 585.

*Page of 2 R.—[Ed.]

Shein (4) which deals with the right of the eldest son to claim one-fourth share on his father's re-marriage. It is not necessary to question the correctness of the ruling in that case here, because the *orasa* in that case was 19, when his mother died. The rights of a Buddhist widow as to disposal of the joint property of the marriage were laid down by a Full Bench of the Chief Court of Lower Burma in *Ma Sein Ton* v. *Ma Son* (5). It was there laid down by Twomey, J., (at page 513*) that the real principle seems to be that the widow, who owned half of the joint property in her husband's lifetime, inherits his half, when he dies, and having thus become possessed of the whole, can do as she likes with it subject to the claims of the eldest son and the eldest daughter. In the next paragraph it was clearly pointed out that it must be noted that the eldest son can claim one-fourth share from his mother only, if he has attained a full status of *orasa* at the time of his father's death. In the same case Parlett, J., substituted for the "full status of *orasa*" the words "if the eldest son or daughter is grown up." I have no hesitation, therefore, in holding that a minor son has not attained the full status of *orasa* and cannot claim a one-fourth share of the estate on his father's death. Ko Ko Gyi being a minor his mother had, it follows, the right to mortgage the whole estate. I set aside the decree of the District Court and restore the decree of the Sub-Divisional Court dismissing the suit throughout with costs.

Z. K. *Decree set aside.*

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(4) 66 Ind. Cas. 538; 11 L. B. R. 109.

(5) 30 Ind. Cas. 588; 8 L. B. R. 501 at p. 513; 8 Bur. L. T. 203 (F. B.).

*Page of 8 L. B. R.—[*Ed.*]

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 80 OF 1925.

November 17, 1925.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir George Claus Rankin, KT.

VERNON MILWARD BASON—APPELLANT

versus

A. H. SKONE AND ANOTHER—RESPONDENTS.

Contempt of Court—Jurisdiction of Court, when to be exercised—Obstruction of course of justice—Procedure—Discretion of Court.

A Solicitor's clerk while attempting to serve on the appellant a notice issued by the High Court was assaulted and ill-treated by the latter, and the notice had eventually to be served by affixing a copy thereof on the door of the appellant's flat:

Held, that appellant's conduct was calculated to obstruct and interfere with the due course of justice and the due administration of the law and that the appellant was, therefore, guilty of contempt of Court. [p. 533, col. 1.]

Where proceedings in a Magistrate's Court would be quite sufficient to meet the requirements of a case, it is not desirable to invoke the special jurisdiction inherent in the High Court by way of proceedings for contempt of Court. [p. 534, col. 1.]

Where, however, a Judge of the High Court has exercised his discretion and taken action by way of proceedings in contempt and the matter has been fully investigated and a definite conclusion has been arrived at, the Court will not, on the Appellate Side, interfere with the exercise of such discretion where the conclusion arrived at by the Judge on the merits is not challenged. [p. 533, col. 2; p. 534, col. 1.]

Appeal against an order of Mr. Justice C. C. Ghose, dated the 22nd May 1925.

Messrs. *L. P. E. Pugh* and *W. W. K. Page*, for the Appellant.

Messrs. *N. N. Sircar* and *S. K. Chakravarty*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by Vernon Milward Bason against a judgment of my learned brother Mr. Justice C. C. Ghose which was delivered on the 22nd of May 1925*.

It appears that the appellant had instituted a suit against certain defendants for damages for breach of an agreement. The suit was dismissed with costs. The defendants' bill of costs was taxed and an allocature was issued on the 2nd of May 1925. It was served on the appellant's attorneys on the 5th of May; and, on the 9th of May a notice was issued under O. XXI, r. 37, C. P. C. which runs as follows: "Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison." It was necessary to serve that notice on the appellant and, one Ashit Kumar Pal, who was a clerk in the service of Messrs. Orr Dignam & Co., was entrusted with the

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*Since reported in *Skone* v. *Bason*, 88 Ind. Cas. 725; 41 C. L. J. 515; 29 C. W. N. 766; 26 Cr. L. J. 1205; A. I. R. 1925 Cal. 945.—[*Ed.*]

duty of effecting the service. He went to the place where the appellant resided in Moira Street. What took place on that occasion has been described by the learned Judge in his judgment.

An application was made to the learned Judge for an order committing the appellant to jail in respect of an alleged contempt of Court. The defendants were examined verbally and cross-examined. We were informed that the hearing occupied two days. The learned Judge accepted the account of the occurrence given by Ashit Kumar Pal and rejected the account given by the appellant.

In this Court the learned Advocate, who appeared for the appellant, has not challenged the finding of the learned Judge upon the facts of the case. The learned Judge said as follows: "He (*i. e.* the clerk,) informed Bason of the purpose for which he had called and made over to him both the original notice under O. XXI, r. 37 (1), C. P. C. and a copy. (It may be noted in passing that Ashit in his affidavit states that he made over the original notice only to Bason). Bason read the notice and flung the papers on the floor. Ashit thereupon picked up the papers from the floor and showed to Bason the original notice bearing the seal of this Court and informed him that if he refused to accept service he would affix a copy on the outer door. Bason thereupon became very angry and called Ashit Kumar Pal a 'damned swine' and caught him by the throat and dragged him and pushed him towards the door, so that he nearly fell down. Ashit states that thereafter he affixed a copy of the said notice on the front door of the room."

Those being the facts the learned Advocate has argued in the first place that no contempt of Court was committed by the appellant.

I am not able to accept that argument.

The learned Advocate cited the case of *In the matter of a special reference from the Bahama Islands* (1) and I agree that the question is whether, what the appellant did was calculated to obstruct or interfere with the due course of justice or the due administration of the law. It is clear that it was necessary for the clerk to serve the notice upon the appellant. In the first place, it was necessary for him to try and effect personal service and if he could not effect personal service then it was necessary to affix a copy of the notice on the door of the appellant's flat.

I have no doubt whatever that what the appellant did to the clerk was calculated to obstruct or interfere with the course of justice and the due administration of the law, although, in fact, it did not prevent the clerk from affixing the copy of the notice on the door.

For these reasons, I am of opinion that the first point on which the learned Advocate relied, is not a good one.

The next argument, which the learned Advocate submitted, was that even if the action of the appellant did constitute contempt of Court, the learned Judge ought not to have invoked the jurisdiction, which is inherent in this Court, and should not have called upon the appellant to show cause why he should not be committed for contempt, *first* because the matter was one which could have been investigated fully and dealt with adequately in a Magistrate's Court in Calcutta; and *secondly* because there was no necessity for the matter being immediately dealt with because, in fact, the notice had been served and the proceedings in execution would go on.

I think there is considerable weight in that argument and if I had been sitting as a Judge of first instance and had been hearing the application, I feel sure that I should have rejected it and should have held that the proper place for this matter to be investigated was the Magistrate's Court in Calcutta. I do not think this was a case, in which it was necessary to invoke the special jurisdiction which is inherent in this Court, by way of an application for committal for contempt of Court.

But the position is this: The learned Judge had jurisdiction. He heard the case, as I have already said, for two days. Witnesses on the one side and the other were examined before him. He investigated fully the facts and he came to a distinct conclusion, which was unfavourable to the appellant.

The learned Advocate in this Court, as I have already said, has not ventured to challenge the finding of fact; and, the question, therefore, arises, would it be right for this Court in these circumstances to interfere with the discretionary order which the learned Judge made?

In my judgment it would not, in the first place because the facts have been **fully in-**

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(1) (1893) A. C. 138.

vestigated and a distinct finding has been arrived at by the learned Judge, a decision which has not been questioned in this Court; and, secondly, because I am unable to say that the fine which was inflicted by the learned Judge upon the appellant in respect of the assault can be said to be unduly severe.

In my opinion, therefore, it is not necessary for this Court to set aside the decision of my learned brother in order that the matter might be dealt with in a Magistrate's Court in Calcutta.

At the same time I desire to make it clear that, in my opinion, in such cases as this, where proceedings in the Magistrate's Court would be quite sufficient to meet the requirements of the case, it is not desirable to invoke the special jurisdiction inherent in this Court by way of proceedings for contempt of Court.

For these reasons, in my judgment, this appeal should be dismissed with costs.

Rankin, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 1119 OF 1923.
January 25, 1926.
Present:—Mr. Justice Madhavan Nair.
SRINIVASA PILLAI—PLAINTIFF
—PETITIONER
versus
BALASUBRAMANIA ODAYAR
MINOR BY GUARDIAN SORNATHACHAI
—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 68—Bulls supplied to minor, whether necessaries.

The question whether the bulls supplied to a minor are a necessity or not depends upon the particular circumstances of the case.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Nannilam, in S. C. S. No. 2 of 1923 (S. C. S. No. 302 of 1922 on the file of the Additional District Munsif's Court of Tiruvalur).

Mr. *S. R. Dekshit*, for the Petitioner.

Mr. *N. S. Srinivasa Iyer*, for the Respondent.

JUDGMENT.—It is not disputed that the plaintiff supplied the defendant with two bulls. The defendant being a minor he is liable to pay for them only if the plaintiff is able to show that these were "necessaries" to the defendant. This position is accepted by both the parties. The plaintiff has given evidence on the question. It appears to me that the learned District Munsif has not given proper consideration to the evidence on record because in his view "bulls" can never be considered "necessaries". There is no law laying down such an absolute proposition. The question in each particular case will have to be decided with regard to the evidence let in by the parties on the question. I cannot for these reasons accept the finding of the learned District Munsif as a satisfactory finding. I would, therefore, ask him to review the evidence in the light of s. 68 of the Indian Contract Act and submit a fresh finding on the question whether the sale of bulls to the defendant in this case can be considered to have been for the necessaries of the infant. These will be submitted within four weeks and ten days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Munsif of Nannilam submitted the following

FINDINGS.—I have been directed by the High Court in its order, dated the 15th day of October 1925, in C. R. P. No. 1119 of 1923 (connected with Small Cause Suit No. 2 of 1923 of the file of this Court) to submit a finding on the following point:—

"Whether the sale of bulls to the defendant in this case can be considered to have been for the necessaries of the infant?

* * * * *

I, therefore, accept the evidence on the plaintiff's side in preference to that on the defendant's side and hold that having regard to the occupation of the defendant, as well as the price paid for the bulls, that the bulls are the "necessaries of the infant" suited to his condition in life.

My finding on the point is in the affirmative and in favour of the plaintiff.

JUDGMENT.—The District Munsif has found that the sale of the bulls was for the necessaries of the defendant. There is evidence to support this finding. Accepting this finding I set aside the decree of the lower Court and give the plaintiff a decree as prayed for with costs throughout. The decree will be against the properties of the defendant.

V. N. V. *Decree set aside.*
R. L.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.
July 24, 1925.
Present:—Lord Phillimore, Lord Blanesburgh and Sir John Edge.

DADABHOY FRAMJI CAMA—
APPELLANT
versus
COWASJI DORABJI PANDAY AND OTHERS
—RESPONDENTS.

Settlement—Husband releasing interest in property—Widow, whether can challenge settlement.

A widow claiming title through her husband is not competent to challenge a settlement to which her husband was a party and by which he released his interest in certain property.

Messrs. *A. C. Clauson* and *Cecil Turner*, for the Appellant.

Mr. *E. B. Raikes*, for the Respondents.

JUDGMENT.

Lord Phillimore.—Their Lordships have followed with care and with interest the very careful arguments put before them on both sides in this case, and in the circumstances they do not think it necessary to reserve consideration of the case in order to write an elaborate judgment. They think that the same conclusion which the Courts below have arrived at might possibly have been reached by simpler methods; but, however that may be, they see no reason to differ from the construction put upon this section in both Courts below, and therefore, their Lordships will humbly advise His Majesty that the principal appeal should be dismissed.

As to the cross-appeal there are many answers to make, but the one which is sufficient is that it is an appeal by a lady claiming as the widow of the party to the settlement sought to be impeached, and having no title except as widow of that party. Her husband deliberately put his hand to a deed which on its face did not bind others than those who were parties to it, and by it he in substance, though not exactly in those words released, all his interest under the previous deed, and for that reason if for no other the cross-appeal must be rejected.

With regard to the costs the trustees should certainly have their costs, and upon the whole their Lordships are of opinion that the costs, as between Solicitor and client, of all parties, including those of the cross-appeal, should come out of the estate in the manner provided in the judgment of the High Court of Bombay, which will be followed in this matter.

Their Lordships will humbly advise His Majesty accordingly.

Z. K. *Order accordingly.*

Solicitors for the Appellant:—Messrs. *Turner & Co.*

Solicitors for the Respondent:—Messrs. *T. L. Wilson & Co.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 176 OF 1923.
December 7, 1925.
Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

T. R. RAMASWAMI AIYANGAR—
APPELLANT
versus
THE OFFICIAL RECEIVER OF COIMBATORE—PETITIONER—RESPONDENT.

*Provincial Insolvency Act (V of 1920), ss. 53, 54—Fraudulent preference, intention necessary to constitute—Execution of mortgage by debtor—Act of insolvency—Adjudication, order of, as insolvent—Application to set aside mortgage under s. 53—Mortgagee, whether bound by prior order—*Bona fides, *proof of—Mortgage declared void—Prior genuine mortgage-debts, discharge of, by mortgagee—Rights of mortgagee.*

In order to make out that an alienation by an insolvent amounts to fraudulent preference under s. 54, Provincial Insolvency Act, it must be shown that the insolvent had the dominant idea of cheating his other creditors by preferring particular creditors. [p. 536, col. 2.]

Where at the instance of a creditor, a debtor is adjudicated an insolvent on the ground that a mortgage executed by him amounts to an act of insolvency, on an application by the petitioning creditor under s. 53 of the Provincial Insolvency Act to have the mortgage declared void as against the Official Receiver, it is not open to the mortgagee to attack the finding that the execution of mortgage was an act of insolvency. [p. 537, col. 1.]

To attract the operation of s. 53 of the Provincial Insolvency Act, it is not in terms necessary that the document should be to defeat or delay creditors. It is sufficient if it is a transfer not in good faith or not for valuable consideration. It is, therefore, open to the mortgagee to escape the operation of the section by showing good faith and payment of valuable consideration. [*ibid.*]

A document cannot be partly in good faith and partly not. [*ibid.*]

The general principle applicable to cases under s. 53 of the Provincial Insolvency Act is this:—The assignment, as an assignment is void; but, for money genuinely paid in discharge of genuine debts, the alienee will stand in the shoes of those whom he has paid. In the case of a mortgage-debt paid off, the transfer will not operate as a mortgage at all, not even to the extent of the amount paid, but the alienee will be entitled to rank in the schedule of secured creditors to the extent of his payment. [p. 537, col. 2.]

Chidambaram Chettiar v. *Sami Iyer*, 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351, distinguished.

Palamalai Mudaliar v. *South Indian Export Co.*, 5 Ind. Cas. 33; 33 M. 334; 7 M. L. T. 167; 20 M. L. J. 211; (1910) M. W. N. 239, *In re Jaladanki China Pitchia*, 11 Ind. Cas. 868; 36 M. 29; 10 M. L. T. 183; (1911) 2 M. W. N. 152, *Loorthia Odayar* v. *Gopalasami*, 80 Ind. Cas. 147; 46 M. L. J. 125; 19 L. W. 135; (1924) M. W. N. 117; A. I. R. 1924 Mad. 450 and *Rajani Kumar Das* v. *Gour Kishore Saha*, 35 C. 1051; 7 C. L. J. 586; 12 C. W. N. 761, relied on.

Appeal against an order of the District Court, Coimbatore, dated the 25th October 1923 and made in S. A. No. 163 of 1921, in I. P. No. 17 of 1920.

Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *T. M. Krishnaswamy Iyer*, for the Respondent.

JUDGMENT.

Wallace, J.—This is an appeal against the order of the lower Court setting aside a mortgage in favour of the appellant under s. 53 of the Provincial Insolvency Act on a petition by a petitioning creditor dated 12th July 1920. This very alienation by mortgage was held to be an act of insolvency and adjudication followed thereon. The mortgage was dated 10th April 1920 and was for Rs. 6,000, and the consideration was four prior debts of a total sum of Rs. 2,500, which the mortgagee undertook to discharge, and a cash payment of Rs. 3,500. It is found by the learned Judge, and it is not disputed here, that two of the debts amounting to Rs. 1,000 were genuine and were paid by the mortgagee. The Judge holds that the Rs. 3,500 cash were never paid. He records no clear finding as to the nature of the document, viewing it at one time as a sham and at another time as a fraudulent preference. He has set it aside *in toto*.

The first point for consideration is whether the Rs. 3,500 cash was paid. I agree with the lower Court that the appellant, on whom the onus lay, has not proved the payment. There are various suspicious circumstances. The document recites that the money was paid in cash on the date of the document, and the evidence of the appellant's witnesses, P. Ws. Nos. 1, 2 and 3 is that the whole sum was paid at once, 35 notes of Rs. 100 each—but the appellant himself deposed that he got Rs. 3,500 by cashing a Rs. 10,000 *hundi*, at the Bank of P. W. No. 4. The Bank books, however, show that only Rs. 3,100 was paid to the appellant on the date of the document, and the balance not till the next day; so that, the appellant's account of how he got the full sum of Rs. 3,500 to pay the whole amount on the date of the document is not true. Further, although the document was not registered until 31st May 1920, no separate voucher was taken from the insolvent for the Rs. 3,500. Nevertheless, the appellant handed over the document to the insolvent for registration. He has claimed that it was in his own possession up till the day of registration, and filed Ex. V to support his statement. But as the District Judge has shown, a good deal of suspicion attaches to Ex. V, and it has been in fact not proved by the writer of it. Further the appellant says that he noted the payment of Rs. 3,500 in his diary and accounts. He has produced neither of these documents. Also he did not obtain any encumbrance certificate, while, as a matter of fact, there was an undischarged prior encumbrance on the property. The appellant is a banker and is used to dealing cautiously with applications of money, and usually in the case of his own Bank demands collateral security for all advances. It is very difficult to believe that he would have parted with a sum of Rs. 3,500 in such a careless fashion. I am not, therefore, prepared to differ from the learned Judge in holding that the Rs. 3,500 was not paid. It is further clear from the evidence of the appellant and from that of the insolvent that the appellant was aware that the insolvents were in financial straits. Under this mortgage the latter disposed of all their property, and along with the prior mortgage on the property, the property was mortgaged upto the hilt. I think the proper conclusion is that this Rs. 3,500 was not paid and that the object of inserting the same in the document was to secrete this money for the insolvent's benefit. The four debts mentioned in the document are genuine debts and two of these were paid. The appellant says that he refrained from paying the other two because the insolvency petition was presented.

I have now to consider the effect of these findings. I do not think that it can be concluded that the insolvent had the dominant idea of cheating his other creditors by preferring the creditors of these four debts. It is thus not properly a case of fraudulent preference under s. 54 of the Provincial Insolvency Act, but I think it can be brought under s. 53. As already pointed out, the District Judge has held this mortgage to be the act of insolvency and the adjudication was based on this conclusion. That adjudication is not now before us and I take it that this finding stands, namely, that the document is one got up by the insolvents to defeat and delay creditors, of whom the petitioning creditor was one. The alienee in such circumstances no doubt is faced with this handicap, that it is not open to him to attack that finding, but on the other hand, to attract the operation of s. 53 of the Provincial Insolvency Act, it is not in terms necessary that the document should be to defeat or delay creditors. It is sufficient if it was a transfer not in good faith or not for valuable consideration. It is open, therefore, to the alienee to escape the operation of the section by showing good faith and payment of valuable consideration. Now, this alienee had paid valuable consideration to the extent of Rs. 1,000 but considering that the intention of the document was to secrete a much larger part of the insolvent's estate from his creditors, it is impossible to hold that the mere payment of Rs. 1,000 will avail to make the document one taken in good faith. A document cannot be partly in good faith and partly not. The dominant intention underlying the document is what has to be looked at, and in this case, that intention was to deceive and defraud creditors. It is, therefore, a document taken not in good faith and liable to be declared void against the Official Receiver. There is, therefore, no reason to disturb the order of the District Court setting it aside.

The appellant contends that even so he is entitled to stand in the shoes of the creditors whose debts he has discharged. One of these was a simple money debt and the other was a mortgage debt. We have been referred to certain rulings under s. 53 of the Transfer of Property Act. In *Chidambaram Chettiar* v. *Sami Iyer* (1) it was held that a transfer to defeat creditors is wholly void even if it is in part for valuable consideration and that it cannot be upheld even to the extent to which it is supported by consideration. But the upholding contended for and negatived in that case was an upholding as an assignment. In *Palamalai Mudaliar* v. *South Indian Export Co.* (2) after a mortgage had been paid off, the alienee was given a charge on the property to the extent of the payment; and the same principle was acted upon in *In re Jaladanki China Pitchiah* (3), *Loorthia Odayar* v. *Gopalasami* (4) and *Rajani Kumar Das* v. *Gour Kishore Saha* (5). The general principle applicable to cases under s. 53 of the Provincial Insolvency Act; I think is this: the assignment, as an assignment is void; but, for money genuinely paid in discharge of genuine debts, the alienee will stand in the shoes of those whom he has paid. In the case of a mortgage debt paid off, the transfer will not operate as a mortgage at all, not even to the extent of the amount paid, but the alienee will be entitled to rank in the schedule of secured creditors to the extent of his payment. Consequently, I think the proper method of disposal by the Official Receiver is that the appellant should be allowed to rank in the schedule of secured creditors to the extent of the amount paid by him to discharge the mortgage, and as an unsecured creditor to the extent of the amount paid by him to discharge the unsecured debts; and I would direct that this be done.

I would give the appellant roughly proportionate costs on his success and direct that he receive one-third of the costs throughout and pay two-thirds of the costs throughout.

Madhavan Nair, J.—I entirely agree. The learned District Judge has held that the alienation in favour of the appellant should be set aside under s. 53 of the Provincial Insolvency Act, but he has also found that the appellant has paid a sum of Rs. 1,000 thereby discharging two prior debts of the insolvent, namely, (1) Rs. 500 due to one Sinnakkal under a mortgage, Ex. II, and (2) Rs. 500 due to the Bank under Ex. III. I agree with my learned brother that the evidence in the case fully supports these conclusions. It is argued that the sum of Rs. 1,000 having been paid, the alienation in favour of the appellant should be upheld at least to the extent it is supported by consideration, and in this connection, some decisions under s. 53 of the Transfer of Property Act dealing with transfers made with intent to defeat or delay creditors were referred to in the course of the argument. In *Chidambaram Chettiar* v. *Sami Iyer* (1) confirmed by the Privy Council in *Chidambaram Chettiar* v. *Sirinivasa Sastrial* (6) it was held that a transfer intended to defeat creditors is wholly void as an assignment though it is in part supported by valuable consideration; but this does not mean that the alienee is not to get any credit for the debt that he may be found to have actually discharged. In *Palamalai Mudaliar* v. *The South Indian Export Co.* (2) an alienee who paid a portion of the consideration by discharging a valid mortgage previously binding on the property alienated was given a charge on the property to the extent of his payment. This principle is recognised in *Loorthia Odayar* v. *Gopalasami Iyer* (4) though this decision covers a wider ground. Applying the principle of these decisions, I think that though the assignment as an assignment is void under s. 53 of the Provincial Insolvency Act, the alienee is entitled in so far as he has paid off the mortgage debt due to Sinnakkal to rank in the schedule of secured creditors to the extent of his payment and, in so far as he has paid off the debt due to the Bank, to rank as an unsecured creditor. I agree with my learned brother that the Official Receiver should be directed to dispose of the claims of the appellant as regards these two debts on this basis. I also concur in the proposed order as to costs.

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(1) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.

(2) 5 Ind. Cas. 33; 33 M. 334; 7 M. L. T. 167; 20 M. L. J. 211; (1910) M. W. N. 239.

(3) 11 Ind. Cas. 868; 36 M 29; 10 M. L. T. 183; (1911) 2 M. W. N. 152.

(4) 80 Ind. Cas. 147; 46 M. L. J. 125; 19 L. W. 135; (1924) M. W. N. 117; A. I R. 1924 Mad. 450.

(5) 35 C. 1051; 7 C. L. J. 586; 12 C. W. N. 761.

V. N. V. *Order modified.*

R. L.

(6) 23 Ind. Cas. 714; 37 M. 227; 26 M. L. J. 473; 18 C. W. N. 841; 16 M. L. T. 286; 20 C. L. J. 571; (1914) M. W. N. 754; 16 Bom. L. R. 783; 1 L. W. 963 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 127 OF 1924.
March 13, 1925.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir George Claus Rankin, KT.

TILOKE CHAND SURANA AND ANOTHER
—PLAINTIFFS—APPELLANTS
versus
J. B. BEATTIE & Co.—DEFENDANTS—
RESPONDENTS.

Mortgage—Mortgage suit—Receiver—Loan by tenant to mortgagor—Payment towards rent—Money spent on improvement of mortgaged property—Collateral arrangement—Receiver, whether bound—Estoppel—Tenant in possession—Notice—Evidence Act (I of 1872), s. 115—Transfer of Property Act (IV of 1882), ss. 8, 50.

A Receiver was appointed in a mortgage suit and thereafter the mortgagor entered into an arrangement with the tenant of the mortgaged premises under which the tenant advanced a sum of money to the mortgagor which was applied towards the repairs and improvement of the mortgaged premises, the mortgagor agreeing to set off the amount of the loan towards future rent:

Held, that irrespective of the fact whether the Receiver had or had not power to sanction the arrangement between the mortgagor and his tenant the Court would not allow him to repudiate the transaction after it had been carried through, and after he and the mortgagees had taken advantage of the transaction and the money had been advanced and spent in the improvement of the premises which were the mortgagees' security. [p. 541, col. 2.]

Where an arrangement between a mortgagor and the tenant of the mortgaged premises for pre-payment of rent, or for setting off future rent against money due from the tenant to the mortgagor, is made subsequent to the date of the mortgage, such arrangement is only a collateral bargain between these parties and is not binding upon the mortgagee. [p. 542, col. 1.]

Per *Rankin, J.*—The principle to be applied in the case of a mortgage of tenanted land is that the mortgage operates as a grant of the reversion expectant on the determination of the term of the lease, and the rents and profits accruing after the transfer pass to the mortgagee. The tenant in such a case has the protection of s. 50 of the Transfer of Property Act, if the rent is paid as rent and is not paid in advance. Any payment made by the tenant to the mortgagor in advance would be a mere loan. [p. 543, col. 2.]

In the absence of an enquiry by a transferee of tenanted premises, the open possession of the tenant over the premises is notice not only of the immediate terms of his tenancy but of collateral agreements as well. [p. 545, col. 1.]

Appeal against the judgment of Mr. Justice Page, dated the 19th March 1924.

Sir *Benode Mitter* (with him Messrs. *H. C. Majumdar* and *S. C. Mitter*), for the Appellants.

Mr. *W. W. K. Page*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the plaintiffs against the judgment of my learned brother Mr. Justice Page which was delivered on the 19th of May 1924.

The plaintiffs brought a suit against the defendant, who was sued as J. B. Beattie & Co., to recover possession of a portion of certain premises, which was occupied by the defendant. The portion in question was part of the first floor of premises Nos. 3 and 3-1, Mangoe Lane, Calcutta.

There was a prayer for Rs. 3,160 in respect of rent up to the 31st of August 1923.

There was a further prayer for damages

at the rate of Rs. 600 per month from the 1st of September 1923 until delivery of vacant possession by reason of the alleged wrongful possession of the defendant after the 1st of September 1923.

The defence shortly stated was that the defendant had been a tenant of these premises for a long time, and that in 1920 the defendant was requested by his landlords, Messrs. Hyam and Jones, to advance money in order that such money might be applied in repairing and improving the premises generally.

It was alleged that it was verbally agreed that the defendant would advance Messrs. Hyam and Jones money to be spent on repairs, and that the money so advanced would be accepted as rent of the premises paid in advance and that the defendant would be entitled to remain in possession as tenant of the premises until rent of the said premises at the rate of Rs. 200 per month should have accrued to an amount equivalent to the rent so paid in advance.

It was alleged that the defendant advanced in June 1920 Rs. 7,800 ; that on the 20th of October 1921 he made a further advance of Rs. 1,500, and that on the 29th of December 1921 he again advanced a sum of money, this time the sum being Rs. 2,500; that the money was spent by the landlords upon repairs and improvements of the premises in accordance with the arrangement and that consequently the defendant was entitled to remain in possession up to some date in 1926.

The facts of this case may be stated shortly as follows: The defendant was a tenant of the portion of the premises, which I have mentioned, from about the year 1907 at a rental of Rs. 150. On the 13th of July 1914 his landlords Messrs. Hyam and Jones executed a mortgage to Mr. M. A. Sassoon and two others of the whole premises. On the 13th of January 1917, a mortgage suit was filed by Messrs. Sassoons, the mortgagees : on the 16th of March 1917 M. A. Sassoon was appointed Receiver and on the 27th July 1917 a preliminary decree was made : on the 24th of January 1919 the final decree was made and it included an order for sale.

It should be mentioned that on the 30th of April 1917 Messrs. Hyam and Jones had made a further mortgage of the premises to Messrs. Mackintosh Burn & Co. They had brought a suit and had obtained a decree in January 1919. They were added as parties to the suit of Messrs. Sassoons, and the final decree of the 24th of January 1919 dealt not only with the rights of Messrs. Sassoons, the mortgagees, but also with the rights of Messrs. Mackintosh Burn & Co., as second mortgagees.

The 6th of May 1920 is a material date inasmuch as the Calcutta Rent Act came into force on that date.

The first agreement, which was made by the defendant with his landlord, was on the 7th of June 1920 ; and, in respect of that, the sum of Rs. 7,800 was advanced, and a receipt was given in the following terms :—

"Received from J. B. Beattie, Esq., the sum of rupees seven thousand and eight hundred only in advance on account of rents of premises No. 3-1, Mangoe Lane for the purpose of making an additional room on the roof of the one storied godown in the above premises, to be deducted out of the monthly rents payable, *viz.*, Rs. 200 per month."

Part of the arrangement was that the rent was to be increased from Rs. 150 to Rs. 200.

On the 12th of July 1921 Messrs. Hyam and Jones created an equitable mortgage by depositing the title deeds of the premises with the plaintiffs.

In order to carry this out Messrs. Sassoons were paid off and the deeds were handed by them to the attorneys for the plaintiffs ; and, a receipt was given by Messrs. Sassoons in the following terms :

"Suit No. 270-16.

"M. A. Sassoon *v.* J. I. J. Hyam.

"Received from Messrs. Hyam and Jones a cheque for Rs. 7,02,000 only, *viz.*, Rs. 6,92,093-3-3 in full satisfaction of the plaintiff's claim for principal and interest due under the decree herein and Rs. 9,906-13-9 on account of the costs of the suit. We undertake to refund excess, if any, on adjustment of the costs of this suit."

On the 20th of October 1921, as I have already said, a further advance of Rs. 1,500 was made by the defendant to Hyam & Jones and on the 29th of December 1921 another sum of Rs. 2,500 was advanced. The position, therefore, up to this date was that Messrs. Sassoons had been paid off and apparently had no more interest in the premises. The plaintiffs became mortgagees by the deposit of the title deeds.

It appears that Messrs. Sassoons subsequently alleged that a mistake had been made in the calculation of the amount which was due to Messrs. Sassoons, and that there was still a sum of about Rs. 25,000 due in respect of interest. In consequence thereof an application was made to the learned Judge sitting on the Original Side for the sale of the premises by Messrs. Sassoons: and, on the 5th of April 1922 an order for sale was made. The material part of the order was as follows: "It is ordered that the Registrar of this Court do sell the mortgaged premises Nos. 3 and 3-1 Mangoe Lane and No. 1 Barrettos Lane or a sufficient part thereof with liberty to the plaintiffs to bid for and purchase the same as directed by the said decree dated the twenty-fourth day of January one thousand nine hundred and nineteen for recovery of the balance of interest due to the plaintiffs under the said decree dated twenty-seventh day of July one thousand nine hundred and seventeen and it is further ordered that on payment to the plaintiffs the said sum as aforesaid the Receiver of this suit be discharged."

It is not for me in this appeal to express any opinion whether that order should have been made, having regard to the fact that Messrs. Sassoons had accepted the sum, which was actually paid to them in July 1921, in full satisfaction of their claim for principal and interest and had delivered up the title-deeds.

The result, however, was that the premises were sold by the Registrar of the Court and the plaintiffs in this suit became the purchasers at that sale for one lac of rupees and the purchase was stated to be subject to a mortgage, dated the 12th day of July 1921. As far as I knew there was no such mortgage. It was, however, assumed by both parties to this appeal that the mortgage intended to be referred to was the mortgage of the plaintiffs, dated 12th July 1921.

Clause 15 of the conditions, upon which the sale was held, provided that the said properties were sold subject to a mortgage, dated 12th July 1921, in favour of Messrs. Telak Chand Hanotmull for Rs. 6,00,000 carrying interest at 12 per cent. per annum and the existing tenancies, quit rents, rights of way and other rights and easements if any affecting the same: and, it specifically mentioned a lease for a period of 25 years.

The sale was held on the 24th of March 1923, and the plaintiffs became the purchasers. Their attorneys by letter, dated 28th March 1923, gave notice to the defendant of the sale and that the plaintiffs had become purchasers and they called upon the defendant not to pay rent to any person other than the plaintiffs. On the 31st May 1923 they gave notice to the defendant to quit the premises by the end of June.

Then the defendant set up the agreement to which I have already referred and I need not read the letters with regard to that.

On the 30th of July the plaintiff's attorneys gave further notice to the defendant calling upon him to quit the portion of the premises occupied by him on the 31st of August and stated that in default the defendant would be held liable for damages at the rate of Rs. 300 per month.

The defendant did not give up possession, and this suit was filed on the 9th of November 1923.

The learned Judge dismissed the plaintiff's claim altogether.

As I understand the learned Judge's judgment he treated the three payments which were made by the defendant in June 1920, 20th October 1921 and 29th of December 1921 as having been made in pursuance of the arrangement which was made between the defendant and his landlords on the 7th of June 1920.

With great respect to the learned Judge, in my judgment, the evidence does not support that finding: and, it appears to me that the case must be considered upon the basis that there was a fresh arrangement made in respect of each of these payments.

It is necessary, therefore, to see whether there is any difference in the rights of the parties as regards these three payments.

I propose in the first place to deal with the payment of Rs. 7,800 and the arrangement which was made in respect of it in June 1920.

In my opinion the evidence shows that the defendant advanced Rs. 7,800 to his landlords, Messrs. Hyam and Jones, undoubtedly for the purpose of repair and improvement of the premises, and the agreement was that the money was to be re-paid by the landlords giving the defendant credit for the monthly rents as they became due at the rate of Rs. 200 per month. It was an implied term that the defendant should remain in possession of the premises until the whole amount was re-paid in this manner, unless the landlords re-paid in a lump sum or otherwise. That being the arrangement, the advance of Rs. 7,800 would cover the rents which were payable for 39 months at the rate of Rs. 200 a month, and would cover a period from June 1920 to the end of August 1923.

I agree with the learned Judge's conclusion that the plaintiffs cannot recover any rents in respect of the period up to the end of August 1923. I agree with the learned Judge's finding that Messrs. Sassoons and the Receiver Mr. M. A. Sassoon knew about the arrangement which was made between the defendant and Messrs. Hyam and Jones in June 1920 and assented to it. In my judgment the money, which was advanced by the defendant, was in fact spent on repairs of the premises, as has been found by the learned Judge.

In those circumstances, in my opinion, neither Messrs. Hyam and Jones nor Messrs. Sassoons nor the Receiver could have claimed rent from the defendant for the period up to the 31st of August 1923.

The plaintiffs became mortgagees by paying off Messrs. Sassoons and taking a deposit of the title-deeds from Messrs. Hyam and Jones on the 11th July 1921 which was after the arrangement made between the defendant and Messrs. Hyam and Jones: and, I am at a loss to understand how the plaintiffs could be in a better position than Messrs. Hyam and Jones or Messrs. Sassoons or the Receiver.

In my judgment the learned Judge was right in his conclusion as to this part of the case.

The learned Counsel for the appellants argued that the arrangement which was made between the defendant and his landlords was of no effect as against the plaintiffs by reason of the provisions of s. 52 of the Transfer of Property Act.

Even if the plaintiffs could be said to be parties who would have any right under any decree or order which might be made by the Court in the mortgage suit instituted by Messrs. Sassoons upon which I express no opinion, I am of opinion that this point is of no avail to the plaintiffs by reason of the fact that the mortgagees, who were plaintiffs in the suit, and the Receiver were both aware of the arrangement which was made by the defendant with the landlords and had assented to such an arrangement and the plaintiffs cannot be in a better position than Messrs. Sassoons or the Receiver.

The learned Counsel further relied upon the limitation of the Receiver's powers as to dealing with the property.

I do not think it necessary to examine in detail what were the powers of the Receiver, because I am of opinion that, even if the Receiver had no power to sanction the arrangement which was made between the defendant and his landlords, the Court would not allow him to repudiate the transaction after the transaction had been carried through, and after he, the Receiver and the mortgagees had taken advantage of the transaction and the money had been advanced and spent in the improvement of the premises which were the mortgagees' security. I think there is no substance in that point.

The last point to which it is necessary for me to refer in this connection is the argument of the learned Counsel who appeared for the appellants, that there was no proof that the arrangement which was made in June 1920 between the defendant and Mr. Hyam was made with the authority of Mr. Jones, the other landlord.

The issue was, "Was there an agreement between the defendant and Messrs. Hyam and Jones as alleged in the written statement?"

As I understand the learned Judge's judgment, and on reference to the evidence, the contest was upon the question whether the arrangement alleged by the defendant had been made. There was no suggestion at the trial that Mr. Hyam was not acting with the authority of his co-lessor: further I do not find the point specifically taken in the memorandum of appeal. In these circumstances and having regard to the nature of the arrangement, which to my mind was a perfectly proper arrangement, the result of which was for the benefit and advantage of the landlords and an improvement of their property, I have no doubt that Mr. Hyam in making the arrangement of June 1920, was acting with the authority of Mr. Jones. For these reasons, I agree with the learned Judge's conclusion that the plaintiffs cannot recover rent in respect of these premises for any period prior to 31st August 1923.

The position, however, to my mind is different as regards the payments which were made by the defendant on the 20th of October and the 29th of December 1921.

The arrangement as to these payments

according to the evidence is said to have been similar to that which governed the previous payment in June 1920.

But as I have already said, it seems to me that the evidence shows that the arrangements of the 20th of October 1921 and of the 29th of December 1921 must be regarded as being separate from the previous arrangement of June 1920. These two arrangements were made after the mortgage to the plaintiffs. That being so, the rule which was referred to by Lord Justice Swinfen Eady in *Ashburton* v. *Nocton* (1) is applicable.

The learned Lord Justice stated the rule as follows:—"If the arrangement between mortgagor and tenant for pre-payment of rent, or for setting off future rent against money due from the tenant to the mortgagor, be made subsequent to the date of the mortgage, such arrangement will be treated as a collateral bargain between those parties and not binding upon the mortgagee."

Therefore, unless it can be shown that the plaintiffs assented to the above-mentioned arrangements between the defendant and the mortgagors, I am of opinion that the plaintiffs are not bound by them. There is no evidence to show that the plaintiffs consented to the arrangements; and, in my judgment, in October and December 1921 Messrs. Hyam and Jones were not in a position to give more than their personal undertaking to set off the sums which would become due in respect of the monthly rents against the advances which the defendants made so long as they were in a position so to do. They were not able to bind the plaintiffs, the mortgagees, or to deprive the mortgagees of any of their rights, which would include the right to give notice to the defendant to pay the rent to them and on failure by the defendant to pay the rent to determine the tenancy.

It was alleged that Mr. Hyam did not inform the defendant of the mortgage which had been created in favour of the plaintiffs. Even if that be so, although one may sympathise with the defendant, it does not affect the plaintiffs' rights.

The learned Counsel for the defendant based part of his argument upon the Calcutta Rent Act and urged that his client was safeguarded by reason of the provisions thereof.

In my opinion the Calcutta Rent Act is not sufficient to release the defendant from his liability for the reasons that the rent after August 1923 had not been paid by the defendant to the persons to whom it was due, namely, the plaintiffs.

There are two other points to which it is necessary for me to refer. The learned Counsel for the defendant relied upon the doctrine of merger. He referred to the fact that the plaintiffs had purchased the property at the sale which was held under the order of the Court in March 1923 and he relied upon the conditions of sale in cl. 15, to which I have already referred.

He urged that the plaintiffs were affected with notice of the defendant's tenancy: and for the doctrine of merger, he relied upon the case of *Toulmin* v. *Steere* (2) and of *Smith* v. *Phillips* (3).

I am of opinion that the doctrine of merger is not available to the defendant.

It was held in the case of *Gokoldas Gopaldas* v. *Puranmal Premsukh Das* (4) that the doctrine of *Toulmin* v. *Steere* (2) is not applicable to Indian transactions, except as the law of justice, equity and good conscience.

Sir Richard Couch, in giving the judgment of the Judicial Committee stated as follows: "The doctrine of *Toulmin* v. *Steere* (2) is not applicable to Indian transactions, except as the law of justice, equity and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

"In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere* (2) seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation."

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(1) (1915) 1 Ch. 274 at p. 291; 84 L. J. Ch. 193; 111 L. T. 895; 59 S. J. 145; 31 T. L. R. 122.

(2) (1817) 3 Mer. 210; 36 E. R. 81; 17 R. R. 67.

(3) (1837) 1 Keen 694; 6 L. J. Ch. 253; 48 E. R. 474; 14 R. R. 138.

(4) 10 C. 1036; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. s.) 692 (P. C.).

I agree with the learned Counsel's argument to this extent that the plaintiffs, when they bought the premises, did receive notice of the defendant's tenancy and were thereby put upon enquiry and they must be taken to have had knowledge of the actual facts.

Now, what were the facts of which they would have become aware upon enquiry?

Messrs. Hyam and Jones had made arrangements with the defendant in October and December 1921, by which the above-mentioned sums were advanced by the defendant, and they had entered into a collateral bargain by which they had made themselves personally liable to set off the monthly rents as they became due against the sums which had been advanced, and so to re-pay them. The plaintiffs would have found that these arrangements were made after the date of the plaintiffs' mortgage and that they, the plaintiffs, were not bound by them; consequently, in my judgment, neither of the above-mentioned points, upon which the learned Counsel relied, are sufficient to release the defendant from his liability.

In my judgment, the plaintiffs cannot recover any rent for any period prior to the end of August 1923. But the plaintiffs are entitled to possession of the premises and to recover mesne profits after the 31st of August 1923.

The result is that the plaintiffs' claim for rent for the period up to the 31st of August 1923 is dismissed; the plaintiffs are entitled to a decree for Rs. 200 for rent for the month of September 1923, and they are entitled to a decree for mesne profits from the 1st of October 1923 until the date of delivery of possession at the rate of Rs. 210 (two hundred and ten) per month, which we consider to be a fair rate to be paid for the occupation of the premises. The possession of the premises must be vacated by the defendant on or before the expiry of three months from to-day.

We have considered the question of costs: and, having regard to the peculiar features of this case, we have come to the conclusion that each party should pay its own costs not only of the appeal but also of the trial. It is not necessary to mention all the reasons which have weighed with us: it is sufficient to say that the plaintiffs have failed with regard to a substantial part of their claim in which they persisted even in the Court of Appeal.

Rankin, J.—I agree.

As regards the arrangements which were made in October of 1921 and December of 1921, which were after the mortgage by deposit to the appellants, had been made by Hyam and Jones on the 12th of July 1921 upon the terms of the registered deed of that date—the position is controlled entirely by s. 8 and s. 50 of the Transfer of Property Act. The principle to be applied in the case of a mortgage of tenanted land is that the mortgage operates as a grant of the reversion expectant on the determination of the term. In India a mortgage by deposit has the same effect as a "legal mortgage." By s. 8 accordingly, when this mortgage by deposit was entered into in July 1921, there passed to the mortgagees, namely, the appellants, the rents and profits accruing after the transfer. The result is that the tenant in such a case has only the protection of s. 50 of the Transfer of Property Act, which is the equivalent in India of the old Statute of Queen Anne which was canvassed in *De Nicols* v. *Saunders* (5) and, the principle of that case applies where the arrangement in question has taken place subsequent to the mortgage. In order to get the benefit of the protection of s. 50 the tenant must pay rent as rent, and must not pay rent in advance which, in these circumstances, is a mere loan to the mortgagor. I entirely agree that the evidence does not admit for a moment of these two subsequent arrangements of October and December 1921 being regarded as the carrying out of a previous arrangement entered into in June 1920, and I respectfully differ from the learned Judge in so far as he has not differentiated between the first of the three arrangements and the others.

The only argument which to my mind requires examination in support of the claim of the respondent to stand as against the appellants, upon the later arrangements, is the argument urged before us that although the appellants, had their mortgage of the 12th of July 1921 stood by itself, would not have been bound by the arrangements of October and December 1921, nevertheless when they came to take as auction-purchasers in March 1923 the equity of redemption subject to their own mortgage, they became unable to set up as against the respondent the rights which they had under their mortgage of July 1921. That, as has been pointed out, is the doctrine of merger and the cases which were relied upon before us, the cases of *Smith* v. *Phillips* (3) and *Morrogh* v. *Alleyne* (6) are mere illustrations of the doctrine of merger laid down in the case of *Toulmin* v. *Steere* (2), an authority which has been much buffeted by modern decisions both in India and in England. I see myself no principle in saying in this case that the appellants' position as against the respondents' was made worse by the circumstance that they paid one lac of rupees and bought in the equity of redemption in addition to their subsisting mortgage. It remains, therefore, to consider the rights of the parties as regards the transaction which was entered into on the 7th of June 1920.

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(5) (1870) 5 C. P. 589; 39 L. J. C. P. 297; 22 L. T. 661; 18 W. R. 1106.

Now, the facts as to this transaction are not very satisfactorily presented in the evidence. The evidence of Mr. Beattie is that the roof of the premises—and I understand he is speaking not only of his own part of the premises—was in a bad condition, that it was leaky, that it required repairs and that the premises otherwise were bad and required repairs. Mr. Hyam's evidence is the same and there is no cross-examination of either witness tending to show that that version of the facts was in any way incorrect. It is quite true that when one scrutinizes the receipt, dated the 7th of June 1920, one finds that the advance is said to be for the purpose of "making an additional room on the roof of the one-storied godown in the above premises." When the plaintiffs' witness Mr. Shorsbree was in the witness-box he was cross-examined on the basis that a part of the premises was to be constructed out of the advance. However, that may be, the defendant and Hyam both go into the witness-box, they are not asked anything to throw doubt upon the story that the property as a whole was out of repair and that the purpose of that advance was to enable repairs to be made. The learned Judge has accepted that view: and, in the circumstances, it is quite impossible for this Court to accept any suggestion to the contrary.

The position, therefore, was this: A mortgage with the Sassoons had been made in 1914. In a suit which was solely between the Sassoons and Hyam and Jones and which had begun on the 13th of January 1917, one of the Sassoons had been appointed Receiver so far back as the 16th of March 1917. A later mortgage had been given to Mackintosh Burn, Ltd., in April 1917, and notwithstanding that a preliminary decree had been passed in the Sassoons' suit on the 27th of July 1917, not till 1918 did Mackintosh Burn, Ltd., bring a suit at all. The final decree for sale on the 24th of January 1919 was made in the Sassoons' suit to which Mackintosh Burn, Ltd., were added as parties in order that the rights of all persons might be worked out in each other's presence. It appears that Mr. Hyam was acting really as manager for the Receiver; so he says. At all events, the Receiver was allowing him to make out the rent bills, to endorse them to him and the Receiver's peon collected the rent. The Receiver and Hyam were managing this property for a period of over three years; and we must take it that the time came when the property required to be repaired. At that time it so happened that Mr. Beattie was in this position, at all events, as regards the main part of the premises, that under the Calcutta Rent Act, he had, so long as he would keep the covenants, fixity of tenure, and, in these circumstances, the Receiver and Hyam knowing that they could not eject the defendant or claim more rent, and being in need of money got the necessary money for repairs by getting him to pay rent in advance. It was a substantial amount of Rs. 7,800. I do not regard that as if the Receiver was wrongly making a lease for three years. It is a mere arrangement whereby Hyam and the Receiver too, in order to get the advance, undertook, so long as Mr. Beattie kept the covenants, that they would not attempt to give him notice to quit at all events unless they paid off the balance. That may or may not be an arrangement within the competency of a Receiver, but it was done with the consent of the Sassoon mortgagees. It was done at a time when, as the learned Judge found, Mr. Beattie had not been informed about Messrs. Sassoons' mortgage. To my mind it was an entirely unreasonable arrangement. I do not say that it was contrary to the Receiver's duty. But if it was, I do not understand why we are to suppose that the consent of Mackintosh Burn & Co. was lacking to a perfectly good and very beneficial agreement to which they have never objected.

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(6) (1873) Ir. R. 7 Eq. 487.

We have to consider whether it binds the equitable mortgagees of the 12th of July 1921.

Now, it seems to me that the cases of *Green* v. *Rheinberg* (7) and *Ashburton* v. *Nocton* (1) show that such an arrangement will in equity bind a person taking a transfer of the reversion, unless he can show that he purchased for value without notice. This no doubt is an advance upon the Common Law stand point of *Cook* v. *Guerra* (8).

In this case there was a tenant upon the property and his open possession is notice not only of the immediate terms of his tenancy but of collateral agreements as well, in the absence of all enquiry by the transferees.

Under the doctrine, therefore, illustrated by *Daniels* v. *Davison* (9), the mortgagees in this case, who made no enquiry, are not entitled to say that they were purchasers for value without notice. Therefore, the transfer of the reversion to them by the equitable mortgage of the 12th of July 1921 is not a transfer free from the rights of the respondent under the arrangement of the 7th of June 1920.

In these circumstances the learned Counsel for the appellant says that in view of fact that he in March 1923 became the auction-purchaser of the property subject to his own mortgage as has been already detailed, he can obtain a better right and a right to override the arrangement of June 1920 by the doctrine of *lis pendens.* I do not understand him to argue that he could obtain a better right than Messrs. Sassoons, the mortgagees, by the doctrine of subrogation, but he says that as he ultimately became the auction-purchaser he obtained a better right by the doctrine of *lis pendens.* To my mind, that doctrine has no application to this case, not because I am prepared to hold that an auction-purchaser is necessarily outside s. 52 of the Transfer of Property Act, but because it seems to me that where the Court is by its Receiver managing property for a series of years in a mortgage suit the person who takes the property after that management cannot under this section go back and rip up such transactions of the Receiver and question their formal propriety. The doctrine is intended to prevent one party to a suit making an assignment inconsistent with the right which may be established in the suit and which might require a further party to be impleaded in order to make effectual the Court's decree.

I think that the arrangement is one which binds the appellant.

The respondent being *prima facie* monthly tenant, was given on 30th July 1923 a month's notice to leave after August 1923, and it is for him to show what this arrangement of June 1920 was, and to show that it prevented the owners of the reversion from giving him a valid notice to quit as they purported to do.

The arrangement was on the 7th of June 1920. There is no evidence or suggestion that the rent of the respondent was payable monthly in advance. The arrangement was according to the written document simply this: "For the purpose of making an additional room on the roof of the one-storied godown in the above premises, to be deducted out of the monthly rents payable, *viz*, Rs. 200 per month." I have no doubt that the intention was that on the 1st of July the rent for June should be taken to be Rs. 200 and Rs. 200 should be cancelled accordingly. The learned Judge taking, rather at the foot of the letter, two passages in the evidence appears to have thought that the arrangement was that the rent should be increased only as and when the repairs were finished. That, I think, is not the meaning of the receipt: and, so far as I can gather, the computation of the defendant in para. 5 of the written statement was not based upon anything of the sort. There is no evidence as to when the repairs were finished; and the burden lies entirely upon the defendant. In para. 5 of the written statement the computation is made as if the increased rent first applied to the month of July 1920, that is to say, the rent payable on the 1st of August, assuming it to be payable in arrear in respect of July 1920.

In my judgment, the evidence does not show that: and, I think, therefore, that there was a good notice to quit determining the respondent's status as a monthly tenant. Thereafter his right to continue in occupation rested solely on the Rent Act. The writ was issued on the 7th of November at a time when the rent for September had not been paid to the proper person, and, as the tenant had no further right to notice, there is no answer to the suit under the Calcutta Rent Act as a matter of ejectment. He cannot, however, be charged more than Rs. 200 for September 1923.

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(7) (1911) 104 L. T. 149.

(8) (1872) 7 C. P. 132; 41 L. J. C. P. 89; 26 L. T. 97; 20 W. R. 367.

(9) (1809) 16 Ves. Jun. 249; 33 E. R. 978; 10 R. R. 171.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 854 AND 855 OF 1925.

October 28, 1925.

Present:—Mr. Justice Jackson.

THE VICE-CHAIRMAN, CHIDAMBARAM MUNICIPALITY—DEFENDANT—PETITIONER

versus

GANASAMBANDHAM PILLAI—PLAINTIFF—RESPONDENT.

Madras District Municipalities Act (V of 1920)—Rules for conduct of elections, r. 5—Candidate's name, omission of, in final list of valid nominations—Remedy of party aggrieved—Civil Courts, jurisdiction of—Statutory tribunal, creation of—Effect.

Where a special tribunal out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. If the tribunal has functioned and given a decision whether right or wrong, the Civil Court has no jurisdiction. It is only when the special tribunal has refused to function that a Civil Court exercises the jurisdiction which the proper tribunal has failed to exercise. [p. 546, col. 2; p. 547, col. 1.]

Sarvothama Rao v. Chairman, Municipal Council, Sidapet, 73 Ind. Cas. 619; 47 M. 585 at p. 594; 17 L. W. 431; (1923) M. W. N. 266; 32 M. L. T. 178; 45 M. L. J. 23; A. I. R. 1923 Mad. 475 and *Bhaishankar Nanabhai v. Municipal Corporation*, 31 B. 604; 9 Bom L. R. 417, followed.

Where at an election of a Councillor for one of the wards of a Municipality, the name of a candidate is omitted from the final list of valid nominations published under r. 5 of the Election Rules, the remedy of the aggrieved party is to refer the matter to the Local Government under r. 31 or to file an election petition under r. 1 of the Election Dispute Rules, and not a suit for injunction restraining election in a Civil Court. [p. 546, col. 2.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif of Chidambaram, in I. A. No. 1005 of 1925 in Original Suit No. 502 of 1925.

Mr. *T. R. Ramachandra Iyer*, for the Petitioner.

Mr. *Patanjali Sastri*, for the Respondent.

JUDGMENT.—The petitioner seeks to set aside two orders of the District Munsif of Chidambaram, one ordering the production and the other ordering the attachment and seizure of the ballot boxes in the election of a Councillor for the 4th ward of Chidambaram Municipality. There is no ground for presumption from the record at this stage of the proceedings that the District Munsif had any jurisdiction to interfere with the final election. It seems that when the final list of valid nominations was posted in accordance with Election Rule 5, the respondent found that his name had been omitted. Accordingly he filed O. S. No. 502 of 1925 in the Court of the District Munsif of Chidambaram. His remedy would have been to refer to the matter to the Local Government under r. 31 or to have filed an election petition under r. 1 of the Election Dispute Rules. As Mr. Justice Wallace observes in *Sarvothama Rao v. Chairman Municipal Council, Sidapet* (1) it is impossible in deciding the propriety of an injunction to avoid deciding on the maintainability of the suit and it is better if the Court concerned decide the two questions together. But the Munsif does not seem to have addressed his mind to this question of jurisdiction. The law is quite clear, and is set forth both in the Madras ruling quoted above and in *Bhaishankar Nanabhai v. Municipal Corporation* (2) where a special tribunal out of the ordinary course is appointed by an act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive [*Bhaishankar Nanabhai v. Municipal Corporation* (2).] If this tribunal had functioned and given a decision whether right or wrong, I am clear that the Civil Court would have no jurisdiction. It is only when the special tribunal has refused to function that a Civil Court exercises the jurisdiction which the proper tribunal has failed to exercise [*Sarvothama Rao* v. *Chairman, Municipal Council, Sidapet* (1).]

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(1) 73 Ind. Cas. 619; 47 M. 585 at p. 594; 17 L. W. 431; (1923) M. W. N. 266; 32 M. L. T. 178; 45 M. L. J. 23; A. I. R. 1923 Mad. 475.

(2) 31 B. 604; 9 Bom. L. R. 417.

It is idle for the respondent to complain that if that is the law, it deprived him of the speedy and drastic remedy which he personally desires. It is only under the Statute, that he has any rights at all in this matter, and he must submit to the whole statutory scheme, instead of accepting the privileges, and repudiating disabilities. It is an essential condition of those rights that they should be determined in the manner prescribed in the act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts for they never had any, there is no change of the old order of things; a new order is brought into being *Bhaishnakar Nanabhai* v. *Municipal Corporation* (2). Nor are the reasons for the Statute far to seek.

It is a positive practical necessity that these elections should be held and completed without being delayed at every stage by some person who considers that he has a personal grievance, and it is highly important that the ordinary Courts of Law should be kept entirely immune from the excitement that elections invariably generate. It would be deplorable if Munsif's Courts were to become the storm centre of disputed elections. If these principles require illustration the present case could hardly be bettered. An election has been held which ought not to be delayed because a Chairman has to be elected in November yet all the ballot boxes for one ward are in the Munsif's Court, and the Munsif has plunged into the fray not only with the fervour but with the vocabulary of the hustings. The respondent made yet a third application to have the taking of the votes stopped by the injunction, and the Munsif ordered that the election should not proceed without the respondent as candidates Whereupon the Chairman added his name as a candidate and proceeded. The Munsif describes this Act, which was certainly not in contravention of the plain terms of his order as an insult and gross insubordination. Evidently he regards himself as the authority in supreme control of the election, and the various other functionaries are his subordinates and it is precisely to avoiding putting the Courts of Law in this intolerable invidious position that the Legislature is careful to appoint special tribunals and to exclude the ordinary jurisdiction.

I find that the orders in question were passed without jurisdiction and order the District Munisf of Chidambaram to restore the ballot boxes to the proper authority. The injunctions are cancelled, costs to petitioners.

V. N. V. *Order set aside.*

R. L.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 25 OF 1923.

July 9, 1924.

Present:—Mr. Kennedy, J. C. and Mr. Lobo, A. J. C.

TANUMAL AND OTHERS—APPELLANTS IN APPEAL NO. 25 AND RESPONDENTS IN APPEAL NO. 20

versus

GANGA RAM AND OTHERS—RESPONDENTS IN APPEAL NO. 25 AND APPELLANTS IN APPEAL NO. 20.

Contract Act (IX of 1872), s. 253—Partnership—Death of partner—Agreement by managing member of joint Hindu family to continue partnership, effect of—Right to sue for accounts of old partnership, whether survives.

Ordinarily a partnership is dissolved by the death of one of the partners but there may be an implied contract to continue the partnership after the death of a partner and in such a case the partnership would continue between the persons who have entered into such contract. Where such a contract is entered into by the managing member of a joint Hindu family not on behalf of the members of the family but acting merely on his own behalf, the contract is not binding on the other members of the family. [p. 549, col. 2.]

Where a partnership is continued after the death of one of the partners it is, however, technically a new partnership and not the old partnership. On the death of a partner each surviving partner is presumed, where the partnership is continued, to invest in the new partnership his share of the assets of the dissolved partnership and to take over his share of the liabilities of that partnership. So that even where a partnership is so continued one of the continuing partners has a right to demand a settlement of accounts of the old partnership up to the date of the death of the deceased partner, and he does not lose his right to such an account by reason of his agreement with the surviving partners to continue the partnership. [p. 549, col. 2; p. 550, col. 1.]

Mr. *Kimatrai Bhojraj*, for the Appellant.

Messrs. *Suganlal*, *H. Jeswani*, *Dipchand Chandumal*, for the Respondents.

JUDGMENT.—The appellants in Appeal No. 20 who are the respondents in Appeal No. 25 and one Tolaram father of the respondents in Appeal No. 20 entered into a partnership at Rohri in the name of Gangaram Dholandas & Co., to carry on certain saltpetre contracts at Ludhiana. The partnership commenced in May or June 1915. A regular deed of partnership was executed some months later. Tolaram was a *gumashta* or working partner with a share of 2 annas and 3 pies out of 13 annas and 6 pies. Some time after May, 1915, the firm of Gangaram Dholandas & Co., became amalgamated with another firm carrying on similar business at Kot Ramchand in the name and style of Gellanand Basantram on certain terms and conditions with which for the purposes of this appeal we are not concerned.

On the 8th July 1918, Tolaram died leaving surviving him his four sons the respondents in Appeal No. 20 one of them Ladhoomal being a minor. It does not appear from the record what happened for some months after the death of Tolaram but on 19th November 1918, the respondent No. 1 in Appeal No 20 Tanumal wrote to the appellants Nos. 1 to 3 in Appeal No. 20 a *chit* the relevant portion whereof reads as follows:

"I after due respect write to say that my deceased father Munshi Tolaram was a partner in this concern and his share is 2 annas 3 pies out of 13 annas 6 pies but now as my father Munshi Tolaram has died I bind myself to have the same share on the same terms in his stead and on his behalf. I will pay whatever profits and losses occurred before or after this in proportion to the same share. . . . I agree to pay Rs. 30 a month for the intervening period from the date of my father's death till I join. Therefore, I write this *chit* in order to continue on the partnership for the future."

It appears that nothing further was done till April 1919 when the appellants in Appeal No. 20 met respondents Nos. 1 and 3. Disputes then arose between them respondent No. 1 desiring that his brother respondent No. 3 should work in his stead in the partnership as he himself was employed in Government service and the appellants in Appeal No. 20 contending that the partnership deed which had been prepared should be signed by the respondent No. 1 which the respondent No. 1 refused to do. The result was that the partnership deed was not executed.

On 18th June 1919 respondents Nos. 1 and 3 in Appeal No. 20 served a notice on appellants Nos 1 to 3 wherein it was alleged that the partnership came to an end on the death of Tolaram and that Tolaram and his sons formed a joint Hindu family. A demand was formulated in the said notice for settlement of accounts of the partnership up to the death of Tolaram. The accounts not having been settled the respondents in Appeal No. 20 filed Suit No. 1008 of 1919 in the Court of the Subordinate Judge of Rohri for settlement of partnership accounts as claimed in the notice of 18th June above referred to. The main defence put up in this suit by the appellants in Appeal No. 20 was that the partnership was not dissolved on the death of Tolaram, that the *chit* executed by Tanumal on 19th November 1918 was executed by him in his capacity as eldest surviving member and manager of the joint family consisting of himself and his younger brothers, that the said *chit* was, therefore, binding on the respondents in Appeal No 20 and that by reason of that *chit* which related back to the death of Tolaram the partnership had to be considered as a continuing partnership which had never been dissolved and the business whereof was still being carried on and that the plaintiffs, therefore, could not sue for accounts without suing for a dissolution of the partnership.

The learned Subordinate Judge of Rohri dismissed the suit accepting the defence put up by the appellants in Appeal No. 20 as set out above, discrediting Tanumal's attempts to prove a partition among the brothers subsequent to the death of Tolaram and discrediting also Tanumal's allegation that the *chit* of November 1918, Ex. 118 in the case was of a conditional character and not a complete agreement.

Against this decision the respondents Nos. 2 and 4 in Appeal No. 20 filed an appeal in the District Court, Sukkur being Civil Appeal No. 17 of 1921, the respondent No. 1 and the appellants in Appeal No. 20 were made respondents in that appeal. The learned District Judge accepted the findings of the learned Subordinate Judge as to the jointness of the respondents in Appeal No. 20 and as to the final and binding nature of Tanumal's *chit*, Ex. 118. He, however, held that the *chit* was binding on Tanumal alone that he had executed it in his own name and in his own personal capacity and that, therefore, it had no binding effect on his three brothers respondents Nos. 2—4 in this appeal. He held that Tanumal had by this reason of Ex. 118 disentitled himself from claiming accounts, Nos. 2 and 4 were so entitled. He, therefore, allowed the appeal and in consequence thereof respondents Nos. 2—4 in Appeal No. 20 became entitled to claim from the appellants in Appeal No. 20 an account of the partnership till the death of their father.

Against this decision which would lead to obvious difficulties the appellants have filed this Second Appeal No. 20 of 1923 while Tanumal has filed the companion Appeal No. 25 of 19.3.

Now it appears to us that the important point in these two-connected appeals is as to what was the effect of Tolaram's death upon the partnership between Tolaram and the applicants in Appeal No. 20.

That partnership was governed by the terms of a partnership deed dated 9th November 1915. The deed is not before us but it is agreed on all hands that it was silent with regard to the question as to whether or not the death of any partner resulted in a dissolution of the partnership. There was, therefore, no express contract for a continuation of the partnership after the death of Tolaram. Now s. 253 of the Indian Contract Act, provides that in the absence of any contract to the contrary the relation of partners to each other are to be determined by rules mentioned therein and according to sub cl. (10) of s. 253, Indian Contract Act, a partnership is dissolved by the death of any partner.

Both the lower Courts taking into consideration Ex. 118 and the course of events prior and subsequent thereto have held that an implied contract to continue the partnership must be inferred therefrom, the only difference between the finding of the two Courts below on this point being that whereas the learned Subordinate Judge considered that all the respondents in Appeal No. 20 were parties to that contract and bound by it, the learned District Judge held that the respondent No. 1 alone had agreed to the continuation of the partnership as between the appellants in Appeal No. 20 and himself.

We are inclined to agree with both the lower Courts in their finding that Ex. 118 was a final and complete agreement to continue the partnership from the date of the death of Tolaram. It appears to us that the wording of Ex. 118 is clear and explicit and is not subject to any such condition or conditions as were contended for by the executant Tanumal. With regard to the question as to whether it binds the brothers of Tanumal the executant, we are of opinion that the finding of the learned District Judge that it does not is correct. It appears to us that the absence in Ex. 118 of all reference to the joint family consisting of Tanumal and his brothers, the fact that Tolaram was merely a *gumashta* partner in the firm of Gangaram Dholandas & Co., the fact that there is nothing on the record to show that the joint family consisting of Tanumal and his brothers were between July 1918 and November 1918 treated as partners in the business all show that in executing Ex. 118 Tanumal was not acting on behalf of the joint family of which he was the eldest member and manager but that he was acting merely on his own behalf. The agreement to continue the partnership will, therefore, be binding only on the respondent No. 1, Tanumal in Appeal No. 20. But granting this to be so we do not agree that Tanumal has thereby deprived himself of his right to an account of the partnership till the death of his father Tolaram.

Even regarding the partnership as a continuing one so far as respondent Tanumal is concerned, there is ample authority in our own Court for holding that where a partnership is continued after the death of one of the partners it is technically a new partnership and not the old partnership. In the case of *Parchomal* v. *Pamandas* (1), Crouch, A. J. C., states: "When a partnership is a continuing one, there is, technically, a new partnership formed whenever any partner dies. On the death of such partner, each surviving partner is presumed to invest in the new partnership his share of the assets of the dissolved partnership and to take over his share of the liabilities." Again in the case of *Ramdas* v. *Partabrai* (2) it has been held by another Bench of this Court that where a partnership is continued after the death of one of the partners it is technically a new partnership and not the old partnership. In the present case, therefore, as there was after the death of Tolaram technically a new partnership the old partnership stood dissolved, logically there could be nothing to prevent a settlement of accounts thereof and this is exactly what the respondent in Appeal No. 20 sought in the Original Court. The four respondents as surviving members of a joint Hindu family have an identical cause of action, namely, the dissolution of the partnership caused by the death of Tolaram and the consequent right to claim an account of the said partnership and on the authorities referred to above the respondent No. 1 in Appeal No. 20 does not lose his right to such accounts by reason of his agreement with the surviving partners to continue the partnership.

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(1) 4 Ind. Cas. 600; 3 S. L. R. 108.

(2) 23 Ind. Cas. 771; 7 S. L. R. 85.

We must, therefore, allow Tanumal's Appeal No. 25 of 1923 with costs of both Appellate Courts on the respondents and dismiss with costs throughout the appeal of Gangaram and others No. 20 of 1923. The respondent Tanumal as well as the other three respondents in Appeal No. 20 are granted a preliminary decree for accounts of Tolaram's 2 annas 3 pies share out of 13 annas 6 pies in the partnership business up to the time of Tolaram's death in July 1918. The Court of the Subordinate Judge, Rohri to proceed with the suit according to law.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 440 OF 1924.

February 4, 1926.

Present:—Mr. Justice Devadoss.

ABDUL AMEETH SAHIB—PLAINTIFF—PETITIONER

versus

PONNAMBALA MUTHURIAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 10—Wrong Court, presentation of plaint to—Duty of Court—Finding as to merits, legality of.

Where a Court holds that it has no jurisdiction to entertain a suit, it should not go into the merits of the case but should return it for presentation to the proper Court.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Small Causes, Trichinopoly, dated the 10th December 1923, in Suit No. 1086 of 1923.

Mr. *T. V. Ramamurthy Iyer*, for the Petitioner.

Mr. *N. Swaminatha Iyer*, for the Respondent.

JUDGMENT.—This is an application to revise the order of the Small Cause Judge of Trichinopoly. The Judge found that the Court had no jurisdiction. Having decided that the Court had no jurisdiction, it was not competent for him to go into the merits of the case and give a decision on them. He should have returned the plaint for presentation to the proper Court. I, therefore, set aside the decree of the Small Cause Judge and direct him to return the plaint to the plaintiff for presentation to the proper Court. The plaintiff is responsible for filing the suit in a Court which had no jurisdiction. Therefore the defendant is entitled to costs of the suit incurred in the Small Cause Judge's Court, Trichinopoly. As the revision petition was necessitated by the wrong order of the learned Judge I make no order as to the costs in this Court.

V. N. V.
K. L. *Order set aside.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2974 OF 1925.

February 16, 1926.

Present:—Mr. Justice Campbell.

KARAM DIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MEHR DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Death of owner of property—Possession of one of several heirs beyond his share—Adverse possession in respect of excess.

Where one of the heirs of a deceased person comes to occupy more than his share to the exclusion of the rightful heir of the excess share and alienates it and such alienation is accepted by the conduct of the latter, the possession of the former is adverse to the latter and ripens into ownership if it extends beyond twelve years.

Second appeal from a decree of the Additional District Judge, Lahore, dated the 22nd July 1925, modifying that of the Munsif, First Class, Chunian, dated the 30th November 1922.

Dr. *Nand Lal*, for the Appellants.

Lala *Parkash Chand*, for the Respondents.

JUDGMENT.—The nature of this litigation is described in my judgment dated 20th February 1925, by which the appeal was remanded to the lower Appellate Court. The learned Additional Judge has now come to a fresh decision and has granted the plaintiffs a declaration that the sale so far as 7/8th of the land is concerned shall not affect them but he has dealt with the question at issue somewhat perfunctorily.

The facts have now been further elucidated. The whole of the land in suit originally was owned by Ghulam Nabi who died before the 1892 *jamabandi* was drawn up. From 1892 to 1906 *Musammat* Nur Bhari, widow of Ghulam Nabi, was entered as owner of the land. In 1906, the name of Umar Din is substituted for hers and, apparently, this was done when she married Umar Din. Umar Din died in 1908, and then the estate was mutated half to *Musammat* Nur Bhari and half to Murad Bibi, until 1914 when on the death of *Musammat* Murad Bibi her half was mutated in the name of Pir Bakhsh her grandson. Pir Bakhsh died on the 24th March 1921, and the present suit was instituted on the 18th July 1921. The date of the mortgage of the land in suit by the two widows is given in the *jamabandi* of 1909 as the 26th July of that year.

The all important question was that of limitation. It is argued for the appellants that under Muhammadan Law on the death of Ghulam Nabi, *Musammat* Nur Bhari became entitled to ¼th of the land. Umar Din, the brother, to the remainder, but that Umar Din permitted *Musammat* Nur Bhari to remain in adverse possession and lost his rights before the mutation in his name which was incorporated in the 1906 *jamabandi* Hence it is contended that *Musammat* Nur Bhari has all along been absolute owner of the land in suit. The obstacle to this view is that there is no evidence of what happened beyond the entries in the Revenue Records, and, if it is to be assumed that *Musammat* Nur Bhari previously held adverse possession, it must be assumed that when the land was mutated to Umar Din after her marriage with him, it was because she had gifted her estate to him. The entry in the Revenue Records that Umar Din was the owner raises a presumption in favour of the plaintiffs, which the defendants had to rebut by proving not only that *Musammat* Nur Bhari became owner by adverse possession but that she did not transfer her ownership rights to Umar Din I am unable to hold that the defendants have succeeded in establishing this,

Umar Din was thus the owner of the land in suit, and on his death, according to Muhammadan Law, the two widows were entitled to 1-8th and Pir Bakhsh, his grandson, to the remainder. The two widows, however, took possession and, so far as one-half is concerned, *Musammat* Nur Bhari and her alienees have retained possession. She mortgaged the land in conjunction with *Musammat* Murad Bibi in 1909 and the plaintiffs recognised the mortgage by purchasing the mortgagee rights. In my judgment *Musammat* Nur Bhari held adverse possession against Pir Bakhsh in respect of half of the land from the death of Umar Din in 1908, and when the plaintiffs sued in 1921 the suit was out of time in regard to this one-half. So far as the other one-half is concerned they were entitled to date their cause of action from the death of Pir Bakhsh.

I accept the appeal and set aside the decree of the lower Appellate Court. In lieu thereof the plaintiffs will have a decree declaring that the sale shall not affect them as regards half of the land in suit. The parties will bear their own costs throughout.

R. L. *Appeal accepted.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3308 OF 1922.

September 29, 1924.

Present:—Mr. Justice Pratt.

A. M. ROBERTS—PLAINTIFF

versus

A. D. SHANKS—DEFENDANT.

Negligence—Master, liability of, for negligence of servant—Deviation from instructions—Course of employment.

The defendant drove in his car to the Railway Station and gave the driver instructions to take the car back to the garage. The driver instead of taking the car to the garage direct went first to his own house, had his evening meal there and then drove to the garage. While driving to the garage the car collided with the plaintiff's car and it was found that the accident was due to the negligence of the defendant's driver. In a suit by the plaintiff to recover damages from the defendant:

Held, that the defendant's driver had deviated from the instructions of the defendant in going home for his meals, but inasmuch as at the time of the accident he was carrying out the defendant's instructions and was driving to the garage, he was at the time of the accident acting in the course of his employment and was not on a frolic of his own and that, therefore, the defendant was liable. [p. 553, col. 1.]

Sanderson v. *Collins*, (1904) 1 K. B. 628; 73 L. J. K. B. 358; 52 W. R. 354; 90 L. T. 243; 20 T. L. R. 249 and *Storey* v. *Ashton*, (1869) 4 Q. B. 476; 10 B. & S. 337; 38 L. J. Q. B. 223; 17 W. R. 727, distinguished.

Mr. *M. V. Desai*, for the Plaintiff.

Mr. *F. S. Taleyarkhan*, for the Defendant.

JUDGMENT.—This is a suit by the plaintiff for damages for injury done to her car in a collision due to the negligence of the driver of the defendant's car.

The defendant pleads contributory negligence and also that the collision was due to the negligence of the plaintiff's driver, and accordingly supplements his written statement by a counter-claim for damages

The accident occurred on January 13, 1922, at 9 30 P. M. The plaintiff's car is an Overland car and her husband was being driven in it to Mahim. Mr. Roberts was seated on the rear of the car and the driver was in the front seat driving. The accident occurred opposite the Church-Gate Street Station. Mr. Roberts did not actually see how the accident occurred, but he saw the defendant's car 60 or 70 yards ahead driven at great speed. He looked down to arrange some parcels of provisions, which were rolling about at the bottom of the car, and the next thing that he knew was that the defendant's car had crashed into his. The driver, however, did see how the accident occurred and he says that he was driving at a moderate pace of twelve or fifteen miles per hour along the right side of the road, *i. e*, along the west side of the Queen's Road, when the defendant's car approached him in the opposite direction. He says the defendant's car was driven very fast at a speed of 25 to 30 miles per hour and that it was driven in a very irregular manner zigzagging across the road. When the defendant's car came nearer, he says it swerved to the west on to him, and then he did the only thing possible, by swerving his own car to the east, but not in time to avoid the collision. The defendant's driver on the other hand admits that he was driving at 15 to 20 miles per hour, but he says that he was driving on his proper side of the road, *i. e.*, the east side of the Queen's Road. He says the plaintiff's car approached him from the south at a rate of 20 to 25 miles an hour, and that the plaintiff's car swerved suddenly to east. He stopped his car, but it was not in time to avoid the collision and that the plaintiff's car hit his.

[While discussing the evidence whether the accident had happened owing to the negligence of the driver of the plaintiff or of the defendant, his Lordship came to this conclusion :—]

There is no evidence to support the plea of contributory negligence. It is suggested that the plaintiff's driver swerving to the right contributed to the accident, but I do not think it did. The plaintiff's driver could do nothing else when the defendant's car swerved on to his right but to turn. He could not turn to the left, because, if he had, the cars would certainly have met, and, therefore, the only chance of escape was turning to the right and he, therefore, took the only course possible. I think that the accident was solely due to the negligence of the defendant's driver.

It is suggested that the defendant is not responsible for the negligence of the driver on the ground that the driver was not then acting in the course of his employment. Now the facts are that the defendant had employed his driver to drive him to Bori Bunder Station. The defendant left his driver there at 8-30 P. M. with instructions to take the car back to the Wellington Mews. The driver instead of taking the car to the Wellington Mews went to his own house somewhere in Princess Street, had his evening meal there, and at the time of the accident was driving from his home in Princess Street to the Wellington Mews. It is suggested that because the driver had disobeyed his master's instructions to go straight from Bori Bunder to the Wellington Mews, the defendant is not liable. The following two cases were cited in support: *Sanderson* v. *Collins* (1) and *Storey* v. *Ashton* (2).

The facts in this case are distinguishable from *Sanderson* v. *Collins* (1) in that there the coachman had taken the carriage out for his own purposes, whereas here the driver had taken the car out on defendant's instructions and had been left in charge of the car by the defendant. In *Storey* v. *Ashton* (2) the accident occurred after the driver's employment in his master's business had terminated for although he had nearly returned home he drove off after business hours on an errand of a third person. Here the defendant's servant, no doubt, deviated from the instructions of the defendant in going home for his meals, but at the time of the accident he was carrying out the defendant's instructions and was driving to the Wellington Mews in order to garage his car. It is quite clear, therefore, that at the time of the accident the defendant's servant was acting in the course of his employment, and was not on a frolic of his own.

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(1) (1904) 1 K. B. 628; 73 L. J. K. B. 358; 52 W. R. 354; 90 L. T 243; 20 T. L. R. 249.

(2) (1869) 4 Q. B. 476; 10 B. & S. 337; 38 L. J Q. B. 223; 17 W. R. 727.

The only other point remaining is the qustion of damages claimed for the injury to the car. This is proved by Hyland's bill which amounts to Rs. 2,050-2-3 and for loss of use of the car during the two months it was under repairs. The damages for loss of use the plaintiff estimates on the footing of what might have been the earnings of a taxi-cab, which she used as a private car, during that period. She estimates this amount at Rs. 25 per day, but there are no regular accounts to corroborate this figure. She also says that she could have hired a car at the time as a substitute for Rs. 20 a day including chauffeur's wages and petrol. Chauffeur's wages and petrol would not enter into the account because these were expenses which would be incurred in any case. I think the fair amount to allow for the loss of the use of the car is a sum of Rs. 10 a day for the 61 days.

There will be a decree for the plaintiffs for the sum of Rs. 2,660-2-3 with costs and interest on judgment at 6 per cent.

Counter-claim dismissed with costs.

Z. K. *Suit decreed*

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 20 AND 21 OF 1924.

July 15, 1925.

Present:—Sir B. K. Mullick, KT., Acting Chief Justice, and Mr. Justice Kulwant Sahay.

DEBI PRASAD—PLAINTIFF—APPELLANT

versus

JALDHAR MAHTON AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Decision in previous case wrong—Cause of action recurring*—Res judicata.

It is settled law that even if the cause of action for a suit be a recurring one every matter decided in the suit may be *res judicata* which was directly and substantially in issue in the previous suit even though the decision in the former suit be erroneous.

Ram Lal Malik v. *Deodhari Rai*, 74 Ind. Cas. 781; 2 Pat. 771; 5 P. L. T. 7; A. I. R. 1924 Pat. 265, followed.

Appeals against a judgment of Mr. Justice Das, dated the 27th November 1924, modifying a decision of the Additional Subordinate Judge, Patna, dated the 5th September 1921, confirming that of the Munsif, Barh, dated the 21st March 1921.

Mr. *B. C. Sinha*, for the Appellant.

Mr. *Murari Prasad*, for the Respondents.

JUDGMENT.

Mullick, Actg. C. J.—A suit for rent for the years 1315 to 1317 *Faslis* was brought by the appellant against the respondents or their predecessors in the year 1910 in the Court of the Munsif of Barh. The plaintiff alleged that the defendants were his *raiyats* and were liable to pay *chauraha* rent which is rent paid in rice.

The Munsif found that the defendants were the plaintiff's *raiyats* but that they were not liable for the rent inasmuch as the plaintiff had omitted to show them as his *raiyats* in Part II of a road cess return which he had filed in the course of a previous re-valuation. He accordingly dismissed the suit.

The case was finally taken on appeal to the High Court, and in 1917 Mr. Justice Atkinson affirmed the Munsif's finding and held that s. 20 (*b*) of the Road Cess Act was a bar to the plaintiff's claim.

The rents for the years 1318 to 1321 *Faslis* have become barred by limitation and the present suit is brought for the years 1322 to 1325 *Faslis*.

The defence taken by the tenants is that the judgment in the previous case raises a bar under s. 11 of the C. P. C.

The Munsif, and the District Judge in appeal, both decided against the defendants' contention and decreed the plaintiff's suit.

In second appeal Mr. Justice Das has found that Mr. Justice Atkinson's decision, even if it was erroneous, was *res judicata* and that the present suit cannot succeed.

Since the judgment of Mr. Justice Atkinson in the previous suit it has been held by a Division Bench of this Court that it is immaterial whether a landlord in his cess re-valuation return enters a *raiyat's* land in Part I or Part II and that so long as the land is contained in the return the landlord is entitled to recover his rent. Assuming, therefore, that Mr. Justice Atkinson's decision was wrong the question is whether s. 11 of the C. P. C. makes that decision *res judicata* for the purposes of the present suit. The question depends on whether the point now in issue was directly and substantially in issue in the previous suit. It does not appear from anything that has been said in the judgments of the Courts below that the matter was not raised in the previous suit or that it was only incidentally raised; nor has the learned Vakil for the appellant to-day shown us anything from the pleadings in the previous suit which would lead us to hold that the issue was not identical in the two cases or that it was not directly and substantially raised. He rests his argument before us almost entirely upon the fact that the view of the Cess Act taken by Mr. Justice Atkinson has been pronounced to be wrong by a later decision of this Court and he contends that an erroneous decision on a point of law can never be *res judicata.*

This point has been considered in *Ram Lal Malik* v. *Deodhari Rai* (1) and unless we are prepared to make a reference to a Full Bench we must follow that judgment. In my opinion that reasoning contained therein is correct and the present suit is barred by *res judicata.* It is now settled that even if the cause of action for a suit is a recurring one every matter decided in the suit may be *res judicata* which was substantially and directly in issue.

The result is that the appeal will be dismissed with costs.

This judgment will also govern Letters Patent Appeal No. 21 of 1924.

Kulwant Sahay, J.—I agree.

R. L. *Appeal dismissed.*

(1) 74 Ind. Cas. 781; 2 Pat. 771; 5 P. L. T. 7; A. I. R. 1924 Pat. 265.

LAHORE HIGH COURT.

CIVIL APPLICATION NO. 185 OF 1924.

November 21, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

Rai Sahib Pandit WAZIR CHAND TRIKHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

NATHU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Value of property involved—Affidavit, value of.

Where on an application for leave to appeal to the Privy Council, the petitioner files an affidavit that the value of the property in dispute exceeds Rs. 10,000 and there is no counter affidavit by the respondent, the Court may assume the correctness of the affidavit filed by the petitioner.

Petition, under s. 110, C. P. C., and s. 29 of the Letters Patent, for leave to appeal to His Majesty in Council from the judgment of the Lahore High Court, in Letters Patent Appeal No. 16 of 1923.

Pandit *Sheo Narain*, R. B., for the Petitioners.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—There is before us an affidavit by the petitioners that the decree involves a claim respecting property exceeding ten thousand rupees in value. There is no counter affidavit by the respondents, and we consider that a substantial question of law is involved in the appeal, we accordingly order the issue of the certificate prayed for.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 20 OF 1923.

November 13, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

RYALI BRAHMAYYA AND ANOTHER—APPELLANTS

versus

DRONAMRAJU VENKATASURYA NARAYANAMURTHY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Scheme—Provision for redress by application to Court, legality of—Application by archakas *for salary payable by trustee, whether sustainable.*

A general clause in a scheme framed under s. 92, C. P. C., providing for application to the Court with regard to the scheme is *ultra vires* as being opposed to the principle of s. 92, C. P. C., since for such matters as are covered by the section, the sanction of the Advocate-General must be obtained. [p. 555, col. 2.]

An application by *archakas* of a temple to a Court for recovery of the arrears of their salaries is not competent even if the scheme provides for making an application to the Court by the trustee or any other person interested in regard to any matter arising out of the scheme. The proper remedy in such a case is by way of a regular suit. [p. 555, col. 1.]

Appeal against an order of the Court of the Subordinate Judge, Narasapur, dated the 6th September 1922, and made in I. A. No. 255 of 1922, in O. S. No. 46 of 1918, Mr. *A. Satyanarayana*, for the Appellants.

Mr. *V. Suryanarayana*, for the Respondent.

JUDGMENT.—The appellants who are *archakas* of a temple applied to the Subordinate Judge of Narasapur to direct the defendant trustee, to pay them their salary due for seven months. The Subordinate Judge dismissed their application and they prefer this appeal.

The contention of the appellants is that there is a provision in the scheme for an application of this kind and, therefore, the Subordinate Judge was wrong in refusing their prayer. Paragraph 14 of the scheme is as follows:—

"Liberty to apply to the Court is hereby granted to the trustee or to any person interested in regard to any matter arising out of this scheme or seeking any modification thereof."

The appellants are only *archakas* of the temple. If the trustee does not pay their salary, their remedy is by a suit. If the contention of the appellants is to be upheld it would mean that a Court is to administer the trust-estate in which a scheme is framed—could it be said that a person who gives credit to the trustee for temple expenses is entitled to apply to the Court, to direct the trustee to pay the amount due to him? We are clearly of opinion that the appellants have mistaken their remedy and they have no right to move the Court by virtue of para. 14 of the scheme already referred to, to apply to the Court for relief.

The appellants rely upon *Prayag Doss Ji Varu* v. *Tirumala Srirangacharlavaru* (1), *Damodarbhat* v. *Bhogilal* (2) and *Prayaga Doss Jee Varu* v. *Tirumala Purisa Srirangacharryulu* (3). In view of the recent pronouncement of their Lordships of the Privy Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (4) the above decisions cannot be considered good law; and it is unnecessary to consider that question, as the appellants do not ask for execution of the decree wherein the scheme is set out but for reliefs, in respect of services rendered to the temple. Granting that para. 14 gives power to persons interested in the scheme to apply to the Court for relief, the appellants are not persons who come within its purview. In this connection we are constrained to observe that a general clause in the scheme providing for application to the Court with regard to the scheme is *ultra vires*. No doubt such a clause was put in many schemes and such clause is opposed to the principle of s. 92 C. P. C. For such of the matters as are covered by s. 92, the sanction of the Advocate General is to be obtained. By the introduction of a clause in the scheme that applications for the removal of the trustee and for the framing of a new scheme can be made to a Court, s. 92 C. P. C. is practically given the go-by.

The introduction of such a clause will throw upon the Court not only the heavy burden of deciding petty applications of a vexatious nature but also of practically administering the trust institution. The Court should as far as possible be saved the trouble of directly or indirectly interfering with the internal management of temples and trust properties. It is not the function of a Civil Court to concern itself with the management of any institution except in so far as it is permitted by the C. P. C. In *Ayinaville Narayanamurthi* v. *Bulusu Achayya Sastrulu* (5) the learned Judges observe at page 691 "It is far from desirable that Courts should assume themselves the continued supervision of institutions, for the management of which they are called upon to frame schemes". They further remark "We are disposed to consider, though in the view we are taking, it is unnecessary to decide the point, that such decrees are really *ultra vires* having regard to the express provisions of s. 92 of the C. P. C., which makes it imperative that for the purpose of getting, certain reliefs in respect of public charities suits should be instituted by persons interested after getting the sanction of the Advocate-General". *Ayinaville Narayanamurthi* v. *Bulusu Achayya Sastrulu* (5) was followed by Spencer and Madhavan Nair, JJ. in C. M. A. No. 75 of 1925.

The cause of action of the appellants is purely a private one and it has nothing to do with the scheme and, therefore, their application was rightly dismissed by the lower Court.

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(1) 28 M. 319; 15 M. L. J. 133.

(2) 24 B. 45; 1 Bom. L. R. 509; 12 Ind. Dec. (N. S) 567.

(3) 31 M. 406; 4 M. L. T. 92.

(4) 87 Ind. Cas. 313; 49 M. L. J. 25; 23 A. L. J. 555; A. I. R. 1925 P. C. 155; L. R. 6 A. (P. C.) 117; (1925) M. W. N. 474; 2 O. W N. 535; 41 C. L. J. 628; 22 L. W. 246; 27 Bom. L. R. 872; 30 C. W. N. 459 (P. C.).

(5) 85 Ind. Cas. 188; 20 L. W. 687; at p. 691; 47 M. L. J. 714; A. I. R. 1925 Mad. 411.

The appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*
R. L.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 124 OF 1923.
June 24, 1925.
Present:—Mr. Justice Das and Mr. Justice Ross.
LACHMAN SAHAY AND OTHERS—DEFENDANTS—APPELLANTS
versus
GAURI CHARAN MAHTON AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Occupancy holding, non-transferable, transfer of—Rent, suit for, whether lies—Suit by transferee for declaration that rent-decree is void, maintainability of.

Where an occupancy tenant of a non-transferable holding transfers such holding, the landlord may, if he chooses, ignore the sale and bring a rent suit as against his tenant, and in execution of the decree obtained in such suit proceed to bring the holding to sale.

In such a case the transferee of the holding has no *locus standi* to maintain a suit for a declaration that the decree obtained by the landlord is invalid.

Appeal against a decision of the Subordinate Judge, Patna, dated the 16th September 1923, reversing that of the Munsif, Barh, dated the 18th March 1922.

Mr. *Shiveshwar Dayal*, for the Appellants.

Mr. *Bimala Charan Sinha*, for the Respondents.

JUDGMEMT.

Das, J.—There is a deficit Court-fee of Rs. 80-4-0 due from the plaintiffs-respondents on their plaint and on their memorandum of appeal in the Court below. They are given seven days' time to make good the deficiency; if they fail to do so their suit in the Court of first instance will stand dismissed and the appeal in this Court will stand decreed with costs in all the Courts.

I now proceed to deal with the case on the understanding that the deficiency will be made good. The plaintiffs, who are respondents before us, sued the appellants, the defendants first party, for a declaration that, "the decree passed on the 30th of March, 1920 in Rent Suit No. 1964 of 1919 and the auction sale held on the 15th of November, 1920 in Execution Case No. 861 of 1920 are irregular, against the provisions of law and fraudulent and are fit to be set aside and rendered *null* and *void*."

The facts, are these. The defendants second party had a holding of 5 *bighas* of *kasht* land under the defendants first party. They transferred the entire holding to the plaintiffs. Thereafter the landlords brought a rent suit as against the defendants second party, obtained a decree against them, proceeded to execute the decree, and in due course purchased the holding at a sale held in execution of their decree.

The plaintiffs contend that there is a custom of transferability of occupancy holdings in the village and that the decree obtained by the landlords against the defendants second party is fraudulent and not binding upon them. The Court of first instance found that there was no custom of transferability of occupancy holdings in the village. The learned Judge in the Court below has not gone into that question, but he has come to the conclusion that assuming that the decision of the Court of first instance on this point is right, the plaintiffs are still entitled to succeed on the ground that the decree obtained by the landlords as against the defendants second party was fraudulent. In my opinion the decision of the learned Subordinate Judge cannot be supported. If there is no custom of transferability of occupancy holdings in the village, the plaintiffs have no cause of action and their suit should be dismissed on that ground. The learned Subordinate Judge was under the impression that the landlords had to bring a suit for ejectment as against the purchaser. In my opinion this is not right. The landlords may if they choose ignore the sale and proceed to bring a rent suit as against their tenants. This is the course which they adopted; and they are undoubtedly entitled to succeed unless it be established that there is a custom of transferability of occupancy holdings in the village.

I must set aside the judgment and the decree passed by the Court below and remand the case to that Court for disposal of the question as to the custom of transferability of occupancy holdings in the village. This judgment will not be signed by us until the 30th of this month. Costs will abide the result and will be disposed of by the lower Appellate Court.

Ross, J.—I agree.

Z. K. *Case remanded.*

LAHORE HIGH COURT.

Miscellaneous Second Civil Appeal No. 1982 of 1925.
February 22, 1926.
Present:—Mr. Justice Dalip Singh.
Musammat MANGLI and others—Defendants—Appellants
versus
POHU RAM and others—Plaintiffs—Respondents.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 4 23—Appeal by one of plaintiffs only—Question, whether plaintiffs were collaterals—Finding that appellant was collateral—Remand of entire case, legality of.

Where in a suit for possession of property by several plaintiffs as collaterals of the last owner, only one of the plaintiffs appeals with regard to his own share and the sole question to be determined in appeal is whether the appellant was a collateral of the deceased, a finding of the Appellate Court that the appellant was a collateral of the deceased, on the basis of a pedigree-table covering the case of all the plaintiffs, does not empower the Court to remand the whole case, including that of the plaintiffs who have not appealed. The terms of O. XLI, r. 4, C. P. C., do not apply to such a case.

Miscellaneous second appeal from an order of the District Judge, Ferozepore, dated the 9th June 1925, reversing that of the Sub-Judge, Third Class, Ferozepore, dated the 4th December 1924.

Mr. *Shamair Chand*, for the Appellants.

Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—The sole point in this appeal is whether O. XLI, r. 4, applies to the facts of this case, and whether under that rule the District Judge had power to remand the whole case for decision. It appears that four plaintiffs sued for possession of certain property on the ground that they were the collaterals of the last male owner Munshi Ram and that one *Musammat* Mangli, who claimed to hold as the widow of Ram Chand, had no right to possession of the property.

The Trial Court found that the plaintiffs had not proved that they were collaterals of Munshi Ram and dismissed the suit. This was the only issue decided by the Trial Court, though four other issues had also been framed.

One of the plaintiffs Pohu Ram appealed to the District Judge only to the extent of his share. He paid Court-fee only to that extent. The learned District Judge came to the conclusion that the pedigree table propounded by the plaintiffs had been proved, and accepted the appeal of Pohu Ram and remanded the whole case for decision on the ground that the decision proceeded on a point common to the case of all the plaintiffs. The defendants have appealed against the remand of the whole case.

In my opinion it is clear that the terms of O. XLI, r. 4, do not apply to this case. The issue was whether the plaintiffs were or were not collaterals of Munshi Ram. Now, it is perfectly open to the Courts to hold that Pohu Ram was a collateral without proceeding to decide whether the other plaintiffs were or were not collaterals. It is true that the pedigree-table propounded covered the case of all the plaintiffs, but it was not necessary for the purposes of the appeal of Pohu Ram to decide whether the whole of that pedigree-table was correct. It was perfectly sufficient to hold that *qua* Pohu Ram it was correct. The rights of the collaterals were clearly separate rights with regard to their own shares and I cannot hold that the learned District Judge was empowered by the mere fact that he accepted the whole of the evidence originally led by the plaintiffs to prove their case to confer jurisdiction on himself to remand the whole case including that of the plaintiffs who had not appealed. There has been a change in the present Code and the words are no longer " decision appealed against," but decree appealed from, and further it is laid down that " any one of the plaintiffs may appeal from the whole decree and thereupon the Appellate Court may reverse etc." In this case there was no appeal from the whole decree. It does not, in my opinion, make any difference that the grounds of the appeal cover the whole decision.

I, therefore, accept this appeal and vary the order of the learned District Judge to this extent that the case will be remanded for decision on the remaining issues only as to the share of Pohu Ram, namely, one-third. The respondents shall pay the costs of the appellants for this appeal. The other costs will abide the event.

R. L. *Appeal accepted.*
N. H.

MADRAS HIGH COURT.

Civil Revision Petition No. 30 of 1925.
September 8, 1925.
Present:—Mr. Justice Jakson.
N. K. GOVINDAN NAIR—Petitioner
versus
KANHIRATHOTIKAYIL ITHALUTTY—Respondent.

Court Fees Act (VII of 1870), ss. 7 (1), 17—Redemp-

tion of kanom, *suit for—Damages, claim for—Court-fee payable.*

Where in a suit for redemption of a *kanom*, the plaintiff seeks to deduct from the *kanom* amount certain damages to which he claims to be entitled, he is bound to pay Court-fee not only on the *kanom* amount but also an *ad valorem* fee on the amount claimed as damages.

When damages are sued for, s. 7 (1) of the Court Fees Act must apply, and redemption and damages are two distinct subjects as contemplated by s. 17.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Additional District Munsif, Calicut, in I. A. No. 1123 of 1924, in O. S. No. 286 of 1923.

Mr. *K. P. Ramakrishna Iyer*, for the Petitioner.

Mr. *A. Parameshwara Iyer*, for the Respondent.

JUDGMENT.—Petitioner is plaintiff in O. S. No. 286 of 1923 on the file of the Court of the Additional District Munsif of Calicut. He sues to redeem certain land granted on *kanom* and seeks to deduct from the *kanom* amount certain damages to which he claims to be entitled. The question is whether he need pay Court-fee only on the *kanom* amount, or whether as held by the lower Court, he must also pay an *ad valorem* fee on the amount claimed as damages.

The petitioner relies upon *Eacharan Pattar* v. *Appu Patter* (1) but there it was simply a question of taking an account of rents due on the original contract. Here, there is the additional cause of action that the defendant committed a tort. *Reference under Court Fees Act*, s. 5 (2) is also a question of rents. I do not think that petitioner can draw any useful analogy between improvements and damages. Improvements are specially provided for in Madras Act (I of 1900) and it was early held that they would not affect the Court-fee. *Zamorin of Calicut* v. *Surya Narayana Bhatta* (3) I find no authority for extending this principle to damages; and it cannot be said to be intended by the phrase "or otherwise" in s. 6 (2), Madras Act (I of 1900).

The petitioner also contends that this is a mortgage suit in which any question of damages must necessarily be only one of account. The only authority he can cite is the observation in *Ragavaji Sait* v. *Annamalai Mudali* (4) (which was not a mortgage suit but a suit between principle and agent:) "Even if this suit be regarded as a suit for damages based on fraud and not as a suit for account." I agree with the lower Court that when damages are sued for s. 7 (1) of the Court Fees Act must apply and redemption and damages are two distinct subjects as contemplated by s. 17.

The petition is dismissed with costs.

Note.—The petitioner says that he relied upon *Parasurama Pattar* v. *Venkatachalam Pattar* (5), *Thekkemannengath Raman* v. *Kakkesseri Pazhiyot Manakkal* (6) and not upon *Ragavaji Sait* v. *Annamali Mudali* (4). These two cases deal with the point whether (1) a claim for rent (2) a claim for damages for breach of contract are barred at the time of redemption. I did not and do not consider that these rulings affect the question.

V. N. V. *Petition dismissed.*

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(1) 19 M. 16; 6 Ind. Dec. (N. S.) 715.
(2) 14 M. 480; 5 Ind. Dec. (N. S.) 335.
(3) 5 M. 284; 2 Ind. Dec. (N. S.) 198.
(4) 17 M. L. J. 625.
(5) 21 Ind. Cas. 701; 25 M. L. J. 561; (1914) M. W. N. 198.
(6) 27 Ind. Cas. 989; 28 M. L. J. 184; 2 L. W. 433.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1357 OF 1922.

June 9, 1925.

Present:—Mr. Justice Das and Mr. Justice Ross.

RAM LAL SINGH—PLAINTIFF—APPELLANT

versus

Musammat SEPTI—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 70—Mortgage—Execution admitted—Proof, necessity of—Executant pardanashin lady—Consideration, proof of.

Admission of execution of a document dispenses with necessity of its proof. [p. 559, col. 1.]

But where the defendant executant of the deed is an illiterate *pardanashin* lady the mere admission of her execution of the document is not sufficient to dispense with the necessity of proving the passing of consideration. [*ibid.*]

Appeal against a decision of the Subordinate Judge, Patna, dated the 25th July 1922, reversing that of the Munsif, Barh, dated the 3rd December 1921.

Mr. *A. K. Ray*, for the Appellant.

Mr. *S. M. Niamutullah*, for the Respondent.

JUDGMENT.

Ross, J.—This is an appeal by the plaintiff in a suit on mortgage. The Trial Court passed a decree for money holding that the mortgage-bond had not been proved as a mortgage. The learned Subordinate Judge held that the plaintiff was not entitled to a decree and decided the cross-appeal in favour of the defendant holding that no consideration passed.

With regard to the question of proof of the mortgage-bond it was contended on behalf of the appellant that the learned Subordinate Judge had erred in law. There was a clear admission of execution in the written statement. All the attesting witnesses were summoned but only one appeared and his statement was that the executant did not sign the deed in his presence. The plaintiff was, therefore, entitled to prove the execution by other evidence. The learned Subordinate Judge referred to the decision of this Court in *Hira Bibi* v. *Ramdhan Lal* (1) as laying down the proposition that where evidence is adduced which shows that the deed was not properly attested, an admission of the execution will not have the effect of establishing the document. It is true that there are remarks to that effect in the course of the judgment, but the decision followed the decision of the Calcutta High Court which laid down that admission of execution dispenses with the necessity of proof. Consequently in view of the clear admission of execution in the written statement it must be taken that this document was sufficiently proved.

But the question still remains whether any consideration passed and, on this point, there is a finding of fact against the appellant. It is contended that the burden of proof was wrongly thrown upon the plaintiff in view of the fact that there was an earlier admission by the defendant that she had borrowed this money from the plaintiff to pay off a rent decree. But that admission was made in the plaint in a contribution suit in which the present plaintiff was, according to the finding of the Court below, acting as agent on behalf of the defendant. Consequently the admission cannot have its natural effect inasmuch as it is practically the statement of the agent, *i. e.*, the plaintiff. The defendant is an illiterate *pardanashin* lady and the mere admission of her execution of the document is not sufficient to dispense with the necessity of proving the passing of consideration. In my opinion the learned Subordinate Judge was right in his treatment of the alleged admission in the plaint in the contribution suit, and there was no error of law in this part of his judgment. Consequently this appeal is concluded by the finding of fact and must be dismissed with costs.

As there is a deficit Court-fee due on the cross-appeal in the Court below, the defendant will not be allowed to execute the decree for costs until the deficit is made good.

Das, J.—I agree.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

First Civil Appeal No. 1303 of 1921.

February 16, 1925.

Present:—Mr. Justice Fforde and Mr. Justice Abdul Raoof.

LACHHMI NARAIN—Defendant—Appellant

versus

MOHAMMADJI and others—Plaintiffs—Respondents.

Custom v. *personal law—Alienation—Presumption—*Tarkhans *of Hassan Abdal, Attock District.*

In the case of a person who is not a member of an agricultural tribe and whose main occupation is not agriculture, there is no initial presumption against a free power of alienation. [p. 560, col. 1.]

In matters of alienation the *tarkhans* of Hassan Abdal in the Attock District are governed by their personal law and not by custom. [p. 560, col. 2.]

First appeal from a decree of the Senior Sub-Judge, Campbellpur, dated the 29th April 1921.

Messrs. *M. S. Bhagat* and *Dev Raj Sawhney*, for the Appellant.

Messrs. *L. C. Mehra* and *Devi Dayal*, for the Respondents.

JUDGMENT.—This is a suit for a declaration that a mortgage executed by the defendant Mohammad Ghaus on the 18th August 1920 shall not affect the reversionary rights of the plaintiffs.

The Trial Court has granted a decree for the declaration sought. The case now comes before us on appeal from that decision. In the Court below the plaintiffs claimed that the mortgage in question was void inasmuch as the mortgagor was a minor at the time of executing the deed. They further contended that the parties were governed by custom, and that the property being ancestral Mohammad Ghaus had no absolute power of disposal. The defendant Lachhmi Narain; the mortgagee in question, on the other hand, contended that even if Mohammad Ghaus was a minor at the date in question the plaintiffs were estopped from setting up his minority to avoid the transaction, inasmuch as they had themselves benefited by it as they had received one-half of the mortgage money to redeem a prior mortgage made by Mohammad Ghaus to themselves in May 1920.

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(1) 62 Ind. Cas. 540; 6 P. L. J. 465; 2 P. L. T. 752; (1922) Pat. 42; 4 U. P. L. R. (Pat.) 3; A. I. R. 1922 Pat. 70.

In the course of the arguments before us, however, Mr. Lal Chend Mehra for the respondents admitted that if custom is not established his case must fail. It is, therefore, only necessary to decide whether or not the parties are governed by custom or by Muhammadan Law in matters of alienation.

The parties are not members of an agricultural tribe nor is their main occupation agriculture, and there is, therefore, no initial presumption against free power of alienation. The evidence shows that Mohammad Ghaus is a shop-keeper dealing in shoes, *lungis* and caps, while his father used to work at a water-mill as a carpenter.

As there is, therefore, no presumption in favour of a restricted power of alienation it is necessary for the plaintiffs to prove a special custom in this respect. The Court below has held that a special custom restricting alienation has been proved, but it has based its decision on two cases in the High Court the first being No. 933 of 1911 decided in 1914 and the other No. 1582 decided in 1920. The former of these two cases decided merely that custom in this particular family governed the parties in a particular mode of succession to property and did not decide any point of custom in respect of alienation. The decision of the High Court in the other case was confined to dismissing an appeal from the District Judge on the ground that there was no certificate, and the decision of the District Judge in favour of custom restricting alienation was itself based on case No. 933 of 1911, which, as we have already pointed out, had nothing to say as to alienation. We may also point out that the first Court in that case had held that the parties were not governed by custom and it referred to Suit No. 630 of 1914 (*Fazal Ilahi* v. *Umar*) decided on the 11th December 1914 in which it was decided that *tarkhans* of the same village to which the parties belong were not governed by custom in respect of alienation.

The evidence in the present case directed to proving a special custom in restriction of alienation consists of the testimony of two witnesses, namely, Mohammad Kassam (P. W. No. 3) and Husain Bakhsh (P. W. No. 4) Mohammad Kassam states that Mohammad Ghaus is dealing in shoes, *lungis* and caps and that his father worked as a carpenter. In respect of the matter of custom he says as follows:—"We follow custom. Two cases went up to High Court." In other words he bases his view that the parties follow custom by reference to the two cases which we have already discussed.

Husain Bakhsh uses almost the identical expression used by this previous witness in attempting to prove custom. He says "We follow custom. In two cases *tarkhans* of Hassan Abdal have been declared as following custom." These are the same two cases referred to by the previous witness.

It is quite clear upon the evidence in this case that no special custom restricting parties in matters of alienation has been established. We must accordingly hold that personal law applies according to which the alienation by Mohammad Ghaus could not be challenged by the plaintiffs.

Although it is not necessary to decide the question as to whether or not Mohammad Ghaus was a minor when he effected the mortgage in question we have no doubt that he was in fact under 21 years of age; but we are also of opinion that the plaintiffs in view of their conduct are estopped from relying upon this fact to attack the mortgage executed in favour of Lachhmi Narain.

For these reasons we accept this appeal and setting aside the decree of the Trial Court dismiss the suit with costs.

Z. K. *Appeal accepted.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 179 OF 1923.
July 23, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

DATTATRAYA KESHAV NAIK—
PLAINTIFF—APPELLANT
versus
GANGABAI NARAYAN NAIK—
DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), ss. 3, 35, 87—

Registration of document—Death of one of two executants—Admission of execution by surviving executant and widow of deceased executant—Registration, validity of—"Representative", definition of, whether exhaustive.

One of the two executants of a deed died before the deed could be registered. After his death a fresh clause was added to the deed giving a more detailed description of the properties to which the deed referred. This fresh clause was signed by the surviving executant and by one of the widows of the deceased executant, who signed as the guardian of the sons of the deceased who were infants and whose own mother was also alive. The document was then registered on an admission of execution by the surviving executant and the widow of the deceased executant who had signed the additional clause:

Held, (1) that the widow of the deceased who had signed the additional clause was a representative of the deceased executant within the meaning of s. 35 of the Registration Act and that the registration was, therefore, valid;

(2) that even if the widow was not a representative of her deceased husband within the meaning of s 35 the error of the registering officer in accepting her as such was only a defect in the procedure which was not sufficient to invalidate the registration.

The definition of the word "representative" as given in s. 3 of the Registration Act is not exhaustive.

First appeal from the decision of the First Class Subordinate Judge at Thana, in Suit No. 310 of 1921.

Mr. *G. S. Rao*, for the Appellant.

Mr. *G. N. Thakor* (with him Messrs. *B. R. Damle* and *R. A. Jahagirdar*), for Respondent No. 4.

Messrs. *K. A. Padhye* (*S. D. Sapre*, appeared) and *M. K. Thakore*, for Respondents Nos. 5 and 8.

Mr. *W. B. Pradhan*, for Respondent No. 7.

JUDGMENT.

Macleod, C. J., and Coyajee, J. gave separate judgments dismissing the appeal on its merits.

Coyajee, J., remarked:—It was, however, contended before us, on behalf of the plaintiff, that the document Ex. 67 was not registered in accordance with the provisions of s. 35 of the Indian Registration Act, 1908, it did not, therefore, affect any of the properties comprised therein, and was not receivable in evidence. The facts material to a correct appreciation of this contention are briefly these. On April 13, 1890, Keshav and Gopinath signed the document and it was also duly attested. In May 1890 Keshav died, before the document was registered. On August 11, 1890, a fresh clause was added giving a more detailed description of the properties. This was signed by Gopinath for himself, and Bai Gopikabai, the widow of Keshav, as the guardian of the plaintiff and his brother Shripal, both of whom were then infants. This was attested by the same set of attesting witnesses. The document was then duly registered. It is contended that it was not competent to Gopikabai, who was the step-mother of the plaintiff and Shripad to represent them, for their own mother Bhagirathibai was then, and is still, alive, and that this circumstance renders the registration invalid. The Trial Judge has, in para. 23 of his judgment, given his reasons for rejecting this contention. In my opinion, he was right. The document was executed by Keshav himself. The material portion of s. 35 is: "If the person executing the document is dead, and his representative or assign appears before the registering officer and admits the execution the registering officer shall register the document." The question is whether Gopikabai was competent to represent her husband Keshav for the purpose of admitting the execution of the document. The definition of the word "representative" as given in s. 3 of the Act is not exhaustive. In the circumstances of the case, I think, she was competent. But assuming that the registering officer was in error in accepting her as Keshav's "representative" for the said purpose, it was only a defect in procedure which was not sufficient to invalidate the registration. [Reference may be made to (1) s. 87 of the Act; (2) the observations of the Judicial Committee in *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (1) and (3) *Pakran* v. *Kunhammed*, (2)]

For these reasons I agree in the order proposed by the learned Chief Justice.

Z. K. *Appeal dismissed.*

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(1) 2 I. A. 210 at p. 216; 15 B. L. R. 228; 24 W. R. 75; 3 Sar. P. C. J. 509; 3 Suth. P. C. J. 170 (P. C.).

(2) 23 M. 580; 8 Ind. Dec. (N. S.) 807.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 694 OF 1923.

November 2, 1925.

Present:—Mr. Justice Devadoss.

KATHA MUTHU PILLAI—DEFENDANT No. 1—APPELLANT

versus

SUBRAMANIAN CHETTIAR—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 18 (c)—Transfer of Property Act (IV of 1882), s. 55—Contract of sale

—*Specific performance, suit for, against vendee—Direction to vendor to discharge encumbrances, legality of*

When a vendor undertakes to discharge the encumbrances on the property, the Court decreeing specific performance as against him can direct him to discharge the encumbrances before he is paid the consideration for the sale. [p. 562, col. 2.]

The provisions of s. 55 of the Transfer of Property Act apply not only to completed sales but also to agreements of sales. [p. 563, col. 1.]

Opinion of Abdur Rahim, J., in *Adikesavan Naidu* v. *Gurunatha Chetti*, 39 Ind. Cas. 358; 40 M. 338; 32 M. L. J. 180; (1917) M. W. N. 171; 5 L. W. 425; 22 M. L. T. 300, followed.

Second appeal against a decree of the Court of the Subordinate Judge, Madura, in A. S. No. 68 of 1919 (A. S. No. 484 of 1918 on the file of the District Court, Madura), preferred against that of the Court of the District Munsif, Tirumangalam, in O. S. No 560 of 1912.

Mr. *K. Rajah Iyer*, for the Appellants.

Mr. *K. Bhashyam Iyengar*, for the Respondent.

JUDGMENT.—The plaintiff's suit is for specific performance of a contract of sale entered into with him by the first defendant. The District Munsif gave a decree for specific performance and the Subordinate Judge dismissed the appeal of the first defendant. He has preferred this second appeal.

The contention of the appellant is that the direction in the decree, "that first defendant do draw the above amount on discharging the decree in Original Suit No. 185 of 1910 of the principal District Munsif's Court of Madura and filing a copy of record of satisfaction," is bad in law. The argument of Mr. Rajah Ayyar is that when a decree for specific performance is given against the vendor, he should not be directed to redeem any encumbrance on the property which was not disclosed to the vendor. The agreement dated the 18th day of October, 1909, does not mention the existence of any encumbrance on the property contracted to be sold, nor is there any recital in it that there are no encumbrances on the property. The finding of the learned Subordinate Judge is that the first defendant did undertake to free the property from two encumbrances which were mentioned in the certificate of sale, Ex. C. The first defendant purchased the property in Court-auction in execution of his decree in Original Suit No. 141 of 1902. In the sale proclamation, he stated that the encumbrances had been discharged. In Ex. C which was drawn up by the Court there is a recital that the encumbrances have been discharged. Ths finding is that the first defendant knew that these encumbrances had not been discharged and that he undertook to discharge them when the agreement, Ex. A, was entered into. The question is when a vendor undertakes to discharge the encumbrances on the property, whether the Court decreeing specific performance can direct him to discharge the encumbrances before he is paid the consideration for the sale? The contention of Mr. Rajah Ayyar is that the Court should decree specific performance and if the vendee finds that there are encumbrances on the property he should bring a suit for damages against the seller. Under s. 55, cl. 1 (*g*) of the Transfer of Property Act, a seller is bound to discharge all the encumbrances on the property then existing. If the vendee is not aware of the existence of any encumbrance on the property when the contract of sale is entered into, and he comes to know of the existence of any encumbrances he can ask a seller to discharge those encumbrances before a sale is effected. When he sues for specific performance of the contract of sale could it be said that he is not entitled to have a direction in the decree that the seller should discharge the encumbrances on the property before he is paid the consideration for the sale? The provisions contained in s. 18 (*c*) of the Specific Relief Act apply to this case. Where the vendor professes to sell unencumbered property and if it is afterwards found that the property is mortgaged for an amount not exceeding the purchase-money, the purchaser may then compel the seller to obtain a conveyance from the mortgagee or himself pay off the encumbrances out of the unpaid purchase-money. Here, on the finding of fact that the vendor undertook to discharge the encumbrances, the purchaser was entitled to insist upon his discharging them, before a conveyance is effected through Court. He is entitled to ask the Court to give a direction in the decree that the encumbrances should be discharged before the consideration for the sale is paid to him.

Considerable argument was advanced by Mr. Rajah Ayyar that the provisions of s. 55 do not apply to executory contracts, in other words, the covenants contained in s. 55 of the Transfer of Property Act apply only to completed sales and not to agreements of sales. Under s. 55 the seller is bound to do certain things. One of them is to answer to the best of his information all relevant questions which may be put to him by the buyer in respect of the property and the title thereto and the other is to produce before the buyer on his request for examination all documents of title relating to the property which are in the seller's possession. It cannot be said that these two things should be done after the sale is effected. The covenants contained in s. 55 apply to contracts of sale as well as to completed contracts. In this connection with great respect I am unable to agree with the reasoning of Sadasiva Ayyar, J., in *Adikesavan Naidu* v. *Gurunatha Chetti* (1) Abdur Rahim, J., was of opinion that the covenants contained in s. 55 apply to contracts of sale as well.

It is argued for the appellant that it was open to the plaintiff to repudiate the contract and to claim damages when the vendor was not able to give him a clear title. No doubt the vendee can repudiate the contract of sale if he finds that the vendor has no title to convey or that the property is encumbered. *Vide Reeve* v. *Beeridge* (2). The case in *Eastern Mortgage and Agency Co., Ltd.* v. *Mohammad Fazl-ul-Karim* (3) does not apply to the facts of this case. There it was held that it was open to the vendee to resist a suit for specific performance on the ground that the defects in the property were not disclosed by the vendor. But here the first defendant did undertake to discharge the encumbrances on the property and the plaintiff is entitled to enforce the terms of that agreement. The argument that s. 18 (c) applies only to undisclosed encumbrances and does not apply to cases where the vendor undertakes to discharge the encumbrances on the property before the sale cannot be accepted. When the vendor undertakes to discharge the encumbrances on the property, he contracts to sell the property unencumbered and, therefore, cl. (c) applies to a case like this. The Court granting specific relief is entitled to direct the vendor to discharge the encumbrances which he undertook to do before he is paid the consideration for the sale. The clause in the decree objected to is perfectly legal. In this connection I may refer to recent decision of Spencer and Viswanatha Sastri, JJ., in *Venkataranga Iyer* v. *Ramaswami Iyer* (4) in which a similar direction was given by them.

It is stated that the amount secured by the two mortgages on the property which the vendor undertook to discharge is about Rs. 300 or Rs. 400. As the consideration for the sale is Rs. 1,950, the direction in the decree may be varied by directing that the amount which would be necessary to discharge the encumbrances be kept in deposit and the balance be drawn by the first defendant. This would be an equitable arrangement as the plaintiff cannot be damnified to a larger extent than the amount of the two mortgagees. If the mortgagees try to enforce their mortgages the amount in Court would be sufficient to meet their demands and the first defendant need not be kept out of a large sum of money by reason of a portion thereof being necessary to meet the demands of the mortgagees.

With this modification I dismiss the second appeal with costs.

V. N. V. *Appeal dismissed.*

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(1) 39 Ind. Cas. 358; 40 M. 338; 32 M. L. J. 180; (1917) M. W. N. 171; 5 L. W. 925; 22 M. L. T. 300.

(2) (1888) 20 Q. B. D. 523; 57 L. J. Q. B. 265; 58 L. T. 836; 36 W. R. 517; 52 J. P. 549.

(3) 90 Ind. Cas. 851; 41 C. L. J. 571; 52 C. 914.

(4) 93 Ind. Cas. 670; 22 L. W. 786; A. I. R. 1926 Mad. 173.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL
No. 2569 OF 1925.
February 17, 1926.
Present:—Mr. Justice Campbell.
MAULA BUX—DEFENDANT—APPELLANT
versus
CHANAN MAL AND OTHERS—PLAINTIFFS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 4—Appeal from injunction decree—Death of one of several plaintiffs-respondents—Legal representatives not brought on record in time—Abatement in toto.

Where in an appeal from a decree issuing mandatory injunction to the defendant restraining him from opening windows in a particular wall of his house one of the several plaintiffs-respondents dies and his legal representatives are not brought on the record the appeal abates *in toto*. [p. 564, col. 1]

Miscellaneous second appeal from an order of the District Judge, Gurdaspur, dated the 19th June 1925.

Mr. *Chandra Gupta*, for Lala *Faqir Chand*, for the Appellant.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—In this case four plaintiffs obtained a decree against Maula

Bakhsh defendant for mandatory injunction restraining him from opening windows in the southern wall of his house No. 6220 under construction situate in Batala City. Maula Bakhsh appealed to the District Court. During the pendency of the appeal one of the plaintiffs Bhagat Ram died and application was not made in time to substitute his legal representatives on the record. The learned District Judge rejected an application to set aside the abatement of the appeal against Bhagat Ram and dismissed the appeal *in toto* on account of the abatement.

In second appeal it is argued, firstly, that the abatement against Bhagat Ram should have been set aside and, secondly, that in spite of it the appeal could have proceeded against the remaining respondents.

No sufficient cause was alleged in the affidavit accompanying Maula Bakhsh's application to set aside the abatement and the application was rightly refused. On the other point the test is whether appeal could have been preferred by Maula Bakhsh without joining Bhagat Ram as a respondent. In that case Bhagat Ram would have had, as his legal representatives now have, a final decree in their favour that the defendant is not to open windows in the wall of his house, and it would be impossible for a fresh decree to be passed in appeal against the surviving respondents altering the decree under appeal which would result in any effectual relief of the appellant. Furthermore a Court hearing an appeal must have before it all persons whose interests might be affected by the decree in appeal. The argument addressed to me that Bhagat Ram and all the several plaintiffs could have instituted separate suits for the injunction and, therefore, an appeal could proceed against any one of them without the others has no force. The joint suit has been brought and has resulted in a decree and to examine the correctness of that decree as regards the surviving plaintiffs-respondents in the face of the absolute decree in favour of the representatives of Bhagat Ram would be altogether nugatory. The lower Appellate Court was correct in dismissing the appeal.

The appeal fails and is dismissed with costs.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 635 OF 1925.

April 17, 1925.

Present:—Justice Sir Lallubhai Shah, KT.

KISHOREDAS P. MANGALDAS—PLAINTIFF

versus

AHMED SULEMAN—DEFENDANT.

Bombay Rent (War Restrictions) Act (II of 1918), s. 9—Landlord and tenant—Tenancy terminating during continuance of Act—Ejectment after Act ceases to be applicable—Notice to quit, whether necessary.

There is nothing in the provisions of the Bombay Rent (War Restrictions) Act to justify the contention that the contractual tenancy which, apart from the provisions of the Act, exists between a landlord and tenant cannot be terminated during the continuance of the Act. Where such tenancy has been terminated by a proper notice to quit during the continuance of the Act, the mere fact that the tenant is entitled to retain possession of the premises while the Act remains in force is not sufficient to create any such relationship of landlord and tenant between the parties as would require a fresh notice to terminate it after the provisions of the Act have ceased to be applicable to the premises. The right of the tenant to continue in possession of the premises occupied by him under the provisions of the Act is a statutory right the limits of which are to be found in the terms of the Statute; and the moment the Statute ceases to extend that protection to him he ceases to have the protection as against the landlord which the Statute gave him up to a certain period. Thereafter his possession with reference to the premises is that of a tenant holding over whose tenancy had been terminated, and he is not entitled to any fresh notice to quit. [p. 567, col. 1.]

Mr. *Kanga*, Advocate-General, (with him Sir *Chimanlal Setalvad*, KT.), for the Plaintiff.

Mr. *Kemp*, for the Defendant.

JUDGMENT.—This is one of the three suits in which the question arises as to whether after the Bombay Rent (War Restrictions) Act, II of 1918, has ceased to apply to a particular set of premises, the tenant is entitled to a fresh notice to terminate the tenancy even though a notice terminating the tenancy has been given by the landlord during the time when the Act was in operation. This particular suit has been fully heard and the parties have adduced evidence on all the points. At the instance of the learned Counsel for the defendants in the other two suits I have heard the parties in those suits also on the question of notice, which is common to all these three suits. But in dealing with the point I shall refer only to the facts of this case. The plaintiff sues to recover possession of a certain shop, which is described as shop No. 3, situated at the junction of Shaikh Memon Street and Janjirkar Street and which is one of a group of shops known as Green Market. The defendant was a monthly tenant on the basis of a lunar month. In 1918 he used to pay Rs. 120 as rent but after the Rent Act came into force he paid at Rs 72-6 0 per month as standard rent. On July 29, 1924, the plaintiff gave one month's notice calling upon the defendant to vacate the premises on *Shravan Vad* 30th, *Samvat* 1980, corresponding with August 30, 1924. The premises in question were used for the purposes of business and not as a dwelling house, and the protection which the tenant had under the Rent Act terminated on August 31, 1924. There was some correspondence between the parties which commenced in January 1925. In the course of that correspondence the plaintiff stated that he would charge Rs. 200 per month for the period during which the defendant was wrongfully holding over. The defendant offered to pay 60 per cent. over and above the standard rent, which would be nearly the rent which he was paying before the Rent Act came into force, *i. e.*, nearly Rs. 120. But the plaintiff did not accept the defendant's offer, and insisted upon his paying Rs. 200 per month if he wanted to continue as a tenant. He filed the present suit on March 3, 1925, to recover possession on the basis that the tenancy had been duly terminated by the notice of July 29 and claiming compensation for the period during which the tenant held over after the period of the notice at the rate of Rs. 200 per month.

The principal defence is that the notice of July 29 is ineffective because the defendant remained in possession according to law after August 30 under the provisions of the Statute at least for one day. That gave him, it is contended, the position of a tenant according to the Act and as no notice terminating that tenancy was given, there was no effectual termination of the tenancy. It is also contended that the amount claimed by the plaintiff is too high under the circumstances if the notice is found to be effective.

I shall first deal with the question which relates to the notice. Though the question has been argued at some length it seems to me that the point is very narrow. Apart from the provisions of the Bombay Rent Act (II of 1918) it is clear that the defendant was a monthly tenant of the plaintiff and his predecessor-in-title, and it was open to the plaintiff to terminate that tenancy by one month's notice according to the lunar month. The notice given is clearly one month's notice. Apart from the provisions of the Rent Act it is not disputed and it cannot be disputed, that the notice is a perfectly good notice to terminate the monthly tenancy which existed between the parties. It is urged, however, that under the provisions of s. 9 of the Rent Act, so long as the defendant pays or is ready and willing to pay rent to the full extent allowable by the Act and performs the conditions of the tenancy, he is a tenant in spite of the notice to terminate the tenancy. No doubt the word "tenant" is used in s. 9 of the Act; and it is contended that as a result of that provision his position on August 31 was that of a tenant of the defendant and that in spite of the notice the original tenancy continued under the Statute which required a further notice to terminate it after the provisions of the Act ceased to apply after August 31. It seems to me that this contention is not sound. Apart from the Statute the tenancy is a matter of contract between the plaintiff and the defendant and in spite of the Statute it is perfectly open to the landlord to give a proper notice terminating that tenancy. It is equally clear that under the provisions of the Act in spite of the termination of such tenancy the tenant can continue in possession. No order for the recovery of possession of the premises can be made against the tenant so long as he pays or is ready and willing to pay rent to the extent allowable by the Act. In the view I take of the case, this would mean that on August 31 no order for the recovery of possession of these premises could be made against him if he was willing to pay the standard rent on that day. But when the provisions of the Act ceased to apply after August 31, 1924 there was in fact no tenancy to terminate. After August 30, on which the contractual tenancy terminated, he could remain in possession only under the provisions of the Statute which gave him the right to remain in possession subject to the conditions as to payment of rent and other conditions with which we are not concerned. But the moment the Statute ceased to have operation in his favour his position with reference to the premises is that of a tenant holding over, whose tenancy has been terminated. On a consideration of all the arguments urged on both sides, I have come to this conclusion and I have stated the view which I take of the legal position of the defendant after the notice was given and after he ceased to have the benefit of the Rent Act. It has been urged that as the word "tenant" is used in sub-s. (1) of s. 9, the Legislature has given him the position of a tenant during the period in which the Act is in force and he is entitled to all the rights and remedies which a tenant would have against the landlord as if he was a monthly tenant under a contract with his landlord. I am unable to accept this contention and I do not see how the mere use of the word "tenant" in s. 9 can justify this position.

Certain English decisions have been referred to in the argument before me and I shall refer only to two of them to show that the view taken by the English Courts on this point is not that the tenant, or the statutory tenant as he is called, is in the position of a tenant apart from the Statute, but that his rights and remedies, such as they are, are determined by the provisions of the Statute. In *Shuter* v. *Hersh* (1), it has been held that:—

"Where a tenant remains in possession under the provisions of the Increase of Rent, etc., Restrictions Act, 1920, after receiving notice to quit, there is no necessity for the landlord to give the tenant a fresh notice to quit before raising the rent to the extent permitted by the Act unless a new tenancy has been actually created, and the mere fact that the landlord accepts rent after giving the notice to quit cannot be taken as a waiver by him of the notice to quit so as to create a new tenancy."

Scrutton, L. J., refers to the entity described as the "statutory tenant" as the person who holds the land of another contrary to the will of that other, who strongly desires to turn him out. Such a person would not ordinarily be described as a tenant and in spite of the fact that he was described as a tenant in the parliamentary Statute the notice given to quit was accepted as a good notice and no further notice was considered necessary. I admit that the point which arises for decision in the present case did not arise for decision in that case, but the observations with regard to the validity of the notice given during the continuance of the protection of the Act to the tenant are useful in dealing with the present point.

The other case is the case of *Keeves* v. *Dean* (2). With reference to the point that arose in that case as to whether a statutory tenant would have the right to assign his right to retain possession it was held that the right of a statutory tenant was merely a personal right to retain possession of the premises and could not be assigned to another person. The following observations of Scrutton, L J., are useful (page 694)* :—

"This case is another stage in the unwelcome task which Parliament has imposed upon the Courts of defining the position of the 'statutory tenant.' My Lord has objected to his being called by that name, on the ground that he is not a tenant at all. But it is a convenient expression, and, although it is true that before the passing of these Acts no one would have spoken of a person who after the expiry of his tenancy remained in possession against the will of his landlord as a tenant, Parliament has certainly called him a tenant, and he appears to me to have something more than a personal right against his landlord. I take it that he has a right as against all the world to remain in possession until he is turned out by an order of the Court, and that he could maintain trespass against any person who entered the premises without his permission. However, it does not much matter what he is called so long as it is clear that one is speaking of a person who holds over after the expiry of his tenancy against his landlord's will."

I may also refer to *Kalianmal Tillockchand* v. *Dharamsey Jetha & Co.* (3) where the learned Chief Justice makes the following observations with regard to the position of a person entitled to remain in possession under the Statute (page 144†) :—

"The plaintiff was entitled to terminate under the ordinary rules of law the contract which had been established between him and the defendants by the consent decree, and on August 31, 1922, when the plaintiff's notice expired that tenancy terminated. Had it not been for the Rent Act, the defendants would have been bound to vacate, but under its provisions they might remain in possession, and under s. 9

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(1) (1922) 1 K. B. 438; 91 L. J. K. B. 626; 127 L. T 0 L. G. R. 359; 66 S. J. 472; 38 T. L. R. 355.

(2) (1924) 1 K. B. 685; 93 L. J. K. B. 203; 130 L. T. 593; 22 L. G. R. 127; 68 S. J. 321; 40 T. L. R. 211.

(3) 80 Ind. Cas. 253: 26 Bom. L. R. 141; A. I. R. 1924 Bom. 330.

*Page of (1924) 1 K. B.—[*Ed.*]

†Pae of 26 Bom. L. R.—[*Ed.*]

no order for the recovery of possession of the premises could be made so long as they paid or were ready and willing to pay rent to the full extent allowable by the Act, and perform the conditions of the tenancy. I presume that would mean the conditions of the tenancy existing between the parties before the agreement terminated, which would be continued to that extent by virtue of those words if the tenant remained in possession under the Act."

The decisions do not deal with the point which arises in the present case. But they throw a very useful light upon the position of the person, who remains in possesion under the protection of the Statute after the contractual tenancy between him and his landlord has been duly terminated by a notice given during the period in which the Act is in force. I do not see any reason why on principle the landlord should be required to give a fresh notice to terminate a tenancy which in fact does not exist. So far as the contractual tenancy between him and his tenant is concerned it has been duly terminated and there is nothing in the provisions of the Rent Act to justify the contention, that it cannot be terminated during the continuance of the Act. The mere fact that the tenant is entitled to retain possession while the Act remains in force is not sufficient, in my opinion, to create any such relationship of landlord and tenant between the parties as would require a fresh notice to terminate it. In fact it is a statutory right the limits of which are to be found in the terms of the Statute; and the moment the Statute ceases to extend that protection to him he ceases to have the protection as against the landlord which the Statute gave him up to a certain period. In the present case there is no scope for the argument that by accepting the rent, the landlord has waived the notice to quit and has treated the contractual tenancy as subsisting. I am, therefore, of opinion, that the notice given on July 29 to the defendant was effectual and valid and put an end to the tenancy between the plaintiff and the defendant, and the fact that he was in rightful possession of the premises under the Statute for one day against the will of the landlord does not constitute any such change in the legal relationship of the parties as would render any further notice necessary to terminate the tenancy.

My finding, therefore, on the first issue is in the affirmative.

[The learned Judge awarded Rs. 125 a month as compensation.]

Z. K. *Suit decreed.*

RANGOON HIGH COURT.
FULL BENCH.

CIVIL REFERENCE No. 8 OF 1925.
June 22, 1925.
Present:—Sir Sydney Robinson, KT., Chief Justice, Mr. Justice Brown and Mr. Justice Doyle.

MAUNG SAN MIN AND ANOTHER—
APPELLANTS
versus
MAUNG PO HLAING AND OTHERS—
RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (1) (b)—Transfer of Property Act (IV of 1882), s. 59—Evidence Act (I of 1872), s. 91—Suit for recovery of possession of immoveable property—Allegation that possession was given to defendant as security for advance of Rs. 100 or upwards—Oral evidence, admissibility of.

Where a plaintiff seeks to recover possession of immoveable property on the allegation that possession of the property was given to the defendant as security for a loan of Rs. 100 or upwards, but without the execution of any registered instrument, oral evidence is not admissible to prove the transaction alleged by the plaintiff. [p. 569, col. 2.]

Civil reference made by Mr. Justice Carr, in Special Civil Second Appeal No. 303 of 1923, dated 20th May 1925.

ORDER OF REFERENCE TO A FULL BENCH.

Carr, J.—The plaintiffs in this suit set out that they borrowed Rs. 125 from the defendants and handed over their land temporarily, the land to be returned whenever required. The defendants denied this and alleged that the plaintiffs had made over the land absolutely in satisfaction of a debt of Rs. 355, and had agreed to execute a registered deed when required.

The plaintiffs' prayer was for possession of the land unconditionally.

The Sub-Divisional Judge held, on the authority of *Ma Htwe* v. *Maung Lun* (1), that the transaction set up by the plaintiffs was in effect a mortgage and that it could not be proved. He further held that the defendants had proved the agreement for sale. He dismissed the suit.

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(1) 33 Ind. Cas. 163; 8 L. B. R. 334; 9 Bur. L. T. 114.

The District Judge considered that the plaint was skilfully worded—because it avoided the use of the word 'mortgage.' He said that no mortgage was the basis of the claim and that the question whether the transaction was a mortgage or a sale did not arise. He relied upon two unauthorised reports—*Maung Aung* v. *Maung Shwe Lin* (2) and *Mg. Po Kin* v. *Mg. Oh* (3). He proceeded to consider the plaintiffs' evidence as to the nature of the transaction and held that the plaintiffs had proved their case. He considered, however, that the plaintiffs were not unconditionally entitled to possession and gave them a decree for possession on re-payment of Rs. 125.

In effect he has allowed the plaintiffs to prove an invalid mortgage and has given them a decree for redemption. The transaction set up by the plaintiffs, and which the District Judge has held proved, was in the nature of an usufructuary mortgage, and would have been such a mortgage had it been effected by a duly registered deed. Its nature is in no way changed by the omission to describe it by its specific name. Thus the decision is contrary to the ruling in *Ma Htwe's case* (1).

That was a ruling by a Full Bench of the Chief Court of Lower Burma, and remains binding. But I think that, in view of the decision of a Full Bench of this Court in *Maung Myat Tha Zan* v. *Ma Dun* (4), this ruling requires consideration. In the last named case the principle of part performance was accepted on equitable grounds, and it was held that a person in possession under a sale which was invalid for want of a registered deed should be held to be in possession under a contract for sale, could set this up as a valid defence and could adduce evidence to prove the transaction.

The equitable considerations on which that decision was based seem to me to apply equally to a case such as the present. If it is inequitable to allow the giver of possession to recover possession in contravention of his agreement, then it is equally inequitable to allow the receiver of possession to retain possession in contravention of his agreement.

I am fortified in this view by the case of *Jogendra Krishna Roy* v. *Kurpal Harshi & Co.* (5). In that case the defendants had taken a three years' tenancy of certain premises on an oral agreement. It was held that a tenancy was created in law and that the defendants were liable for damages when they repudiated the tenancy within the three years. It was laid down generally—

> "When in pursuance of an agreement to transfer property the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined."

Reading this case along with *Maung Myat Tha Zan's case* (4), it would seem that the transaction in the present case must be considered as an agreement to mortgage and that the plaintiff is entitled to prove and to enforce it. But this conclusion is opposed to the decision in *Ma Htwe's case* (1).

I, therefore, refer the following questions for decision by a Bench or a Full Bench as the Chief Justice may direct:—

1. When a plaintiff alleges that possession of immovable property has been given to the defendant as security for a loan of Rs, 100 or upwards, but without the execution of any registered instrument, is oral evidence admissible to prove the transaction?
2. If so, and if the transaction is proved, is the plaintiff entitled to a decree for recovery of possession of the property on payment of the amount of the loan?

JUDGMENT OF THE FULL BENCH.

Robinson, C. J.—The questions referred for decision by the Full Bench are: (1) When a plaintiff alleges that possession of immoveable property has been given to the defendant as security for a loan of Rs. 100 or upwards, but without the execution of any registered instrument, is oral evidence admissible to prove the transaction? (2) If so, and if the transaction is proved, is the plaintiff entitled to a decree for recovery of possession of the property on payment of the amount of the loan?

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(2) 73 Ind. Cas. 1039; A. I. R. 1923 Rang. 51.

(3) 91 Ind. Cas. 1021; A. I. R. 1923 Rang. 230; 2 Bur. L. J. 4.

(4) 81 Ind. Cas. 857; 2 R. 285; 3 Bur L. J. 78; A. I. R. 1924 Rang. 214.

(5) 68 Ind. Cas. 993; A. I. R. 1923 Cal. 63; 49 C. 345; 35 C. L J. 175.

It may be open to question in this case whether the plaintiff sued basing her claim on a usufructuary mortgage but the learned Judge finds and for the purposes of this reference, I think we must take it, that the suit was based on the alleged usufructuary mortgage; that being so, the case falls within the purview of the Full Bench ruling in *Ma Htwe* v. *Maung Lun* (1). The suit should, therefore, be dismissed and no question of the admissibility of oral evidence to prove the transaction arises. It must be remembered that there is a marked distinction in these cases between those relating to an inchoate mortgage and an inchoate sale. In the latter it is open to the party in possession of the land who has bought without obtaining a registered deed of conveyance to sue for specific performance of the contract to sell. There is no right to sue for specific performance possessed by a mortgagor who has given his land in mortgage without securing his right of redemption by a registered-deed of mortgage. There is no contest between the Full Bench ruling cited and the Full Bench decision in *Maung Myat Tha Zan* v. *Ma Dun* (4). This being the state of the law, the second question referred does not arise at all, but I think it will be well to explain my views in this somewhat difficult question. Had the plaintiff brought a suit merely alleging that she was the owner of the land and that the defendant was in wrongful possession thereof and claiming a decree for possession based on her title alone, there would be no objection to such a suit lying. I note that in the order of reference in *Ma Htwe's case* (1), Sir Charles Fox suggests this:—Had such a suit been brought and the defendant applied that he was in possession under a contract of sale which had not been completed by the execution of a registered-deed it would be open to the defendant to lead evidence to prove a contract to sell and if he had established that contract he would have been entitled to retain possession even though he had not properly registered the conveyance. That is laid down in *Maung Myat Tha Zan's case* (4), and is in accordance with a large number of authorities of other Indian High Courts. It would be also open to him to sue for specific performance and, on obtaining a decree, to complete his title. Even if he had failed in such a suit he would still be entitled to retain possession as against the plaintiff.

In my opinion it was open to the plaintiff in this case to have brought a suit based solely on her title. Defendant admits her title and if he fails to prove the contract to sell which he alleges, the plaintiff would be entitled to a decree. That decree must be made conditional on her re-paying the money advanced not with the intention of granting her practically a decree for redemption but by ordering re payment on equitable grounds. Even if this were held to be impossible on the ground that no charge is created on the land for the amount advanced, it would be open to the defendant to bring a suit for the return of the money. The reason why different principles apply to the admissibility of evidence to prove a contract to mortgage and a contract to sell is that in the latter the defendant is entitled to claim specific performance and in the former case, he is not. The answer to the first question referred is in the negative unless it is the defendant, who seeks to lead that evidence in order to obtain from the Court equitable relief in the shape of a decree, conditioned, subject to the return of the money advanced. I would answer the second question referred to in the negative on this suit as it is held to have been framed.

Doyle, J.—I concur.

Brown, J.—I agree that the answer to the first question referred must be in the negative. If a suit is brought to redeem a mortgage, which is invalid for want of a registered-deed of sale, that suit must clearly fail and evidence cannot be brought to prove the transaction. The finding in *Ma Htwe* v. *Maung Lun* (1), on this point does not, in my opinion, conflict with the Full Bench decision in *Maung Myat Tha Zan* v. *Ma Dun* (4). I also agree with the remarks of the learned Chief Justice as to what the position would be if the plaintiff had brought a suit merely alleging that she was the owner of the land and that the defendant was in wrongful possession thereof and claiming a decree for possession based on her title alone. In such a suit it would be open to the defendant to bring evidence to show that he was in possession under a contract of sale and it would then probably be open to the plaintiff to bring rebutting evidence to show what the terms of the contract really were. From a perusal of the plaint, it seems to me to be at least open to doubt whether the plaintiff did not bring a suit of the nature in the present case, but that is not the question which has been referred to us and the learned Judge who has referred the matter would appear to hold otherwise. My answer to the first question referred being in the negative the second question does not arise.

Z. K. *Reference answered in negative.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT
No. 923 OF 1921.
March 21, 1925.
Present:—Justice Sir Amberson Marten, KT.

KISHENPRASAD & Co. LTD.—PLAINTIFFS
versus
RAJARAM RAMHARAKH AND OTHERS
—DEFENDANTS.

Trust—Breach of trust—Participation in division of trust funds—Liability to refund trust moneys.

Defendant No. 1 was an employee of the plaintiffs and was entrusted by the latter with the cashing of a cheque for a large amount of money. He cashed the cheque and made away with the proceeds with the help of defendant No. 2, his brother. The proceeds were subsequently divided between the different defendants who were members of a joint Hindu family. Defendants Nos. 1 and 2 were tried for the offence of criminal breach of trust and were convicted. Plaintiffs subsequently brought a suit to recover from all the defendants the amount of money which had been embezzled by defendant No. 1 with the help of defendant No. 2:

Held, that defendant No. 1 having committed a breach of trust in which defendant No. 2 was an abetter and that the remaining defendants having afterwards been parties to a mis-application of the trust property in breach of the trust with notice of the trust, they were all liable to replace the trust moneys and that the plaintiffs were entitled to a decree. [p. 573, col. 1.]

Mr. *B. J. Desai*, for the Plaintiffs.

JUDGMENT.—This is a very peculiar suit. The defendants are all members of a joint Hindu family, and in effect the plaintiffs are seeking to make all the members of this family liable for the embezzlement by defendant No. 1 with the aid of defendant No. 2 of a sum of Rs. 40,000 belonging to his employers, the plaintiffs. Defendants Nos. 1 and 2 have both been prosecuted to conviction for this embezzlement. Defendant No. 2 has since died, and his name was struck out at the trial. As regards defendant No. 5, who is a minor, it is conceded that his only liability is to the extent of the assets received by him from his deceased father, defendant No. 2.

The details of the case are lengthy, but shortly stated these are the main outlines. The plaintiffs were foolish enough to entrust the 1st defendant with the cashing of two cheques of Rs. 30,000 and Rs. 10,000 respectively. I say foolish because the 1st defendant was only an employee of a few weeks standing on a salary of Rs. 17 per mensem. He had come from Kudanpur in the Allahabad District, and at that time defendant No. 2, the brother of defendant No. 1, was also in Bombay. It is common ground that defendant No. 1 cashed the two cheques for Rs. 40,000 at the Bank, but never gave the proceeds to his masters as he ought to have done. His story was that on his return from the Bank he was taken ill in the street, and that while he lay unconscious, he must have been robbed of the money in question. This was clearly a suspicious story, but at the time the Police thought there was insufficient evidence to convict him, and accordingly he was allowed to return to his native country.

The plaintiffs, however, had a watch kept through the Allahabad Police over the defendants' movements, and after some time this led to further discoveries. The defendants were apparently misled into thinking that the whole affair had blown over. At any rate much accession of prosperity appears to have come to the joint family. For instance, heavy mortgages of many thousands of rupees on their family lands were paid off, and other lands purchased. I may say at once that though various tales to the contrary were put forward, there is no satisfactory evidence to show where the money came from, apart from the proceeds of the Rs. 40,000 cheques. I am quite satisfied that that was the true source from which these family mortgages were paid off and the lands purchased. But what is even more important is that the defendants proceeded to quarrel as to how the balance of the proceeds of the stolen moneys should be dealt with, and they actually summoned their village *punchayet* to settle their differences on this point. It is clear from the plaintiffs' evidence that at that *punchayet* meeting it was common ground that the money had been brought by the 1st defendant from Bombay with the aid of the 2nd defendant, and that the 1st defendant claimed that he was entitled to a larger share of it than the rest of the family, because he was the person who had secured the money. Naturally one does not accept such a story without closely criticising it. In the present case I am satisfied that what the plaintiffs' witnesses have said about that *punchayet* is true.

In this civil suit practically all the evidence is taken on Commission; and at the trial the suit is undefended. But it so happens that I was the Sessions Judge who tried the criminal charges against defendant No. 1 under s. 408 and against defendant No. 2 under ss. 408 and 109 of the Indian Penal Code, which resulted in an unanimous verdict of guilty against No. 1 and by a majority of 7 to 2 against No. 2, and I sentenced each of them to three years' rigorous imprisonment and a fine on November 11, 1921. At that trial the plaintiffs' witnesses were closely cross-examined, and in addition I had the benefit of hearing the oral statements of the accused from the dock and the argument of their Counsel. I was quite satisfied at that trial that the story of the 1st and 2nd defendants was a false one, and that in fact defendant No. 1 had embezzled the money with the aid of defendant No. 2, he being the person who actually took the money out of Bombay after it had been handed to him by defendant No. 1.

But to avoid any misunderstanding I should state that I decide this present civil suit solely on the evidence of the civil suit and not on that of the criminal proceedings, except that I am entitled to know that defendants Nos. 1 and 2 have been prosecuted to conviction for the embezzlement of these moneys. I think I am also entitled to take into consideration that there is nothing in that criminal trial which should give me any hesitation in accepting the plaintiffs' evidence in the present civil suit.

So much for the more material facts. I do not propose to go into further details. The real difficulty arises as to the law. In this respect I regret that the case is undefended, and that the difficulties I have felt have not been met by Counsel, although I gave an express adjournment for the purpose. The point is this. Under what particular section of what Code or under what proposition of law can one recover in a civil suit money stolen by a thief, and how can the members of his joint Hindu family be made liable for the theft, if they did not actually participate in it? In the plaint the plaintiffs' case is based on conspiracy, *viz.*, that the 1st defendant in conspiracy with the other defendants intended to misappropriate and did in fact misappropriate the Rs. 40,000, and that the 2nd defendant actually took the money from Bombay in furtherance of the conspiracy. That there was a conspiracy between defendants Nos. 1 and 2 is clear, but there is not the slightest evidence to show that defendants Nos. 3, 4 and 5 were guilty of any conspiracy prior to the actual theft. On the contrary it would seem quite improbable that defendants Nos. 3 and 4 could anticipate that anybody would be so foolish as to entrust defendant No. 1 with Rs. 40,000 or any other large sum. However, that may be, I find as a fact that the alleged antecedent conspiracy so far as regards defendants Nos. 3, 4, and 5 is not proved. Consequently the plaintiffs' case in so far as it depends on any such antecedent conspiracy fails.

At the second hearing Mr. B. J. Desai based the plaintiffs' case on another ground. He relied on ss. 71, 76 and 108, Illustration (*a*), of the Indian Contract Act. Section 71 provides that a person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee. But in the present case there is no question of any goods being "found," nor can it be said that any of the other defendants have "found" any money. The cheques were given to defendant No. 1 to cash, and he obtained cash, *viz.*, currency notes from the bankers. So I fail to see how s. 71 has any relevance. Next, turning to ss. 76 and 108, these sections appear under the Chapter dealing with the sale of goods. It was said that, having regard to the definition of s. 76, goods would include a cheque or cash. But assuming that to be so, I am far from satisfied that s. 108 affects the question. The plaintiffs are not seeking to recover here any specific goods or the actual currency notes which the Bank handed over to the 1st defendant. They are merely making a money claim against the defendants; and it was expressly admitted at the trial that the plaintiffs are not seeking to follow the specific moneys in order to obtain any charge on the property which may now represent such moneys. Illustration (*a*), therefore, which deals with a stolen cow which *A* had bought from *B* in good faith, would hardly seem to cover the present case. The true owner might recover the cow, but could he recover damages from *A*, supposing the cow had died or had been re sold? As regards Ch. IX, which deals with bailees, even if one assumes that defendant No. 1 was a bailee and accordingly liable to the plaintiffs, the remaining defendants were not bailees, for the plaintiffs had never entrusted them with anything.

I next invited Counsel to consider whether under the Common Law of England there was not an appropriate civil remedy against a thief who had stolen property. It would seem contrary to common sense that an action would lie, say for breach of contract for payment of a certain sum of money, or in tort for trespass or for injury by negligence to a chattel, and yet that no action would lie for theft. But Counsel were unable to refer me to any authority on that proposition either in England or in India, though I suggested that in a case like the present an action would lie for money had and received. But the difficulty here is not so such as regards the actual thief but as regards the alleged liability of the remaining members of his family. I accordingly do not propose to go into the possible remedies which might be open at Common Law but will consider whether a remedy does not lie in equity.

I accordingly suggested further to Counsel that the plaintiffs' case might be put in this way, *viz.*, that the initial embezzlement was a breach of trust by defendant No. 1, that defendant No. 2 aided and abetted that breach of trust, and that defendants Nos. 3 and 4 were also guilty of that breach of trust inasmuch as with notice of the trust they participated in the improper division of the stolen moneys amongst, or for the benefit of, the members of the joint Hindu family. But this point had not been considered by Counsel, and accordingly I reserved judgment, for the mere fact that the case was undefended would not entitle the plaintiffs to judgment unless they could satisfy the Court that their claim was sound in law.

Shortly thereafter I came across a short paragraph in an English newspaper referring to a somewhat similar case which Mr. Justice Bailhache had tried, and which he was reported to have described as being "the most puzzling he had experienced in forty years study of the law" I accordingly waited for the case to be reported, and subsequently when I was home on leave I wrote to the learned Judge, who was kind enough to inform me that the case was only reported in the Justice of the Peace, Vol. 87, p. 817, dated December 1, 1923 and that the report was a very imperfect one. Shortly stated, in that case four defendants had broken into a jeweller's shop, and articles were stolen to the value of £443. Articles to the value of £188 were recovered, and the subject of the action was a claim by the jeweller for damages in respect of the unrecovered property against the four thieves who were then serving terms of imprisonment in respect of the robbery. The learned Judge held that the wrong against the State must first be vindicated which had been done by a criminal conviction. Next as regards the injury done to the plaintiff in his private capacity, if there had been only one individual concerned in the theft, there would be no difficulty in vindicating the plaintiff so far as trespass was concerned. But the action was complicated as there were four defendants. Further the stolen property was not traced to one individual, and the unrecovered goods could not be traced to any of the defendants. The learned Judge, however, held that he was entitled to presume that the missing articles were stolen by the four defendants, and that the fact that the property could not be traced made no difference. He accordingly held that if two or three people combined to commit a wrongful act and damage was done, judgment could be given against them. Accordingly the same principle applied as if there was only one defendant; and judgment was given against every one of the defendants as regards the stolen property which had not been restored. It was not essential whether the damage could be divided or not, as each of the defendants were liable. It will, however, be seen that in that case the defendants were the actual trespassers and thieves, or at any rate were all engaged in the conspiracy to trespass and steal. Here, as I have already held, there is no evidence to show that defendants Nos. 3 and 4 entered into any antecedent conspiracy in connection with the suit theft. Nor was it a case of trespass on the plaintiffs' premises.

I subsequently waited to see whether the case was to be reported fully as the judgment of the late Mr. Justice Bailhache on this branch of the law, of which he was a complete master, would have been particularly valuable to me. But no further report is forthcoming, and accordingly, as I have already intimated, I do not propose to consider the possible remedies open to the plaintiffs at Common Law, but will consider the obove equitable remedy for breach of trust which I have already referred to.

In this connection I should state that in my opinion the pleadings are sufficient to cover the point, although the precise words "breach of trust" are not mentioned. The facts pleaded clearly shows the fiduciary relationship between the plaintiffs and the 1st defendant. The allegation of a conspiracy to misappropriate the moneys *after* they had been stolen is I think a sufficient allegation of a wilful participation in the breach of trust. In this connection it must be borne in mind that the breach of trust was not necessarily concluded when defendant No. 1 handed the money to defendant No. 2, nor when defendant No. 2 took it away out of Bombay. It at any rate extended up to the time when the trust property was actually applied in paying off the mortgages and in buying property.

Now, in the first place, it is abundantly clear that there was a breach of trust by the 1st defendant in which defendant No. 2 was an abettor. That indeed is what they were convicted of, *viz.*, criminal breach of trust. The only question, therefore, is whether defendants Nos. 3 and 4 having notice of the trust were afterwards parties to a misapplication of the trust property in breach of the trust. In my judgment, on the evidence before me, it is clear that that question should be answered in the affirmative. Accordingly, in my judgment, defendants Nos. 1, 2, 3, and 4 were all liable to replace these trust moneys. It follows then that in the view which I take the plaintiffs' case can and does succeed on that ground. I say nothing further as to whether it could also be based on some other ground.

Counsel informs me that the plaintiffs have recovered Rs. 1,500 found on defendant No. 1, but have received nothing of the fines imposed by me. There will, accordingly, be judgment against defendants Nos. 1, 3, 4 and 5 for Rs. 38,500 (being the balance of the Rs. 40,000) and interest at 9 per cent. per annum from July 5, 1918, to judgment. Costs and interest on judgment at 6 per cent. But so far as regards defendant No. 5 his liability is to be limited to the extent of the assets received by him from his father defendant No. 2 since deceased. The attachment before judgment will continue pending the further orders of the Court, and there will be general liberty to apply.

As the Justice of the Peace newspaper is not, I think, in the local law libraries, a print containing the above brief report of the case before the late Mr. Justice Bailhache can be annexed to this judgment for convenience of reference.

Z. K. *Suit decreed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 235 OF 1924.

June 25, 1925.

Present:—Mr. Findlay, Officiating J. C.

DR. N. LOBO—PLAINTIFF—APPELLANT

versus

BABULAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Execution of decree—Objection proceedings—Order passed on objection, finality of—Wrongful attachment—Damages, suit for—Malice, proof of, whether necessary.

By virtue of the provision contained in r. 63 of O. XXI of the C. P. C., it is incumbent on a person, against whom an order is made in objection proceedings, to file a suit to set aside the order if he feels himself aggrieved thereby, otherwise the order passed in the objection proceedings will become final, and will not be open to question in any other proceeding between the parties. [p. 574, col. 2.]

In a suit to recover damages for wrongful attachment by a person other than the judgment-debtor it is not incumbent on the plaintiff to allege and prove that the person at whose instance the wrongful attachment was made acted maliciously or without reasonable or probable cause. The defendant may have acted in perfectly good faith and innocently, but he is nevertheless liable if damage has been caused by his mistake. [*ibid.*]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 29th February 1924, in Civil Appeal No. 78 of 1923.

Mr. *W. H. Dhabe*, for the Appellant.

Mr. *D. P. Tiwari*, for the Respondent.

JUDGMENT.—The main facts of this case are not in dispute. The plaintiff-appellant Dr. Lobo sued the defendant-respondent in the first Court on the allegation that he had delivered a soda-water machine on the "hire purchase" system to one S. Kitchie. Kitchie, after a time, disappeared from Nagpur, leaving the machine in the house without having paid the price thereof. Kitchie was also in arrears of rent to the defendant who wished to have the house vacated. He applied to the Deputy Commissioner, Nagpur, who in the course of his proceedings took possession of the machine as unclaimed property apparently under the Police Act. Possession was so taken on the 5th of November 1921. Meanwhile, the defendant had filed a suit for arrears of rent against Kitchie and he obtained an attachment order before judgment in respect of the soda-water machine, the date of the attachment being the 3rd of December 1921.

The plaintiff-appellant Dr. Lobo's case was that he came to know of the whereabout of the machine in May 1922 and applied for possession thereof to the Deputy Commissioner. He then came to know that the property had been attached before judgment by Babulal, and he accordingly presented an objection to the attachment in the Civil Court and the property, in pursuance of that objection, was released on 25th October 1922; *cf* Ex. P. 3.

Apparently, the Collector was not even then satisfied that the soda-water machine was the property of Dr. Lobo and further enquiries followed, with the result that he (Dr. Lobo) got possession thereof only in February 1923. During the period of the soda-water machine remained in the Collector's custody; it was apparently kept in the open air exposed to the weather and in consequence deteriorated. The plaintiff accordingly claimed damages from the defendant amounting to Rs. 150 for deterioration, and in respect of his having been kept out of possession for roughly a year he claimed damages in respect of hire to the extent of Rs. 300, *i. e.*, Rs. 450 in all were claimed.

The Munsif held that the defendant could not challenge the claim of the plaintiff to the soda-water machine and that the latter was owner thereof. He further held that the defendant Babulal was unaware of the plaintiff's ownership of the machine when he applied for attachment before judgment. The Munsif found that the deterioration and loss of hire each amounted to Rs. 50 and accordingly he passed a decree for Rs. 100 with proportionate costs. The defendant Babulal appealed to the Court of the Additional District Judge, Nagpur, against the said judgment and decree, and the plaintiff also filed a memorandum of objections. On the question of title the Additional District Judge confirmed the finding of the first Court.

Counsel for the respondent in this Court has made an attempt to attack this finding on the ground that the plaintiff's title had been legitimately attacked in defence in the present suit, which was filed within a year of the order passed in objection suit. The language of O. XXI, r. 63, C. P. C., is, however, perfectly plain. It is incumbent on the person, against whom an order is made in an objection proceeding, to file a suit if he feels himself aggrieved thereby, otherwise the order in the objection suit is final. It seems unnecessary, therefore, for me to consider in detail the decision in *Cecil Cole* v. *Nanalal Moraji Dave* (1), which has been quoted by Counsel for the respondent in support of the proposition that the property had become the possession of Kitchie. But I may point out that in the agreement (Ex. P-4) there was the present case a clear condition that the soda-water machine was to remain in the sole and absolute property of the vendor until the full purchase had been effected. The decision in *Namagauda* v. *Paresha* (2) is clear authority for the proposition that the question of title cannot now be disputed and the decision of the two lower Courts on this point is undoubtedly correct.

Passing now to the question of the liability of the defendant-respondent for damages, I have been referred to the decision of their Lordships of the Privy Council in *Kissorimohun Roy* v. *Harsukh Das* (3) and to *Bishamber Nath* v. *Gaddar* (4). Generally speaking, it is not incumbent on the plaintiff in the present case to allege and prove that the person at whose instance a wrong attachment has been made acted there anent maliciously or without probable cause. It is accepted law that proof of malice is not necessary when the property of a stranger, not a party to the suit, is taken in execution. The decree-holder may have acted in perfectly good faith and innocently, but is nevertheless liable if damages have been caused by his mistake.

I now come to the question of whether, as a matter of fact, any damages were caused by the present attachment before judgment. On behalf of the respondent it has been urged with some show of plausibility that at the time of the attachment the property was already in possession of the Collector, and it has been urged that, in effect, the attachment made no essential difference and that even, after the property had been

(1) 92 Ind. Cas. 191; 49 B. 172; 26 Bom. L. R. 880; A. I. R. 1925 Bom. 18.

(2) 22 B. 640; 11 Ind. Dec. (N. S.) 1009

(3) 17 C. 436; 17 I. A. 17; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472; 8 Ind. Dec. (N. S.) 830 (P. C.).

(4) 9 Ind. Cas. 317; 33 A. 306; 8 A. L. J. 914.

released by the Civil Court on the 25th of October 1922, the Collector did not give it over to the plaintiff-appellant until some 4 months later. This argument, however, loses sight entirely of the fact that in May 1922 the present appellant had applied to the Collector for release of his property and, had it not been for the attachment order, the Collector would undoubtedly forthwith have proceeded to make enquiry as to Dr. Lobo's title to the soda-water machine just as that officer did in October 1922. It is, therefore, apparent that the property in consequence of the attachment remained in the possession of the Collector for a period of five months longer than it otherwise would have been in consequence of the Civil Court's attachment, and it seems to me clear that the plaintiff-appellant is entitled to damages, if any can be shown to have been caused during these five months, *i. e.*, from the 25th of October 1922. The machine remained in the possession of the Collector for a period of roughly 15 months only, and the only reasonable presumption to make, so far as the deterioration is concerned, is that the said deterioration proceeded at a level rate during all these 15 months. It follows, therefore, that the defendant-respondent must be held responsible for a third of the total deterioration and loss of hire, the property having remained, in consequence of the attachment before judgment, in the possession of the Collector for some 5 months of the total of 15 months. There is a concurrent finding of both the lower Courts that the total deterioration amounted to Rs. 100. Therefore, it follows that the defendant-respondant is responsible for Rs. 33-5-4 out of this amount.

As regards damages on account of loss of hire, the appellant has stated that he would be content with a rate of Rs. 7 per mensem. I think the lower Appellate Court's reasons for finding that nothing at all was due on this account are unsound. It has apparently arrived at the said conclusion mainly because for some months the plaintiff remained inactive before attempting to trace out the machine. Any such argument, however, overlooks the fact that the plaintiff may well have delayed action in the reasonable enough hope, or belief that his debtor Kitchie would again return. The Judge of the first Court allowed damages on account of hire at the rate of Rs. 12 a month, but I concur with the Additional District Judge that this rate was excessive. The rate of Rs. 7 a month, however, which the plaintiff-appellant has stated he is willing to accept, seems to be undoubtedly rather below than above the correct figure, and, in these circumstances, I can see no reason for disallowing this rate. The result is that Rs. 35 will be allowed on account of loss of hire for the five months in question.

The judgment and decree appealed against are accordingly reversed and a decree for the total amount of Rs. 68-5-4 with proportionate costs will issue in favour of the plaintiff-appellant. In the peculiar circumstances of this case I do not think the defendant is entitled to costs on the portion of the claim which has been dismissed, and I accordingly order that parties will bear all the remaining costs as incurred.

Z. K. *Decree reversed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT
No. 256 OF 1922.
March 21, 1925.

Present:—Justice Sir Amberson Marten, KT.

THE COORLA SPINNING AND WEAVING MILLS COMPANY, LIMITED—
PLAINTIFF
versus
VALLABHDAS KALLIANJI—
DEFENDANT.

Contract Act (IX of 1872), ss. 73, 107, 140, 141—Civil Procedure Code (Act V of 1908), s. 34—Limitation Act (IX of 1908), s. 22—Sale of goods—Breach of contract—Re-sale beyond reasonable time after breach, effect of—Damages, suit for—Date of breach, determination of—Measure of damages—Interest pendente lite, *whether can be awarded—Principal and agent—Contract entered into by guaranteeing agent—Breach of contract—Suit to recover damages—Principal, whether necessary party—Principal added as co-plaintiff after expiry of limitation—Suit, whether barred.*

Where a contract for the sale of goods empowers the seller to re-sell the goods at the risk of the buyer in case the latter fails to take delivery, the re-sale must be held within a reasonable time from the date of such failure, and the same rule applies to a re-sale held under the provisions of s. 107 of the Contract Act. [p. 578, col. 2.]

Where the time for performing a contract of sale has been postponed, at the request either of vendor or purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place, and, therefore, alters the date with reference to which the damages are to be calculated. The old contract continues, but the date of the breach is shifted. The damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence. [p. 579, col. 1.]

A plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage the defendant is entitled to the benefit of it. [p. 580, col. 1.]

Where a breach of a contract for the sale of goods is committed by the buyer and the seller does not exercise his power of re-sale within a reasonable time, the correct measure of damages is the difference between the contract rate and market rate at the date of breach and not the market rate at the expiration of a reasonable time from the date of breach within which the re-sale should have taken place. It is immaterial in such a case whether the property in the goods has or has not passed to the buyer. [*ibid.*]

A clause in a contract for the sale of goods giving the power of re-sale to the seller confers a valid right on the latter to claim the difference between the contract price and the price realized at the re-sale, provided that power has been exercised in accordance with the provisions of the clause. But where that power has not been exercised within a reasonable time the only right of the seller is to claim damages on the footing of the difference between the contract price and the market value of the goods on the date of the breach, without any reference to the price which might be realized by a re-sale at any time after the limit of the reasonable time has been exceeded. [p. 581, col. 2.]

Where a party responsible for a breach of contract improperly delays the ascertainment of damages for a long time, interest on the damages awarded from the date of the institution of the suit may be decreed under s. 34 of the C. P. C. [p. 584, col. 1.]

Where a contract for the sale of goods is entered into by a selling agent who is in the position of a guaranteeing agent towards his principal and who on default by the buyer in taking delivery of the goods has paid to the principal the amount due in respect of the goods, the agent is entitled in equity to assignment of the principal's rights against the buyer under the contract and is entitled to maintain a suit against the buyer for recovery of damages. Such an agent may also be treated as being in the position of a surety who has paid all that he is liable for and who upon such payment is invested with all the rights which his principal had against the buyer and becomes entitled to the benefits of every security held by the principal. To a suit by the agent in such a case to recover damages from the buyer, the principal is a proper rather than a necessary party and the suit will not be deemed to be barred by time if the principal is not added as a co-plaintiff until after the period of limitation has expired. [p. 587, col. 2; p. 588, col. 1.]

Messrs. *Davar* and *Engineer*, for the Plaintiffs.

Messrs. *Lalji* and *Bhagvati*, for the Defendant.

JUDGMENT.—This is a suit brought by the plaintiffs under a contract dated October 6, 1920, in respect of the sale to the defendants of 75 out of a total of 101 bales of bed-sheets, which were "bunto" goods, and were to be delivered between November 1920 and February 1921. The original plaintiffs, when the suit was filed on January 19, 1922, were the present 2nd plaintiffs, Messrs. Keshavji Manakchand & Co. They are the selling agents of the present 1st plaintiffs, the Coorla Spinning and Weaving Company, Limited, who were added as co-plaintiffs by my order of March 26, 1924.

2. It is common ground that on November 19, 1920, the defendants took delivery of six out of the 101 bales and paid for the same. The plaintiff's case is that at the instance of one Mohanlal Anandji, who was a partner of the defendants or who was acting on their behalf, they gave time to the defendants as regards the balance of the goods, and agreed that the defendants should take delivery in one lot of all the remaining bales, that were turned out to the end of February 1921. They accordingly gave a notice dated February 28, 1921, to the defendants that 75 bales were ready, and forwarded a delivery order. Subsequently they say they saw Mohanlal, who promised to take delivery shortly. Next, on March 21, they wrote saying that twenty more bales became ready by March 16, and requiring delivery to be taken of 95 bales in all by March 31. No written reply was received to either of these letters. Then, on April 8, they sent a solicitor's letter to the defendants calling on the latter to pay for the 95 bales and to take them up without further delay, and stating that if they were not paid for within seven days, they would be sold on their account or proceedings would be taken. It is alleged by the defendants that this letter was not delivered till April 12.

3. On April 13, the defendants in their letter of that date for the first time repudiated their liability, and claimed that the bales were tendered after the due date. On April 28, the plaintiffs wrote stating in effect that the course they had taken as regards the 75 bales was by arrangement with Mohanlal, and that those bales must be taken delivery of, but that if so desired the question of the twenty bales could remain open. On May 25, the defendants replied that Mohanlal was not a member of their firm, but was only a broker in the

transaction, and had no authority to act in the way suggested. Subsequently, on June 27, after further correspondence the goods were sold by public auction. Then, on November 10, 1921, this plaint was declared, but for some unexplained reason it was not admitted till January 19, 1922.

4. The defendants' case is that the contract was with the 1st plaintiffs, the Coorla Mills Company, and not with their agents, and that accordingly this suit is barred by limitation, as the Mills Company was not added as a co-plaintiff till after the expiration of three years from the date of the breach of contract in respect of which the suit is instituted. Secondly, the defendants say that Mohanlal was not a partner of theirs, nor was he authorised to grant any extension of time, and that accordingly they are not liable under the contract as the plaintiffs were not prepared to give delivery within the contract period.

5. As regards the formal issues raised in the case I may at once answer Issues Nos. 1 and 6 as follows, *viz* :—

"(Issue No. 1). The Coorla Mills Company Limited was added as a co-plaintiff in pursuance of the Court's order of March 26, 1924, after this issue was raised (Issue No. 6). Yes. After inspection of the relevant books, this was admitted by defendant's Counsel on November 13, 1924."

6. As regards Issue No. 6, I may state that Ex. E gives particulars of the bailing dates of the 75 bales. It will be seen that the first 59 bales were all manufactured by the end of January 1921, the next ten by February 1922 and the last nine by the end of February 1921. The total is 78 and not 75, because the first three were part of the six bales delivered and paid for on November 19, 1920. The remaining three of these six bales were already manufactured at the date of the suit contract, and are not included in Ex. E. It will accordingly be seen that, so far as the plaintiffs are concerned, there was no reason why the bulk of the goods should not have been delivered long before the end of February, as under cl. 1 of the Contract the defendant had to take delivery on the Company giving intimation that the goods were ready, and under cl. 5 the Company was exempted from delivering all the goods in certain events. I think, therefore, that part delivery was within the terms of the contract. This view is borne out by the part delivery actually effected on November 19 and has not been contested before me.

7. The plaintiffs say that the reason why the goods were not delivered when ready was because of Mohanlal's requests for time. This brings me to Issues Nos. 3 and 4, and I have no hesitation in answering both of them in the affirmative. I entirely accept in this and other respects the evidence of Ratilal Keshavji Mehta, the salesman of plaintiffs No. 2. The opinion I formed of him was that he was a good and candid witness. He explains that Mohanlal first negotiated a ready contract for 48 bales of similar goods dated September 23, 1920, (Ex. I), and that though delivery was to be taken by the end of October, the defendants got into arrears and asked for time through Mohanlal. Time was granted at his request in respect of this ready contract, and eventually delivery was not completed till January 23, 1921, as will be seen from the statement, Ex. B, which sets out the various delivery dates. Consequently, says Ratilal, time was also requested in respect of the suit contract, and Mohan Lal gave as one excuse that the defendants had not then re-sold the ready goods. This seems to me a natural story, and to be borne out by Ex. E. The defendants have not called Mohanlal, or made any attempt to find him. Their only witness is their partner Narsing Vallabhdas. He impressed me unfavourably, and where his evidence conflicts with that of the plaintiffs' witnesses, I think it should be rejected. In particular I think he gave false evidence when he stated that the reason for defendants' delay in taking delivery under the ready contract (Ex. 1) was that the plaintiffs put them off from time to time. I am satisfied that the plaintiffs never did anything of the sort, and that the real reason was due to Mohanlal's request for time. Another specific instance of false evidence is his statement in cross-examination near the end of the trial to the effect that he signed the suit contract at the plaintiff's shop and that Devkaran, the plaintiff's partner, then said that the plaintiffs would tell the defendants when the goods were ready. This was the first time that it was suggested that Narsing went to the plaintiffs' shop, or that Devkaran was present or took any active part in the matter. No such suggestion was made to any of the plaintiff's witnesses: nor was it put forward in examination-in-

chief. And when the witness was asked whether he ever told his Solicitors or Counsel about it, or whether he was inventing it in the witness-box, he said he did not remember. In my judgment it was an invention made under stress of cross-examination when he was being pressed to explain how according to his story he came to leave it to a mere broker to settle the details of a heavy contract for Rs. 60,000 or so.

8. Under all the circumstances I am also satisfied that after the first delivery of six bales it was agreed through Mohanlal that instead of taking delivery of the remaining bales as they became ready, the defendants should take delivery in one lot of all the remaining bales manufactured up to the end of February 1921. Accordingly in my judgment the terms of the suit contract were varied in this respect. It may, therefore, be that, strictly speaking, this was not a mere withholding of delivery at the request of the purchasers as in *Ogle* v. *Earl Vane* (2) and *Hickman* v. *Haynes* (2), but amounted to the substitution of a new contract, which in England might have required to be in writing having regard to the Statute of Frauds. No point, however, was made as to this before me, and its materiality would mainly seem to arise in considering the question of Mohanlal's authority.

9. In the result as regards Issue No. 7 I hold that the plaintiffs' letter and delivery order of February 28, 1921, were in time, although not received by the defendants till March 1. As the goods to be taken delivery of under the new arrangement were all those manufactured up to the end of February, it follows, in my opinion, that the plaintiffs would not be obliged to serve notice until February had expired, and the bales actually manufactured had thus been ascertained. My answer, therefore, to issue No. 7 will be: "The defendants were bound to take delivery of the 75 bales offered on March 1st 1921, on the true construction of the suit contract as subsequently varied by the arrangement with Mohanlal." On the facts, therefore, as found by me, I need not consider what would have been the position if the suit contract had not been varied. But I incline to the view that in that event the notice actually given would have been too late, as the schedule to the contract stipulated for delivery "from November to February," and not for manufacture throughout those months. Further, under cl. 1, prior intimation had to be given to the defendants. Consequently to that extent the contract modified the terms of of s. 93 of the Indian Contract Act.

10. I will next consider whether Mohanlal had the requisite authority from the defendants, and this brings me to Issues Nos. 2 and 5.

[After dealing with the evidence on the point, his Lordship concluded :—]

19. After weighing then all the evidence, my conclusion is that Mohanlal's negotiations with the plaintiffs both before and after the ready contract and the suit contract were all effected with the knowledge and consent of the defendants, and that he was in these transactions their partner or at any rate a fully authorised agent and not a mere broker. I accordingly answer Issue No. 2 "Yes, or else was a fully authorised agent of the defendants to act on their behalf in the manner alleged by the plaintiffs." And Issue No. 5 "Yes."

20. Under the above circumstances I also hold that there was a breach of contract by the defendants, and that accordingly Issue No. 8 must be answered "Yes." This is not a case like that of the *Phoenix Mills Ltd.* v. *Madhavdas Rupchand* (3) where nothing at all was done by either party during the contract period. Nor is it like *Toyo Menka Kaisha Ltd.* v. *Chabildas Nathubha* (4), where the plaintiffs failed in their attempt to prove that the time for delivery had been extended by mutual consent.

21. I next come to Issues Nos. 9, 10 and 11. The goods having been re-sold by auction, the suit is brought not for the price of the goods but (*a*) for the difference between the auction and contract prices under cl. 2 of the contract, or (*b*) alternatively for damages of the same amount or such other sum as the Court may deem fit to award. As regards (*a*) I am of opinion that the sale by auction whether under cl. 2 of the contract or s. 107 of the Indian Contract Act or otherwise must be within a reasonable time; that the sale on June 27, 1921, was unreasonably late; and that consequently the plaintiffs cannot rely on cl. 2 [see *Harichand & Co.* v. *Gosho Kabushiki Kaisha*

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(1) (1868) 3 Q. B. 272; 9 B. & S. 182; 37 L. J. Q. B. 77; 16 W. R. 463.

(2) (1875) 10 C. P. 598; 44 L. J. C. P. 358; 32 L. T. 873; 23 W. R. 871.

(3) 69 Ind. Cas. 9; 24 Bom. L. R. 142.

(4) 69 Ind. Cas. 29; 24 Bom. L. R. 149; A. I. R. 1922 Bom. 203.

Ltd. (5),] nor on s. 107 as justifying this particular sale. The provision in cl. 2 that "the Company is at liberty to keep the said goods or re-sell them...on our account and at our risk" cannot, I think, be construed as a power to keep the goods as long as the Company liked before it re-sold. I accordingly answer Issue No. 10 "No."

22. As regards the alternative claim (*b*) I think Issue No. 9 raises a question of difficulty as to the date of breach, *viz.*, whether it should be taken to be within a few days of the service of the notice of February 28, 1921, say March 4, or else on or about March 31, when the notice of March 21 (Ex. 2) expired. This depends in the first place on whether I can accept Ratilal's evidence to the effect that after the notice of February 28, 1921, he saw Mohanlal several times, and that Mohanlal promised to take delivery shortly.

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26. In the result, I have arrived at the conclusion that Ratilal's evidence should be accepted in its entirety, and that having regard to Mohanlal's promises the plaintiffs showed further forbearance and withheld delivery voluntarily at his request. But this further extension unlike the original extension to the end of February is not proved to have been to a definite agreed date. In this respect accordingly the case resembles *Ogle* v. *Earl Vane* (1) and *Hickman* v. *Haynes* (2) already cited. The English Law on the point is thus stated in Mayne on Damages, 9th Edition, pages 176-177 :—

> "Where the time for performing a contract of sale has been postponed, at the request either of vendor or purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place, and, therefore, alters the date with reference to which the damages are to be calculated. The old contract continues, but the date of the breach is shifted. The damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence."

27. Under all the circumstances, then I hold that the plaintiffs' notice of March 21 giving a final ten days' time was a reasonable notice to give. I accordinly fix the date of the expiration of that notice, *viz.*, March 31, as the date of the defendants' breach of contract *cf. Hickman* v. *Haynes* (2) and *Plevins* v. *Downing* (6). The plaintiffs' subsequent letter of April 8 would not, I think, extend the date of breach in the absence of proof of any subsequent negotiations after March 31. I accordingly answer Issue No. 9 "March 31, 1921."

28. I next turn to Issue No. 11 which raises the question of quantum of damages. If the property in the goods did not pass to the defendants, then putting aside cl. 2 of the contract, the measure of damages would normally be the difference between the contract rate and the market rate at the date of breach [see *Jamal* v. *Moola Dawood Sons & Co.* (7).] And damages on that basis could be awarded without an amendment of the plaint, even if the plaintiffs had only put forward the auction rate as the correct rate [see *Narsinggirji Manufacturing Co.* v. *Budansaheb* (8).] In fact, however, in prayer (*b*) of the plaint the plaintiffs have claimed alternatively "such other sum" as the Court may deem fit to award as damages. In *Jamal's case* (7) Lord Wrenbury, in delivering the judgment of the Board, says at page 10* :—

> "The question, therefore, is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach —with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after

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(5) 86 Ind. Cas. 521; 23 Bom. L. R. 921; A. I. R. 1925 Bom. 28; 49 B. 25.

(6) (1876) 1 C. P. D. 220 at p. 225; 45 L. J. C. P 695; 35 L. T. 263.

(7) 31 Ind. Cas. 949; 43 I. A. 6; 18 Bom. L. R. 315; 20 C. W. N. 105; 30 M. L. J. 73; 14 A. L. J. 89; 19 M. L T. 80; 3 L. W. 181; 23 C. L. J. 137; (1916) 1 M. W. N. 70; 43 C. 493; 9 Bur. L. T. 8 (P. C.).

(8) 80 Ind. Cas. 430; 26 Bom. L. R. 523; A. I. R. 1924 Bom. 390.

*Page of 43 I. A.—[*Ed.*]

the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises. It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach.* If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it."

29. Then dealing with ss. 73 and 107 of the Indian Contract Act, his Lordship states as follows at page 11* :—

"The respondents further contend that ss. 73 and 107 of the Indian Contract Act, or one of them, are in their favour. As regards s. 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them in transitu. The section follows upon sections dealing with those subject matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares. As regards s. 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment...... The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date."

30. That case has been followed recently in *Harichand & Co.* v. *Gosho Kabushiki Kaisha, Ltd.* (5) where the Court of Appeal held that the vendors did not exercise their express power of re-sale within a reasonable time, and that consequently the correct measure of damages was the difference between the contract rate and market rate at date of breach and not the market rate at the expiration of a reasonable time in which the re sale should have taken place. In that case delivery of fifty bales of yarn under a contract was to be given within sixty-day of the arrival of a steamer, and in default there was an express power for the sellers "at any time to sell the goods by private sale or public auction." Twenty five bales arrived in Bombay on December 24, 1920, and the remainder on January 21, 1921. The purchasers took delivery of two lots of four bales each on January 14 and March 13, 1921, respectively. They then objected that these bales bore the contract No. 10 instead of the original contract No. 9/5, and so belonged to another contract with some different person. It was admitted that this number had nothing whatever to do with the quality of the goods. The seller's explanation was that it solely related to different numberings adopted by their Bombay branch as compared with their head office in Japan.

31. At the trial the main defence was this question of numbering. I decided this point against the purchasers. I next held that there was a breach of contract by the purchasers in their letter of April 5, 1921, and that the express power of sale must be exercised within a reasonable time thereafter notwithstanding the use of the words "at any time." These particular findings were not challenged in appeal, and I may add that a somewhat similar question as to numbering has now been conclusively determined by the Privy Council in *Ramjivan Nevatla* v. *Bhikaji & Co.* (9). It was there held in effect that a first purchaser who is the owner of goods in the hands of a mill-owner can have any reference number he likes put on the bales provided it does not give any warranty or indication of the quality or description to his sub-purchaser or to others.

The next question in *Harichand's case* (5) was whether the actual sale on May 21 was within a reasonable time. At the trial this point was argued by Counsel briefly without any reference to authorities, and depended on the view taken of the correspondence. Practically throughout April correspondence had passed between the respective Solicitors in which the purchasers maintained their erroneous point about the numbering. On April 26, the sellers wrote demanding payment within two days in default of which the goods would be sold. On May 2, the purchasers replied that they never had the idea of evading their liability and that they would be quite prepared to take the goods provided they related to

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*Page of 43 I. A.—[*Ed.*]

(9) 80 Ind. Cas. 381; 26 Bom. L. R. 442; 46 M. L. J. 655; 10 O. & A. L. R. 601; A. I. R. 1924 P. C. 143; (1924) M. W. N. 430; 35 M. L. T. 140; 20 L. W. 424; 48 B. 519; L. R. 5 A. (P. C.) 135; 29 C. W. N. 537; 1 O. W. N. 304 (P. C.).

their contract, and they proposed that they would take the goods provided the sellers admitted they did not appertain to the purchasers' order and would make an allowance in the price on that account. Again, on May 6, the purchasers asked for the production of certain papers and correspondence and said that they had no desire to back out of the contract, and that if the proofs asked for were produced, they would pay for and take delivery of the goods without prejudice to their contention that they were not bound to take delivery as they did not relate to the contract. Subsequently, on May 17, the purchasers withdrew their offer, and the goods were re-sold on May 25.'

33. The view I took of this correspondence was that having regard to the purchasers' letters of May 2 and 6, the sellers were not unreasonable in postponing the sale until the proposals made by those letters had been disposed of. But the view which prevailed in the Appeal Court (see page 928*) was that though in view of the unreasonable nature of the purchasers' objection to accept the goods, sometime might properly be allowed for the vendors endeavouring to get the purchasers to reconsider their refusal, yet that the vendors should have taken steps for a re-sale after receipt of the purchasers' letter of April 21 and that the sale should have taken place at any rate by April 29, *i.e.*, after the expiry of the two days mentioned in the notice of April 26, and that consequently the negotiations made by the purchasers on May 2 and subsequently should be disregarded as they did not materialise, but that otherwise, some time should be allowed for the time taken up in advertising the sale, etc., *e. g.*, a week, such as ensued between the vendors' Solicitors' letter of May 18 and the actual auction on May 25.

34. The case, therefore, in effect depended on the difference of two or three days between April 29 and May 2, and this difference resulted in the vendor being unable to justify his actual re-sale, and being consequently thrown back on his ordinary remedy. Damages were accordingly calculated according to the market rate at date of breach. At pages 928-29* Mr. Justice Fawcett said:—

"The result, in my opinion, is that plaintiffs cannot recover the whole loss resulting from re-sale of May 25 and are thrown back on their remedy of damages on the ordinary basis of the difference between the contract rate and the market rate at the date of breach. This date may be taken to be the day following the defendants' actual refusal in their letter of April 5, *i. e.*, April 6, 1921,...It is true that in *Prag Narain* v *Mul Chand* (10) the measure for damages allowed was the difference between the contract rate and the market rate at the expiration of a reasonable time in which the re-sale should have taken place. But I agree with the following criticism of this decision in Remfry's Sale of Goods in British India (page 406) :—'But there seems to be no reason for a departure from the ordinary rule. The right given to the seller includes the right to a reasonable time for effecting a re-sale, but if he does not exercise the power according to the terms of the section, there is no reason why he should obtain any benefit under it, and the due date should be the day on which to ascertain the market value.' The Privy Council decision in *Jamal* v. *Moolla Dawood Sons & Co.* (7) in effect says the same thing in *Angullia & Co.* v. *Sassoon & Co.* (11) Harington, J , took the same view, and this Court agreed with him in *Narsinggirjie Manufacturing Co.* v. *Budansaheb* (8). We, therefore, allow this appeal and declare that the plaintiffs are entitled to recover damages from the defendants on the basis of the difference between the contract rate and the market rate of the goods on April 6, 1921."

35. So, too, at page 933,* Sir Lallubhai Shah said:—

"I do not read the judgment in that case [*Jamal's case* (7)] as casting any doubt upon the proposition, which has been accepted in several cases to which I have referred, that a clause as to re-sale gives a valid right to the sellers to claim the difference between the contract price and the price realised at the re sale, provided that power has been exercised in accordance with the provisions of the clause But where that power has not been exercised within reasonable time, the only right of the sellers is to claim damages on the footing of the difference between the contract price and the market value of the goods on the date of the breach, without any reference to the price which might be realised by a re sale at any time after the limit of reasonable time has been exceeded. My conclusion is that the defendants committed a breach of the contract on April 5 or 6, that a re-sale should have been effected soon after that—at the latest before the end of April—and that the subsequent negotiations and the subsequent re-sale cannot give the plaintiffs the right to claim damages according to the clause as to re-sale."

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(10) 19 A. 535 at p. 541; A. W. N. (1897) 150; 9 Ind. Dec. (N. S) 343.

(11) 13 Ind. Cas. 705; 39 C. 568 at p. 572; 16 C. W. N 593.

*Pages of 26 Bom. L. R.—[*Ed.*]

36. In both the above cases, however, the property in the goods did not pass to the purchaser. Does it make any difference then in the present case supposing the property did pass? This point was not referred to in the final arguments, which were all based on the assumption that if the auction-sale was bad, the measure of damages would be the difference between the contract rate and the market rate at the date of breach. That assumption appears to me to be correct. On my above findings the plaintiffs cannot rely on s. 107 of the Indian Contract Act as the re-sale was unreasonably late. Consequently, as in *Jamals' case* (7) s. 107 does not apply, and we are left with s. 73. Accordingly the plaintiffs may sue for damages under s. 73 and prior to the re-sale they would also have had the alternative remedy of suing for the price, although the latter remedy is not mentioned in the Indian Contract Act [see *P. R. & Co.* v. *Bhagvan Das Chaturbhuj* (12) and *Finlay Muir & Co.* v. *Radhakissen* (13).] The same result would, I think, follow under English Law, as defendant had not actually received the goods. Thus, in Mayne on Damages, 9th Edition at page 168, I find it stated as follows:—

"If the purchaser refuses to accept the goods, and propery has passed to him, the vendor may at his option consider the contract of sale as still unbroken, and recover their entire price in an action for goods bargained and sold, even though they have not been delivered. He may, on the other hand, after the time for acceptance has expired, or any other essential condition has been broken, sue for breach of the contract, even after he has re-sold the goods. In the latter case, the measure of damages is the difference between the contract price and the market price at the time when the contract ought to have been completed, for the seller may take his goods into the market and obtain the current price for them."

37. Accordingly in the view I take, the measure of damages would be the same in the present case whether the property did or did not pass. But if it is necessary to decide the point, I hold that the property did pass to the defendants. I think it clear that by their letter and delivery order of February 28, 1921, the plaintiffs appropriated these 75 bales to the contract [see *Pignatarao* v. *Gilroy* (14).] I am further of opinion that this appropriation was assented to by the defendants within the meaning of s. 83 of the Indian Contract Act, having regard to my above findings that Mohanlal asked for and was given time after the receipt of the plaintiffs' letter and delivery order.

38. I should perhaps add that it was never contended before me that the effect of cl. 2 of the suit contract was that the only remedies open to the vendors were either to keep the goods or to re-sell, and that having elected to re-sell and the re-sale being invalid the vendors could not rely on their alternative remedy. Nor was it contended that if the vendors elected to keep the goods, they were not entitled to damages in addition. In my opinion cl. 2 does not have any such effect, and I only mention the points to shew they have not been overlooked. The contract may be badly drafted, but I do not think that its language forces me to attribute to the parties such an improbable intention as the above.

39. As regards the actual market rates, I have already held in answer to Issue No. 9 that the date of breach is March 31, 1921, being the date on which the plaintiffs' notice of March 21 expired. To save costs, the parties have very sensibly agreed that whereas the contract rate was at Rs. 1-10 6 per lb., the market rates on February 28 and March 1 were Re. 1-8-0, on March 9, Re. 1-6-6, on March 31, Re. 1-6-0 and on April 13, Re. 1-6-3, and that the average rate obtained at the auction-sale on June 21 was Re. 1-6 0. Also that the market rate on any date between March 1 and 9 should be taken to be Re. 1-7-3.

40. But it will be noticed from the passage which I have quoted from *Harichand's case* (5) that the market was there taken as at April 6 being the date following the purchasers' actual refusal in their letter of April 5. Possibly it was assumed that this

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(12) 2 Ind. Cas. 474; 34 B. 192; 11 Bom. L. R. 335.
(13) 3 Ind. Cas. 185; 36 C. 736.

(14) (1919) 1 K. B. 459; 120 L. T. 480; 24 Com. Cas 174; 88 L. J. K. B. 726; 63 S. J. 265; 35 T. L. R. 191.

letter was not received till the 6th, though this does not appear from the Appeal Paper Book. But I find on looking at the subsequent unreported proceedings that the date finally adopted by the Appeal Court was April 7 and not April 6, as April 6 was a close holiday.

41. Further, in Halsburys' Laws of England, Volume X, page 332, *note* (*g*), I find it stated:—

"The difference is more properly that between the contract price and the market price on the day after the breach, for the defendant has the whole of the day fixed for delivery on which to deliver."

Shaw v. *Holland* (15) is cited in support of this proposition, but in my opinion it does not bear it out. On the contrary as I read the decision the damages were based on the market rate of the last day of a seven days' notice given by a vendor to a purchaser to take delivery. The head-note ends:—

"In an action for the non-delivery of shares on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken."

In that case, on March 3, 1845, the plaintiffs gave a notice which ended (page 142)*:

"If those scrips are not delivered to me on or before the 10th instant, I shall buy them in against you, and debit you with the difference."

Then at page 146* Baron Parke said:—

"The question, therefore, is, when it (the contract) was broken. Now the plaintiff by his letter of March 3, gave the defendant until March 10 to deliver the shares; and he is not, therefore, entitled to calculate the damages with reference to any amount the shares might have sold for subsequently to the 10th."

Accordingly the damages awarded in the lower Court were reduced on that basis.

42. In *Narsinggirji Manufacturing Co.* v. *Budansaheb* (8) delivery had to be taken by December 31, 1919. In remanding the suit for a re-trial, the Appeal Court framed the following issue: "(2) If the breach of contract was by the defendant and not by the plaintiff, what was the market price of the goods on December 31, 1919 ?" And Sir Norman Macleod added (page 527)† :—

"The Court below has found that the contract time was not extended. If the defendant committed the breach the plaintiff will be entitled to the difference between the contract rate and the market rate as found."

Presumably December 31, 1919, and also January 1, 1920, were close holidays, but in such a case the Court has to arrive at the rate as best it can by considering the rates available for the days nearest to the date of actual breach.

43. In the present case I appreciate that as on my findings the property passed, and the defendants had the whole of March 31 in which to pay, the plaintiffs could not have safely gone into the market and re-sold these bales on March 31. But as I read the authorities already cited, the principle on which the date of the breach is taken is because it is the loss to the plaintiff on that particular date which has to be ascertained. As Lord Wrenbury emphasises in *Jamal's case* (7) (page 11*): "The sellers' loss at the date of breach was and remained the difference between contract price and market price at that date." That being so, it is really misleading to consider how soon in fact the vendors could reasonably have re-sold after the date of breach. The materiality of that would only arise if the vendors were validly exercising their powers of re-sale under cl. 2 of the suit contract or s. 107 of the Indian Contract Act. In that event a week might well be spent if the sale was to be by auction and advertisements; etc. issued [*cf. Narsinggirji Manufacturing Co.* v. *Budansaheb* (8)]

44. But on my findings the vendors did not validly exercise these special powers, and consequently they can now only rely on their ordinary remedy. And one can well see that if some date after the date of breach was adopted, this might lead to disputes and difficulties as to what subsequent date should be adopted in any particular case, and that in a fluctuating market the difference of even a day might lead to serious differences in money. And as regards the mitigation of damages under s. 73, that again is at the date of breach. It is not suggested here that at that date there was anything special which the vendors should have done, but did not do, apart from the exercise of their power of sale which stands on a different footing.

45. Following then what I understand to be the principle laid down in *Jamal's case* (7) and in *Narsinggirji Manufacturing Co.* v. *Budansaheb* (8) I hold that I ought to

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(15) (1846) 15 M. & W. 136; 15 L. J. Ex. 87; 10 Jur. 100; 153 E. R. 794; 71 R. R. 596.

*Pages of (1816) 15 M. & W—[*Ed.*]

†Page of 26 Bom. L. R.—[*Ed.*]

*Page of 43 I. A.—[*Ed.*]

take the rate of the date of breach, *viz.*, March 31, as the determining rate. This rate, as I have already said, is Re. 1-6-0 per lb. I accordingly answer Issue No. 11 "Yes. The damages should be calculated on the difference between the contract rate of Re. 1-10-6 and the market rate on March 31, 1921, of Re. 1-6 0 with reference to the 75 bales in suit". The aggregate sum representing this difference must be worked out as proper particulars were not given either in the plaint or at the trial, and the sum actually claimed includes interest.

46. As regards Issue No. 12, a question arises about interest. The plaint claims interest prior to the suit, but this cannot, I think, be allowed. As the sum awarded by me represents damages at date of breach, I do not think that cl. 3 of the contract extends to interest on such damages. But interest from date of the suit stands on a different footing. In the subsequent unreported proceedings in *Harichand's case* (5) interest on damages was awarded by the Appeal Court under s. 34 of the C P. C., from the date of the suit, and Mr. Justice Fawcett stated that in his opinion it was desirable that where a party improperly delayed the ascertainment of damages for three or four years, he should be penalised in this way, and that the main objection advanced by the defendants to take delivery had no substance in it.

47. In the present case the second plaintiffs declared their plaint on November 10, 1921, and filed it on January 19, 1922. So there was no unreasonable delay. Substantially they have been awarded the principal sum they claimed. They themselves paid it to the Mill Company in June and July 1921. They have now been out of their money for over three years, and in my opinion the defendants' main objection as to Mohanlal's want of authority is a dishonest defence. Under all the circumstances I think it fair and so hold that under s. 34 of the C. P. C. the damages awarded should carry interest at 6 per cent. from January 19, 1922, when the plaint was filed down to the date of judgment.

48. In the last issue (*viz.*, No 13) the defendants rely on limitation. This issue was not raised until the second hearing when the Mill Company had been added as a co-plaintiff, and an amended written statement pleading limitation had been put in. It depends primarily on what was the date of breach and that is why I have set out at length my reasons for adopting March 31, for the difference in money values is comparatively small. The material dates are as follows. I have already found that the date of breach was March 31, 1921. My order directing the Mill Company to be added as a co plaintiff was made on March 26, 1924 The amendments to the plaint actually adding them as parties were made on March 28, and the amended plaint was formally re-declared by Ratilal on March 31, 1924. Under these circumstances I hold that the joinder of the Mill Company as plaintiffs was within time, *viz.*, three years of the date of breach, and that accordingly Issue No. 13 should be answered "No."

49. Apart, then, from any question of costs, it is unnecessary for me to decide the points of law which would arise if the date of breach was found to be earlier, say March 4, 1921. But in deference to the able and interesting arguments of Counsel, and as in general it is desirable for a Trial Judge to give his decision on all important disputed points, I will now consider this issue on the assumption that (contrary to the view which I hold) the Mill Company was not added as a co-plaintiff until more than three years had expired from the date of breach. In the first place, I reject the plaintiffs' contention that the suit contract was with the selling agents alone. It may be taken in the plaintiffs' favour—and I so hold—that the contract Ex. A alone should be looked at, and that the other document Ex. A 1 which is not signed by anybody and has no rubber stamp endorsement by the agents is not a duplicate, but is only a copy of part of the original contract.

50. Now Ex. A is a printed from in a contract book which is supplied by the Mill Company to the selling agents. In the printed body of the form no other Company but the Mill Company is referred to. Clauses 3 and 5 expressly refer to the Company's "Mill," and it is not suggested that the agents have any mill. I think, therefore, that in cls. 1, 2, 3, 5 and 6 of Ex A the references to "the Company" are clearly to the Mill Company, and that having regard to the nature of those clauses, it cannot be successfully contended that the Mill Company was merely a third party. For instance, under cl. 2 it was "the Company" who on the purchasers' default had the power either to keep or to re-sell the goods and to recover damages on a re-sale. Under cl. 5 the Company had

a conditional power to cancel the contract in which case the purchaser was not to get any compensation from the Company.

51. Plaintiffs' Counsel laid stress on the rubber stamp endorsement bearing the agents' name; and also on the printed statement in the contract that the defendants "have this day agreed to purchase from the Coorla Spinning & Weaving Company Ltd.'s shop (*Dookan*) for selling cloth situate in the new cloth market the below-mentioned goods..." This is an ambiguous and stupid form, and I hope that at any rate one result of this case will be to ensure that the plaintiffs adopt another form in the future. Strictly speaking you can buy "at" a shop, or "from the proprietors of a shop," but not "from a shop." The distinction is between the place and the persons; but sometimes the word 'shop' is used as including or referring to the goods in a shop. The difficulty here is that although the goods manufactured by the Mill Company are sold at this shop, the proprietors of the shop are the selling agents, and not the Mill Company. Possibly in some bygone days the Mill Company kept their own shop, and this form was in use then and has not since been altered but, this is mere guess work for there is no evidence of it. And if the contract is intended to be with the persons who keep the shop where the Mill Company's goods are sold, then this is inconsistent with the body of the contract which refers to the Mill Company alone unless one treats such persons as contracting agents for the Mill Company.

52. In this respect the rubber endorsement is helpful and shows that the contract was at any rate effected by the aid of the selling agents, just as an application for shares in a Company by a member of the public might bear a banker's or broker's stamp. But although it contains the words "& Co.", I do not think this involves a reference to the selling agents in the body of the contract where the words "the Company" are used. The agents were not a Company in the ordinary sense of the word, and would not, I think, be referred to as such. Ratilal tells us that the reason for the rubber endorsement was to show that the purchasers were to credit the selling agents and not the Mill Company on delivery of the goods, and that they might know that the contract was with the selling agents. All people in the market knew that they were the selling agents of the Coorla Mills, but some outside merchants might not know this. And though the defendants have not put their books in evidence to show whom they gave credit to for the ready bales and the six delivered bales, it seems clear that they transacted all business with the selling agents throughout, and not with the Mill Company. But this observation and also Ratilal's statement may perhaps be open to the objection that it is parol evidence as to the intention of the parties under a written contract (see Bowstead on Agency, 6th Edition, Art. 119, page 405 and I think it safer, therefore, to disregard it.

53. On the whole I think the true view is and I so hold that the contract was with the Mill Company acting by their selling agents. In much the same way a club often executes its contracts by a named agent, *e. g*, its Secretary. And in effect the view adopted by both parties in the initial correspondence is not very different. In their letter of April 8, 1921, the vendors' Solicitors write: "on behalf of our clients Messrs Keshavji Manekchand & Co., selling agents of the Coorla Mills" In the reply of April 13 the defendants' Solicitor writes: "By the contract referred to...your clients agreed to deliver to ours..." I further hold that under all the circumstances the rubber endorsement had the effect of a signature on the contract by the selling agents as such and acting on behalf of the Mill Company. In this respect it will be borne in mind that but for this rubber endorsement there was no signature by or on behalf of the vendors either in Ex. A or Ex. A-1.

54. Counsel were unable to assist me with any authorities in arriving at this conclusion, but the contract is I hope *sui generis*, and accordingly one could not expect to find a case in point. The converse case of the personal liability of an agent in various instances has recently been the subject of much litigation in the English Courts, culminating in the decision of the House of Lords in *Universal Steam Navigation Co.* v. *Mckelvie & Co.* (16) but the facts are too different from the present case to afford much assistance.

55. Turning again to the suit contract, this signature by the selling agents would not, I think, necessarily allow the selling

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(16) (1923) A. C. 492; 92 L. J. K. B. 647; 129 L. T. 395; 28 Com. Cas. 353; 67 S. J. 593; 39 T. L. R. 480.

agents to sue on the contract without joining the Mill Company having regard to the terms of the body of the contract. That being so, I see no reason to alter the opinion which I formed on March 26, 1924, that it was desirable that the Mill Company should be added as a co-plaintiff. I thought the case was one where their "presence before the Court *may* be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit," within the meaning of the second branch of O. I, r. 10 (2). I lay stress on this word 'may.' It should be contrasted with the first branch of the section *viz.*, "any person who ought to have been joined." The effect of the decided cases on this sub-section appears to be that the first branch refers to necessary parties and the second to proper parties.

56. It was next argued on behalf of the defendants that the suit was defective and must have been dismissed unless and until the Mill Company was added. In other words, that the Mill Company were necessary and not merely proper parties. The plaintiffs, on the other hand, contended that the selling agents had here a beneficial interest in the completion of the contract, and could accordingly sue in respect of it. This rule extends in England to auctioneers and factors, and is thus expressed in Bowstead on Agency, 7th Edition, page 431 :—

"An agent may sue in his own name on contracts made by him on behalf of his principal in the following case, namely...(*b*) where, as in the case of factors and auctioneers, he has a special property in, or lien upon, the subject-matter of the contract, or has a beneficial interest in the completion thereof."

Williams v. *Millington* (17), *Robinson* v. *Rutter* (18) and *Consolidated Co.* v. *Curtis* (19) may be referred to in this connection.

Similarly in India Sir Arnold White in *Subrahmania Pattar* v. *Narayanan Nayar* (20) say as follows (page 135*) :—

"He (Willes, J.), says the proper person to bring the action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance, in the case of agents, auctioneers or factors, these exceptions are in truth more apparent than real, etc. The real proposition of law, which these and other cases establish, is that where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name. Unless the contract for the breach of which the action is brought is one made by the agent he has no cause of action because there is no privity between himself and the defendant."

58. It may be that in that particular case this was obiter because it was held on the facts that there was no privity between the plaintiff and defendant (see page 136*), and that accordingly the plaintiffs failed on that ground alone. But the comment on the case in Pollock and Mulla, 4th Edition, page 742, 5th Edition, page 722, is :—

"This is not a real exception to the rule laid down at the beginning of the section, the agent being in such case virtually a principal to the extent of his interest in the contract."

The section in question is s. 230 of the Indian Contract Act which runs :—

"In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them."

Then follow certain specific exceptions which do not apply here.

59. As regards the question of fact whether the selling agents had here a beneficial interest in the completion of the contract, I find that point in favour of the plaintiffs. The details of the agency terms are not perhaps as full as they might be, partly because Mr. Bhagvati very prudently did not cross-examine to bring them out. I think, however, it is sufficiently proved that the terms of business were that the agents were remunerated by commission, but that they took delivery from Mill Company and were debited by the Mill Company with the price of the goods, and that they in their turn delivered the goods to the purchaser and were paid by the purchaser. As the delivery and payment of the six bales were admitted, the details were not gone into, but in the concluding stages of the Trial Counsel for the defendants admitted that the delivery order for the six bales was in the same form as that sent on February 28,

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(17) (1788) 1 H. Bl. 81; 126 E. R. 49; 2 R. R. 724.

(18) (1855) 4 El. & Bl. 954; 24 L. J. Q. B. 250; 1 Jur. (N. S.) 823; 3 W. R. 405; 119 E. R. 355; 25 L. T. (O. S.) 127; 99 R. R. 849.

(19) (1892) 1 Q. B. 495; 61 L. J. Q. B. 325; 40 W. R. 426; 56 J. P. 565.

(20) 24 M. 130.

*Pages of 24 M.—[*Ed.*]

1921 *(Ex.* C-I), which was signed by the selling agents and addressed to their own godown-keeper. I further find that normally the delivery by the Mill Company to the agents would be at or about the same time as the latter were to deliver the goods to the purchaser. But if the purchaser failed to complete, then I think the loss, if any, would fall on the selling agents in cases where they had once accepted or taken delivery from the Mill Company. For instance, in the present case the Mill Company eventually delivered the bales to the selling agents at the time when the auction-sale took place. On the other hand the selling agents were debited with the suit contract price of the goods and not with the price realised at the auction. Consequently they stood to lose by the amount of the difference between the contract price and the auction price.

60. It was at one time contended that the agents never in fact paid the Company the contract price. But it became clear from the accounts produced that at the date of the auction the selling agents were largely in credit with the Mill Company, and that in fact their account still remained in credit after the contract goods had been debited to them. Accordingly in the concluding stages of the trial it was admitted by the defendants' Counsel that this amounted to payment by the selling agents to the Mill Company. Shortly stated, therefore, I hold that the selling agents were in the position of *del credere* or guaranteeing agents, and that on the defendants' default they paid their principals, the Mill Company, the amount due by the defendants.

61. I quite appreciate that there is no express assignment here of the Mill Company's right to damages for breach of contract. Even if there had been, the question would still remain whether it would not be wise to add the assignor as a party. I do not wish to go into English practice for there is a difference there between what is made assignable by the Judicature Act and what is assignable in equity. But I may refer to the judgment of Lord Macnaghten in *Tolhurst* v. *Associated Portland Cement Manufacturers 1900 Ltd.* (21), where at page 420* he said as follows:—

"It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee. The assignor ought in ordinary circumstances to be made a party. But I cannot think that this is necessary when the assignor is a mere name, as the Imperial Company is in the present case, without any means and without any executive or Board of Directors, if indeed it has now any corporate existence at all. I am not aware of any authority for this proposition, but it seems to me to be in accordance with the practice in equity, and it is supported by what was said by James, V. C., in *Castellen* v. *Hobson* (22)."

In the above case the Imperial Company had sold its undertaking to an amalgamated Company, and then gone into voluntary liquidation, its affairs being wound up and its assets distributed.

62. In the present case the Mill Company is still a going concern, but at the date when the suit was filed, the selling agents, had long since paid to the Mill Company for the contract price of the goods, and so *prima facie* they would be entitled in equity to an assignment of the Mill Company's rights under the suit contract. And I think they can put their case higher than this. They were in the position of sureties who had paid all they were liable for. Consequently, upon such payment, the selling agents "were invested with all the rights which the creditor had against the principal debtor" and became entitled to the benefit of every security held by the creditor (see ss. 140 and 141 of the Indian Contract Act). I have not been referred to any authority on s. 140, but the words "invested" seems to me a strong one, and coming as it does in a Statute, I do not see why in a case like the present it should not operate as a transfer to the surety of the creditors' rights without the necessity of any written assignment. If so, then one of those rights would be to damages for breach of contract. In that event, there is some authority for holding that even in England if there has been an assignment the surety could sue in his own name (see Halsbury's Laws of England, Volume XV, page 506, Art. 956), although in general a *del credere* agent may not be able to do so (see Bowstead on Agency, 6th Edition, page 432).

63. But, however, that may be, it is, I think, clear that at the date of the suit the

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(21) (1903) A. C. 414; 72 L. J. K. B. 834; 89 L. T. 196; 19 T. L. R. 677; 52 W. R. 143.

*Page of (1903) A. C.—[*Ed.*]

(22) (1870) 10 Eq. 47; 39 L. J. Ch. 490; 22 L. T. 575; 18 W. R. 731.

sole beneficial interest was in the selling agents, and that the Mill Company were only nominal parties, and were in a position resembling that of a bare trustee. On the other hand, it was desirable for the protection of the defendants that the Mill Company should be added so that the defendants should not be exposed to any separate claim by the Mill Company, and that the matter should be adjudicated upon once and for all.

64. Under those circumstances if it had been necessary for me to decide the point, I should have disposed to hold that the Mill Company were proper rather than necessary parties, and that, following the principle of the decisions of this Court in *Ravji Appaji* v. *Mahadev Bapuji* (23), and *Guruvayya Gouda* v. *Dattatraya Anant* (24), the suit was not barred merely because the Mill Company was not added until after the period of limitation had expired. In the former case it was held that a suit brought originally by a *benamidar* was not barred on the ground that the person for whom he was a *benamidar* was not added until after the period of limitation. In the latter case an ejectment suit brought by the manager and one other member of the joint family was held not to be barred merely because other members of the family were added after the period of limitation. Those cases are no doubt distinguishable from the present one, but they show what view our Courts have taken of s. 2: of the Indian Limitation Act, and s. 32 of the C. P. C., and no case exactly in point has been cited to me.

65. In the view, therefore, which I take, the defendants fail in any event in their defence of limitation. But I may add as a word of warning that Bombay Mill Companies and their selling agents would be well advised to see that their selling contracts are free from ambiguity as to who the real vendors are, and that in many cases, to avoid legal difficulties, it may be advisable for both parties to sue as co-plaintiffs, as indeed was the case with the suit brought by the Mathuradas Mills, Ex. K-1. In the other case, Ex. No. 6, the position was clear and the suit was brought by the Sassoon Mills alone.

66. There will accordingly be a decree for the plaintiffs for an amount and interest thereon to be ascertained in accordance with my answers to Issues Nos. 11 and 12. As regards costs, the defendants will pay the plaintiffs' costs of the suit throughout except that the plaintiffs are to pay the costs of adding the Mill Company and the defendants' costs of the hearing on March 26, 1924, and of and occasioned by the adjournment ordered on that day, including their amended written statement, and there will be the usual set-off of costs. There will be interest on judgment at 6 per cent.

Z. K. *Suit decreed.*

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(23) 22 B. 672; 11 Ind. Dec. (N. S.) 1030.

(24) 28 B. 11; 5 Bom. L. R. 618.

CALCUTTA HIGH COURT.

Civil Rule No. 1176 of 1925.

January 29, 1926.

Present:—Mr. Justice Panton and Mr. Justice B. B Ghose.

BENODE BEHARY SAHA—Petitioner

versus

Rai SUNDARI DASSYA—Opposite Party.

Succession (Property Protection) Act (XIX of 1841), s. 14—Idol, competency of, to make application under Act—Testate succession, application of Act to—Six months' limitation, starting point of.

There is nothing in the Curators Act to show that its application is confined to intestate succession and does not cover cases of testamentary succession. [p. 590, col. 1.]

An idol is a juridical person and is entitled to make an application under the Curators Act. But as an idol must make an application through human agency, an application by a *shebait* on behalf of idol for possession of property under the Act is competent. [p. 589, col. 2.]

To bring the Curators Act into operation, it is sufficient that the application under the Act be made within six months of the death of the last proprietor, even though the claimant claims succession through an earlier proprietor dead more than six months before the application. [p. 590, col. 1.]

Bhimappa v *Khanappa*, 4 Ind. Cas. 594; 34 B. 115; 11 Bom. L. R. 1303, followed.

Rule against an order of the District Judge, Rungpur, dated the 26th August 1925.

Sir *B. C. Mitter* and Mr. *Atul Chandra Gupta*, (with him Babu *Jitendra Kumar Sen Gupta*), for the Petitioner.

Messrs. *H. D. Bose* and *Girijaprasanna Sanyal* (with him Babus *Mritunjoy Chattapodhyay* and *Provat Kumar Sen*), for the Opposite Party.

JUDGMENT.—This Rule was obtained on an application for revision of an order passed by the District Judge of Rungpur, under s. 115 of the C. P. C. The order was passed by the Judge under the provisions of the Succession of Property Protection Act XIX of 1841 directing that the curator appointed under that Act should make over certain properties to one Rai Sundari Dassya.

The facts are these. One Purna Chandra Saha died in 1899. He left a Will under the provisions of which amongst other things it was directed that his widow should remain in possession of the properties for her life. Certain annuities were given to his mother, the opposite party before us, and his grandmother. The widow Sarada Sundari was given authority to adopt a son and it was provided that if she died without making any adoption all the properties left by the testator should vest in two idols and that by the income of the properties the *debsheba* of the idols should be performed and if there was any surplus left that would be spent for certain charitable and educational purposes. The lady Sarada Sundari died on the 23rd November 1924 and after her death the present petitioner Benode Behary Saha took possession of the properties, moveable and immoveable, left by Sarada Sundari on the allegation that Sarada Sundari had adopted his son Sudhir according to the authority given in the Will of Purna Chandra Saha. Thereupon, the opposite party, the mother of Purna Chandra Saha, Rai Sundari, made an application under Act XIX of 1841 on which the order complained of was made by the District Judge.

The contentions on behalf of the petitioner may be shortly summarised in this way. The opposite party and Purna Chandra belonged to the same family and were agnatic relations. There are two other persons, Bhabani and Banku, who are also descendants from the common ancestor. The idols to whom the property has been left by the testator were established by an ancestor of all these persons. Therefore, all the persons, Purna, the opposite party and the others mentioned above were *shebaits* of the two idols. Purna used to perform the *sheba* for 19 days in the month and the other three persons performed the *sheba* for the remaining 11 days. On this fact, the contention raised is that the mother Rai Sundari who presented the petition describing herself as *shebait* of the two idols and as such entitled to possession of the properties was not the sole *shebait* and as the question involved relates to the conflicting claims of *shebaits* to the custody of the property belonging to the idols the matter does not come within the purview of the Curators Act.

Secondly, the *shebait* is not one of the persons who are authorised to present an application under that Act.

The third argument is that the dispute does not arise on a question of succession bacause the title of the idols arises for the first time by virtue of the Will and the mother, therefore, cannot claim the properties by succession.

Fourthly, it is urged that there is no finding in the judgment that the applicant was likely to be materially prejudiced if left to the ordinary remedy of a regular suit.

Lastly it is argued that under s. 14 of the Act, this application of Rai Sundari was incompetent as it was not made within six months of the death of Purna Chandra Saha from whom the succession can only be claimed.

With regard to the first point, it may be pointed out that there was no conflicting claim as to the right of *shebaitship* in the Court below. The question that was raised and which was decided was whether the opposite party was entitled to hold the properties on behalf of his son Sudhir Kumar who was alleged to have been adopted by Sarada Sundari the widow of Purna Chandra. No claim was preferred by Benode Behary, the opposite party, that he was entitled to remain in possession of the properties as one of the joint *shebaits* and this question has not at all been discussed by the lower Court. This point we cannot allow to be raised for the the first time in revision.

The second point may be answered thus: that the properties were claimed by the idols and that the idols are juridical persons can hardly be disputed. The idols were certainly entitled, therefore, to make the present application under the Curators Act and as is well-known the idols must act through some human agency. The lady Rai Sundari presented the application as *shebait* of the idols to be put into possession of the properties. There cannot, therefore, be any question of the *shebait* being the proprietor of the properties; the properties have been ordered to be made over to Rai Sundari only as *shebait* of the two idols as she describes herself to be.

The third point seems to be somewhat obscure. Although the title of the idols arises from the testamentary provisions of the Will and it is a case of testamentary succession, there is nothing to show that the expression "succession" in the Curators Act must be confined to intestate succession and not apply to testamentary succession. This point also fails.

The next question is with regard to s. 14 of the Act, which lays down. "That this Act shall not be put in force, unless the aforesaid application to the Judge be made within six months of the decease of the proprietor, whose property is claimed by right in succession." Here, the proprietor is said to be the opposite party, Sarada Sundari and she died within six months of the application. The contention on behalf of the petitioner is that succession is not claimed from her as succession is claimed from Purna Chandra who died in 1899. Under the provisions of this section, the application is not maintainable. But as has been observed with regard to a similar contention in the case of *Bhimappa* v. *Khanappa* (1) it is not necessary to bring the operation of this Act into play that the succession should be claimed from the last deceased proprietor. The learned Chief Justice in delivering the judgment of the Court in that case observed: "It is, however, admitted that the application was within six months of the death of Basawa, and it is contended on behalf of the opponents that the decease of the proprietor whose property is claimed by right 'in succession' referred to in s. 14, would include the decease of Basawa in the present case, because Basawa was, between the death of her husband and her own decease, the proprietor of the property which is claimed, and it is claimed 'in succession' to her, that is to say, the claimant claims to succeed her in the possession of the property. This view of the section is, we think, correct. The words of the Act appear to have been very carefully chosen. Thus in the beginning of the preamble we find a reference to 'pretended claims of rights by gift or succession.' Here the expression is 'by succession' and is used to express the point of view of the claimant. Then in the second paragraph of the preamble we have 'the circumstance of actual possession when taken upon a succession' that is, regarding the succession from the point of view of the Judge and not from the point of view of an interested party." The learned Chief Justice further observed :—"All that the Judge has to decide is who should be put into possession of the property in succession to the last deceased holder. An application was made to him to come to a decision upon that point within six months of the death of Basawa and we, therefore, think that he acted with jurisdiction in coming to his decision." We agree with this view of the reading of s. 14 of the Curators Act.

With regard to the contention that the District Judge did not come to a finding that the applicant was likely to be materially prejudiced is left to the ordinary remedy of a regular suit, we have to observe that although there is no actual finding in those words, the facts found by the learned Judge sufficiently show that this question was present in his mind, and he expressly refers to the provision of s. 3 of the Act with regard to this application. He has found that the opposite party has taken away all the valuable moveable properties left by the deceased and he claims the properties on behalf of his son. That finding is sufficient to maintain an application under s. 3.

It is unnecessary for us to express any opinion on the question whether Benode Behary would be entitled to the possession of the properties as *shebait* of the idols or what the rights of parties are under the Will. It is sufficient to say that we do not find that the order of the Judge of the Court below is without jurisdiction or has been made by any irregular exercise of jurisdiction.

The Rule is, therefore, discharged with costs. Hearing-fee five gold *mohurs*.

R. L. *Rule discharged.*
N. H.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 31 OF 1924.
December 16, 1924.
Present:—Mr. Justice Carr and
Mr. Justice Maung Gyi.
MA SEIN—APPELLANT
versus
SIT PAUNG AND ANOTHER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 7—Appeal to Privy Council—Security, form of—Im-

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(1) 4 Ind. Cas. 594; 34 B. 115; 11 Bom. L. R. 1308.

moveable property, whether can be offered as security—Time for furnishing security, whether can be extended—Difficulty in procuring cash security, whether sufficient reason.

Order XLI, r. 7 (1) of the C. P. C., requires that the security furnished by an appellant to the Privy Council must be given in cash or Government securities. Under the proviso to the rule the Court may allow some other form of security to be furnished, but an order to this effect must be obtained at the time of granting the certificate. An offer of immoveable property as security at a subsequent stage cannot be accepted.

It is open to the Court to grant an extension of time for furnishing security for cogent reasons, but the mere fact that there is difficulty in furnishing cash security would not be a sufficient cogent reason for extension of time.

Burjore v. *Bhagana*, 10 C. 557; 11 I. A. 7; 8 Ind. Jur. 216; 4 Sar. P. C. J. 498; Rafique and Jackon's P. C. No. 76; 5 Ind. Dec. (N. S.) 373 (P. C.) and *Rangasayi* v. *Mahalakshmamma*, 14 M. 391; 5 Ind. Dec. (N. S.) 274, referred to.

Application for leave to appeal to the Privy Council against the judgment and decree of the High Court, Rangoon, in Civil First Appeal No. 93 of 1921.

Mr. *Burjorjee*, for the Applicant.

JUDGMENT.

Carr, J.—Petitioner applied for leave to appeal to His Majesty in Council against the judgment of a Bench of this Court passed on the 21st January 1924 in Civil First Appeal No. 93 of 1921. Leave was granted on the 26th August, and the certificate issued on the 1st September. Petitioner then had six weeks in which to furnish security, but by reason of the vacation and of certain gazetted holidays she obtained further time to the 12th November. On that day she filed an application offering one Ma E Sein as surety and Ma E Sein also filed a petition stating that she was willing to stand surety in Rs. 4,000 and tendering as security certain immoveable property which she valued at Rs. 6,000. Under r. 61 of the Rules of the Appellate Side of this Court the value of the immoveable property must be at least double the amount of security required. This condition was not fulfilled. Nor is there any statement that the property which is a wooden building is insured. Nor was a draft mortgage-deed annexed. Moreover, O. XLV, r. 7 (1) of the C. P. C., requires that the security shall be given in cash or Government securities, this requirement having been inserted by Act XXVI of 1920. There is a proviso that the Court may allow some form of security to be furnished but this may be done only at the time of granting the certificate. The ffer of immoveable security at this stage was, therefore, inadmissible and petitioner has been called upon to show cause why the certificate should not be withdrawn. Mr. Burjorjee has no real cause to show. He asks for an extension of time within which to furnish security in cash and urges that it is difficult to find cash security. This, however, appears to be an eleventh hour statement and we have no evidence that the petitioner has made any attempt to find cash security or that she has had any difficulty in doing so.

Even were these facts proved it is at least doubtful whether they would be sufficient ground for granting extension of time. The Privy Council has laid down in *Burjore* v. *Bhagana* (1) that it is open to the Court to grant an extension of time for cogent reasons. Under the ruling of the Madras High Court in *Rangasayi* v. *Mahalakshmamma* (2) a mere difficulty in furnishing cash in time would not be a sufficient cogent reason. I do not, however, think that it is necessary to discuss this latter case. In the case now before us it seems to me that the failure to furnish security within the time allowed is due solely to a mere careless neglect to ascertain what is required by the law and the rules of the Court. I would, therefore, direct that the certificate be cancelled and that the petitioner do pay the costs of respondent. Advocate's fee two gold *mohurs*.

Maung Gye, J.—I agree.

Z. K. *Certificate cancelled.*

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(1) 10 C. 557; 11 I. A. 7; 8 Ind. Jur. 216; 4 Sar. P. C. J. 498; Rafique and Jackson's P. C. No. 76; 5 Ind. Dec. (N. S.) 373 (P. C.).

(2) 14 M. 391; 5 Ind. Dec. (N. S) 274.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 64 OF 1923.

July 29, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Madgavkar.

DASO KESHAV PANCHBHAVI—
DEFENDANT—APPELLANT
versus
KARBASAPPA KARIYAPPA MUDHOL
—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (w), O. XLVII, r. 7—Review, order granting—Appeal—Grounds of objection.

In view of the provisions contained in r. 1 (*w*) of O. XLIII of the C. P. C., which permits an appeal against an order granting an application for review, the provisions of r. 7 of O. XLVII of the Code have become superfluous. Even if r. 1 (*w*) of O. XLIII has to be read with r. 7 of O. XLVII, the only effect of the latter rule is to enumerate certain grounds on which an order granting a review may be objected to and not to restrict the grounds which might be taken in appeal against such order.

Appeal against an order of the First Class Subordinate Judge, at Dharwar, in Miscellaneous Application No. 42 of 1923.

Mr. *G. N. Thakor*, (with him *R. A. Jahagirdar*), for the Appellant.

Mr. *Bahadurji* (with him *Nilkant Atmaram*), for the Respondent.

JUDGMENT.

Macleod, C. J.—[After stating the facts His Lordship went on:—] The first point taken in the appeal is that the appeal is not competent. Under O. XLIII, r. 1, cl. (*w*), an appeal lies against an order passed under O. XLVII, r 4, granting an application for review. It was argued, however, that the grounds of appeal are limited by the terms of O. XLVII, r. 7. That r. 7 was s. 629 in the Code of 1882. Under that Code there was no right of appeal against an order granting a review, only as provided for by s. 62—such an order might be objected to on the grounds stated therein. When by the Code of 1908 a right of appeal against an order granting a review was given, it would appear that the provisions of s. 629, which became O. XLVII, r. 7, were not sufficiently reconsidered. Once the right of appeal was given that right could only be restricted by direct prohibition. If O. XLVII, r. 7, had directed that an appeal against an order granting an application for review, which lay by virtue of O. XLIII, r. 1, cl. (*w*), would not be permitted except on the grounds mentioned in that rule, then the right of appeal already granted would have been restricted. But O. XLVII, r. 7, only says that an order granting an application for review may be objected to on certain grounds. The result of making such an order appealable was that O. XXVII, r. 7, became superfluous. It was no longer necessary to say that an order refusing an application for review was not appealable, while an order granting an application for review had been made an appealable order

In *Hari Charan Saha* v. *Baran Khan* (1), the contrary was held. The Judges there said (page. 747*):—

"Order XLVII, r. 7, of the C.P.C., provides that an order rejecting an application for review shall not be appealable, but that an order granting such an application may be objected to on certain grounds None of those grounds can be asserted in this case, and it is quite clear that, in so far as r. 7 of O. XLVII goes, no appeal lies. But it is contended that an appeal lies under O. XLIII, r. 1 cl (*w*), which provides in general terms for an appeal against 'an order under r. 4 of O. XLVII granting an application for review.' It has, on at least three occasions, been held by this Court that O. XLIII, r. 1, cl. (*w*), must be read with, and subject to, r 7 of O. XLVII. We refer to the unreported* decisions in *Jagana Nath Prasad Singh* v. *Ramantar Singh* (2); *Tripura Charan Kul* v. *Shoroshi Bala* (3) and *Surendra Nath Talukdar* v. *Sitanath Das Gupta* (4). Following those three decisions, we must hold that this appeal is incompetent and should be dismissed with costs."

In my opinion even if O. XLIII, r. 1, cl. (*w*), is read with O. XLVII, r. 7, the only effect of that rule is to enumerate certain grounds on which an order granting a review may be objected to. It cannot exclude all other grounds, and as I have pointed ont on a strict construction of the two orders, O. XLVII, r. 7, has become superfluous.

I may add that even assuming that an appeal was not competent the Court would have entertained an application under s. 115 of the Code

Madgavkar, J.—[His Lordship after discussing facts concluded:—] As regards O. XLIII, r. 1, cl. (*w*), and O. XLVII, r 7, I entirely concur with what has fallen from my Lord the Chief Justice. Order XLIII, r. 1, cl (*w*), is a new provision, and was perhaps not in the minds of the authors when they reproduced the old s. 629 in the form of O. XLVII, r. 7.

I agree, therefore, with the order proposed.

Z. K. *Appeal allowed.*

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(1) 25 Ind. Cas. 903; 41 C. 746.

*Page of 41 C.—[*Ed.*]

*Since reported in 14 Ind. Cas. 39; 22 Ind. Cas. 773; 21 Ind. Cas. 943 respectively [*Ed.*]

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 530 OF 1924.
February 11, 1925.
Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.
GAHUR HOWLDAR AND ANOTHER—
ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 162—Statement before Police during investigation, use of, at trial—Duty of Judge.

Statements made by any person to a Police Officer in course of an investigation under Ch. XIV, Cr. P. C., cannot be used for any purpose except to contradict a witness at the request of the accused in the manner provided in second paragraph of s. 162 of the Code.

Where a witness supported prosecution in his statement before the Police but resiled from that statement before the Committing Magistrate and Sessions Court, it is the duty of the Judge to withhold from the Jury's knowledge the statement made by the witness to the Police unless it was proved in the manner provided by law at the request of the accused.

Criminal appeal against an order of the Sessions Judge, Dacca, dated the 4th July 1924.

Mr. *K. N. Chaudhuri* and Babu *Jati Mohan Bose*, for the Appellants.

Mr. *Khundkar*, for the Crown.

JUDGMENT.—The two appellants before us have been convicted of constructive murder on a charge framed that they committed an offence punishable under s. 302 read with s. 149, Indian Penal Code. On that conviction they have been sentenced to transportation for life. They were also convicted of rioting but no separate sentence was passed under s. 147, Indian Penal Code.

It is unnecessary to state the facts of the case. It is conceded by the learned Deputy Legal Remembrancer that he cannot resist one point urged on behalf of the appellants that evidence was admitted that was not admissible under the law. One of the witnesses for the prosecution was a man named Kokari. It is in evidence that this witness before the Police made statements supporting the case for the prosecution. Before the Committing Magistrate he resiled from those statements and his evidence before the Sessions Judge was substantially to the same effect as that given in the Committing Court.

If anything, it was even less favourable to the prosecution. The learned Sessions Judge appears to have overlooked the alteration in the law effected by the recent amendment of s. 162, Cr. P. C. Under that section, as it now stands, statements made by any person to a Police Officer in the course of an investigation under Ch. XIV shall not be used for any purpose except to contradict a witness at the request of the accused in the manner provided in the second paragraph of the section. The admission of this evidence as to the statements made by Kokari to the Police was likely to seriously prejudice the appellants for we find further that though the learned Sessions Judge did not positively draw attention to these statements as evidence against the appellants, he did not, as he should have done, warn the Jury that the statements made by this witness to the Police were no evidence at all in support of the case for the prosecution. Under the present law it was the duty of the Judge to withhold from the Jury's knowledge the statements made by this witness to the Police unless they were proved in the manner provided by law at the request of the accused.

We must accordingly allow this appeal. We set aside the conviction and sentence passed on the appellants and direct that they be re-tried according to law.

R. L. *Appeal allowed.*

PATNA HIGH COURT.

CRIMINAL APPEAL NO. 133 OF 1925.
November 10, 1925.
Present:—Justice Sir John Bucknill, KT., and Mr. Justice Adami.
RANJIT NARAYAN SINGH AND OTHERS—
PETITIONERS
versus
Babu RAM BAHADUR SINGH—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 476, 476A, 476B—Complaint—Appellate Court, order by—Appeal to High Court, when lies—Discretion of Court—Interference by High Court.

Upon a proper construction of ss. 476, 476A and 476B, Cr. P. C., an appeal would lie to the High Court from an order passed by a District Judge in the following cases:—

(*a*) where a Munsif has refused an application made to him under s. 476 to make a complaint, there has been an appeal to the District Judge and the District Judge, disagreeing with the Munsif, has made a complaint; [p. 598, col. 1.]

(*b*) where under s. 476A (the Munsif having taken no action *suo motu* and not having been asked to take any action) the District Judge, on application to him, makes a complaint or refuses to make a complaint, [*ibid.*]

In no other case would an appeal lie to the High Court from an order passed by a District Judge as an Appellate Court. [*ibid.*]

The same procedure would apply to any other chain of three Courts (contemplated by s. 476) of ascending jurisdiction. [*ibid.*]

The question whether a complaint should be made under s. 476, Cr. P. C., is one of discretion and the High Court is always loath to interfere except in extraordinary cases. [*ibid.*]

[Case-law discussed.]

Application against a decision of the District Judge, Gaya, dated the 10th July 1925.

Messrs. *Yunus*, *S. N. Bose* and *R. K. L. Nandkeolyar*, for the Petitioners.

Mr. *H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

JUDGMENT.

Bucknill, J.—This was a matter referred to a Bench by Macpherson, J., on the 2nd September last: it had come before him when sitting as Vacation Judge as a proceeding which purported to be an appeal from a decision of the District Judge of Gaya, dated 10th July last. The nature of the matter may be thus summarized.

The respondents to the proceeding now before us brought in 1923 a money suit against the 1st petitioner for a share in certain *bhaoli* produce rent of some 53 *bighas* of *bakasht* land; the 1st petitioner (or appellant here) pleaded payment and in support of this defence referred to certain receipts and papers of account which were produced on his behalf and which were either in part or in whole exhibited in evidence by the petitioners Nos. 2 and 3.

The Munsif (Second Court) of Gaya who tried the suit gave judgment in the respondents' favour for he was (to use his own words) "not satisfied that the signatures on the receipts and the *bujhautas* were the genuine signatures of these persons" (whose signatures they were alleged to be); the decree was dated 21st July 1924.

The 1st petitioner appealed; the appeal was heard on 5th February, 1925, and was dismissed by the Additional Sessions Judge and Subordinate Judge, Third Court, Gaya, who, agreeing with the Munsif that the receipts and *bujhautas* were not genuine, dismissed the appeal.

Almost immediately after this appeal had been dismissed, the respondents on 16th February 1925, applied under s. 476 of the Cr. P. C. to the Munsif, Second Court of Gaya (who was, however, not the same individual as that Munsif who had tried the suit in 1924) requesting him to hear the parties and to make complaint under the provisions of s. 476, Cr. P. C., against the petitioners. They suggested that the petitioners ought to be prosecuted under sections of the Indian Penal Code such as s. 476 (forgery of a receipt) and s. 471 (using as genuine a forged document). This Munsif, however, after hearing the parties refused on 23rd April 1925 to make any complaint as requested. The Munsif seems to have thought that as there was no direct finding of forgery by either the trial or Appellate Courts and as neither of those Courts had thought fit to take any step *proprio motu* under the provisions of s. 476, he himself should not think it desirable to take any action.

From this decision the respondents, exercising their right under s. 476B of the Cr. P. C. appealed to the District Judge of Gaya who on 10th July, 1925, took a different view to that expressed by the Munsif; he considered (to use his own words) that "a good case for prosecution had been made out and that the prosecution should be sanctioned."

He added

"I, therefore, institute a complaint against Ranjit Singh, Ajodhya Singh and Baggo Singh (the appellants here) for their prosecution under ss. 471 and 193 of the Indian Penal Code or any other section or sections that may apply and forward it to the District Magistrate."

This action was, as a matter of procedure, quite properly taken in accordance with s. 476-B of the Cr. P. C.

From this decision the appellants have purported to appeal to this Court. It was entered as Criminal Appeal No. 133 of 1925. It was admitted as an appeal by Jwala Prasad and Macpherson, JJ., on 24th July 1925. It came, as I have already said, before Macpherson, J. sitting as Vacation Judge; the question was raised before him by the Crown as to whether in a case such as this an appeal lies to this Court and, as there appeared to be some doubt as to this point and some possible conflict of decisions, the learned Judge referred the matter to a Bench.

It may at once be stated that applications to this Court under s. 476-B of the Cr. P. C. have at times been made both as appeals and in revisional jurisdiction: and in other High Courts also. For example in this

Court in Criminal Appeal No. 22 of 1925 *Gujaram Marwari* v. *The King-Emperor* and Criminal Appeal No. 37 of 1925 *Bhuki Sao* and *Ramdhani Sao* v. *King-Emperor* (which were heard together) the general features of the position were somewhat parallel to those displayed in the matter now under consideration: one Mahabir Sao applied to a Magistrate who had under the provisions of s. 293, Cr. P. C. dismissed a complaint made by another individual asking that that complainant and two others should be ordered by the Magistrate to be prosecuted by virtue of the provisions of s. 476 of the Cr. P. C. The Magistrate refused to make a complaint. Mahabir thereupon appealed to the Sessions Judge who differed from the Magistrate and himself made the complaint requested under s. 476-B, Cr. P. C. The three persons thus ordered to be prosecuted thereupon appealed to this Court; no question was ever raised at any stage of the proceedings as to there being no right or possibility of an appeal. The cases were admitted as appeals by Kulwant Sahay, J., and myself on 4th February, 1925, and were heard as appeals on 16th April, 1925 by Macpherson, J., and myself: the appeal in the case of one appellant was allowed and in the case of the other two rejected.

I need not refer, I think, to cases which have come up as applications in revision: for it is common ground that such have occurred.

In Criminal Appeal No. 115 of 1925 Macpherson, J., apparently decided a case similar in general features to the present one as an appeal: the Magistrate in that case had refused to make a complaint: on appeal under s 476-B the Sessions Judge differed from the Magistrate and himself made the complaint: the person ordered to be prosecuted appealed to this Court: the appeal came before Macpherson, J., sitting as Vacation Judge and the point that no appeal lay was specifically taken. Macpherson, J., then expressed the opinion that, sitting singly, he ought to follow the expression of opinion given by Mullick, J., in *Faujdar Rai* v *Emperor* (1) and hold that an appeal did lie: but, whilst expressing this view, he decided to reject the application on its merits, whether it was rightly to be regarded as an appeal or as an application in revisional jurisdiction.

And, in the present case, as has already been observed, the same learned Judge, at a later date (*i. e.* on 2nd September 1925), the same point being more specifically perhaps raised by the Crown, referred the matter to a Bench. In the Lahore High Court in the case of *Mahomed Idris* v. *Emperor* (2) the question as to whether an appeal lies from a decision under s. 476B, Cr. P. C. has been discussed and decided by Martineau and Zafar Ali, JJ. In that case their Lordships held that no appeal lies under s. 476-B of the Cr. P. C. to the High Court from an appellate order of a District Judge making a complaint which the Sub-Judge might himself have made but refused to make. This was a reference to a Bench made by Scott Smith, J., who was doubtful as to whether an appeal lay under such circumstances.

This case, is, of course, directly in point here: but it has been suggested to us that the decision is not legally correct. The judgment is very short and was given on October 24th 1924.

It simply reads thus :—

"The question referred to us in this appeal and in Appeals Nos. 233 and 286 of 1924 is whether an appeal lies to this Court from an appellate order of the District Judge making a complaint which the Subordinate Judge might himself have made under s. 476 of the Cr. P. C. Section 476B of the Code gives a right of appeal only when a Court has made or refused to make a complaint under s. 476 or s. 476A, and neither of those sections relates to a complaint made by a Court on appeal from an order of a Subordinate Court refusing to make a complaint. We, therefore, answer the question referred to us in the negative. The appeals will be laid before the Referring Judge for disposal."

In the Calcutta High Court a case similar in features to the present one has been dealt with in revisional jurisdiction and the decision of the Sessions Judge reversed *Kalisadhan Addya* v. *Nani Lal Hazra* (3), but the question of the possibility of an appeal did not there arise.

It is, I think, necessary now here to explain the argument which has been well-placed before us upon this question by the learned Counsel who has appeared for the appellants. He draws a distinction in different sets of circumstances between the possibility of an appeal lying from a decision given by an Appellate Court under the provisions of s. 476B He argues that there may be different positions as a result of a proceeding under s. 467B in appeal. The first position is when the original tribunal has made a complaint (*i. e.* ordered a prosecution under s. 476): the person ordered to be prosecuted has appealed under s. 476B: the Appellate Court has allowed the appeal: in such case he admits that there is no further appeal: though revision by the High Court may be conceivable. This position has been the subject of a decision in the Bombay High Court in the case of a Criminal Appeal, *Somabhai Vallavbhai* v. *Adit Parshottam* (4). In that case a Subordinate Judge had on the appeal of one Somabhar under s. 476, Cr. P. C. issued a complaint and directed the prosecution of certain persons, they appealed to a Sessions Judge who allowed the appeal. Somabhar appealed to the High Court, Macleod, C. J. and Shah, J., held that there was no appeal. In their judgment their Lordships state: "We are clearly of opinion that no appeal lies under the provisions of the Code against an order made by the Court to which the Court making a complaint is subordinate." It will be observed that the point raised before us as disclosed by the 4th position (vide *infra*) was not before the Bombay Court nor decided by it. The 2nd position is when the original tribunal has refused to take action under s. 476: the applicant has appealed under s. 476B; the Appellate Court has dismissed the appeal: he thinks that in this case too there is no futher appeal though again revision by the High Court is conceivable. The 3rd position is when the original tribunal has made a complaint: the person ordered to be prosecuted has appealed: the Appellate Court has dismissed the appeal, he thinks that in this case too there is no further appeal though once more revision by the High Court is possible. The 4th, and, of course, last possible position, is that existing in the present case: the original tribunal has refused to make a complaint: the applicant has appealed and the Appellate Court has itself made a complaint It is argued that in such a case the party ordered to be prosecuted has a right of appeal; and revision also might be possible; except that if an appeal lies revisional jurisdiction would not, it is imagined, be exercised.

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(1) 90 Ind. Cas. 445; 26 Cr. L. J. 1565.

(2) 88 Ind. Cas. 528; 6 L. 56; 1 L. C. 480; A. I. R. 1925 Lah. 322; 26 Cr. L. J. 1168; 7 L. L. J. 84.

(3) 89 Ind. Cas. 251; 52 C. 478; A. I. R. 1925 Cal. 721; 26 Cr. L. J. 1307.

This is the position upon which the Lahore High Court has given the decision quoted above: but it seems that a contrary view has been expressed in this Court by Mullick, J., in *Faujdar Rai* v. *Emperor* (1).

In that case the circumstances were as follows:—

An application was made, under s. 476, Cr. P. C. to a Sub-Deputy Collector to make a complaint against one Faujdar Rai directing his prosecution for the offences of using a forged document and giving false evidence. The Sub-Deputy Collector, after enquiry, refused to take any action. The complainant appealed to the Collector under s. 476B, Cr. P. C. The Collector disagreed with the Sub-Deputy Collector's view and himself made a complaint. Faujdar Rai thereupon appealed to the Divisional Commissioner who held on 30th March, 1925 that no appeal lay. From the Commissioner's decision Faujdar Rai applied to this Court in revision: not against the Commissioner's decision that no appeal lay but against the Collector's complaint. The first point taken was that the High Court had no jurisdiction to interfere with the Collector's order but Mullick, J., rejected this contention: his Lordship then dealt with the matter in revision and allowed Faujdar's application. But, so far as is here material, the most important matter in the judgment lies in the following observations: the learned Judge writes:

"There is a third point raised, namely, that the learned Commissioner was wrong in declining to hear the appeal preferred by the petitioner. I think the contention must be accepted. Section 476B of the Cr P. C. appears to contemplate that if an Appellate Court sets aside the order of the Original Court, the party prejudicially affected has a right of appeal to the Court to which appeals from that Appellate Court ordinarily lie. In this case, therefore, the Commissioner had jurisdiction to hear the appeal from the order of the Collector and to set it aside, if necessary, and I am asked to direct that the criminal prosecution should not proceed till the Commissioner has disposed of the appeal. In my opinion it is not necessary to make any such order as I think I have jurisdiction to interfere under s. 115, C. P. C., and s. 107 of the Government of India Act."

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(1) 81 Ind. Cas 947; 48 B. 401, 26 Bom. L. R. 269; A. I. R. 1924 Bom. 347; 25 Cr. L. J. 1123.

If this view is correct the same reasoning would apply in the present case and the person against whom the Appellate Court (*i. e.* the District Judge) has under s. 476B made a complaint could appeal to the High Court.

It is important in endeavouring to come to a correct decision upon this question to examine carefully the provisions of ss. 476, 476A and 476B in order to ascertain what is their proper construction. I may here say that as a result of such investigation as I have been able to make I have not been able to ascertain that in the Report of the Joint Committee on the Bill to make in the Cr. P. C. the amendments now comprised in s. 476B or in the Debates when the Bill was in the Legislature the question now arising was in any way envisaged: and indeed it was hardly likely that it should have been in view of its somewhat involved nature.

Section 476 contemplates that a Court may either of its own motion or on application make a complaint. Section 476A contemplates that an Appellate Court may make a complaint if its Subordinate Court has taken no action under s. 476 *suo motu* or has not rejected any application made to it to do so. Section 476B gives a right of appeal to an Appellate Court under certain circumstances.

(*a*) Where the Appellate Court's Subordinate Court has refused on application made to it under s. 476 to make a complaint;

(*b*) where an Appellate Court has refused on application made to it under s. 476A to make a complaint;

(*c*) where the Appellate Court's Subordinate Court has made a complaint either *suo motu* or on application, *i. e.* included in the words, "or against whom such a complaint has been made;"

(*d*) where an Appellate Court has itself made a complaint.

In following out the effect of this it will be simplest to illustrate by reference to Munsif, District Judge and High Court as instance of Original, Appellate and Superior Appellate Courts.

It would seem clear that in case,

(*a*) where a Munsif has refused an application made to him under s. 476 to make a complaint, an appeal lies to the District Judge by the applicant; the position does not fall within s. 476A but within s. 476: at the appeal no complaint has yet been made: the District Judge may take the same view as the Munsif and dismiss the appeal. In such case there is no sort of prescribed procedure for an appeal to the High Court. On the other hand the District Judge may disagree with the Munsif and himself make a complaint and the complaint then is amenable to the provisions of s. 476; that is to say, it is, under s. 476B, subject to appeal to the High Court: for s. 476B reads:

"Any person against whom a complaint under s. 476 has been made by any Court".

In the case mentioned the District Judge is making the complaint under s. 476, the District Judge's Court is subordinate to the High Court within the meaning of s. 195, sub-s. (3) of the Cr. P. C. and, therefore, the appeal lies to the High Court.

As to (*b*) the Munsif has done nothing and has been asked to do nothing. The District Judge has either *suo motu* or on application made a complaint. All this is under s. 476A. The complaint is amenable to the provisions of s. 476: clearly the complaint can under the provisions of s. 476B be the subject of appeal to the High Court from the District Judge. For the only complaint is by the District Judge.

As to (*c*) the Munsif has *suo motu* or on application made a complaint: clearly there is an appeal to the District Judge under s. 476B. The District Judge may uphold the Munsif's view but in dismissing the appeal he (the District Judge) makes no complaint: and it is only against the complaint that so far as (*c*) is concerned a right of appeal is given. But the District Judge may direct the withdrawal of the complaint: but even so the District Judge makes no complaint and it will be once more observed that it is only when the District Judge makes the complaint that the provisions of s. 476 apply to it.

Lastly as to (*d*) the Munsif has done nothing and has never been asked to do anything under s. 476. But the District Judge has made a complaint either *suo motu* or on application under s. 476A: to this complaint the provisions of s. 476 are applicable: and under s. 476B such a complaint can be the subject of appeal: but to what Court? Obviously only to the High Court because it is from the District Judge.

In my opinion, therefore, upon a proper construction of ss. 476, 476A and 476B and still retaining the illustration of the three ascending Courts as Munsif, District Judge and High Court, there would lie an appeal from the District Judge to the High Court:

(*a*) Where the Munsif has refused on application made to him under s. 476 to make a complaint, where there has been an appeal to the District Judge and where the District Judge, disagreeing with the Munsif, has made a complaint;

(*b*) where under s. 476A (the Munsif has taken no action *suo motu* and has not been asked to take any action) the District Judge has (*a*) on application to him made a complaint (*b*) on application to him has refused to make a complaint.

I can see no possibility of an appeal lying under any other of the positions referred to.

The same reasoning would, of course, apply to any other chain of three Courts (contemplated by s. 476) of ascending jurisdiction. Being therefore of opinion that in the present case an appeal does lie, one must, therefore, examine the circumstances under which the District Judge was induced to make the complaint.

I think it is desirable to remark, as is pointed out by Macleod, C. J., and Shah, J., in the case decided in the Bombay High Court that the question whether a complaint should be made under s. 476, Cr. P. C. is almost invariably a matter of discretion: and the High Court is under those circumstances always loath to interfere except in extraordinary cases.

It is necessary, therefore, to look first at the original judgment given by the Munsif in the suit which he decided in July, 1924. The action was brought by the plaintiff for recovery of his share in the produce of certain *bakasht* lands in possession of the 1st petitioner. The only substantial defence which appears to have been put forward was that the defendant had in fact paid what was due; there were other questions raised one of which was that part of the lands were *raiyati* lands and part *bakasht* and that the plaintiff could not sue in one and the same suit for rent for both kinds of lands. This point is only of importance because in support of the plea of payment the defendant produced certain documents of account (*bujhautas*) in respect of the alleged payment of what was due with regard to the *bakasht* lands and certain receipts in respect of the *raiyati* lands. The Munsif undoubtedly held that these *bujhautas* and eceipts were not genuine. It would not e, I think, right for me to enter in detail upon the reasons why the Munsif came to this opinion (in case it might be thought that I was expressing any view of my own as to the authenticity of these documents) but I may state that, apart from observing that, so far as he could judge from the caligraphy, he was not satisfied that the signatures purporting to have been made on behalf of the plaintiff were genuine, he gave several other grounds in support of that view. For instance with regard to the *bujhautas* he suggested that they showed a set-off in the defendant's favour, in respect of the alleged share of a 3rd party, for the inclusion of which there appeared to be no sort of justification; again, he thought that under the circumstances, which disclosed litigation still existing between the parties with regard to the lands in question, it was highly improbable that clear receipts and *bujhautas* would have been, as the defendant alleged, granted to him by the plaintiffs or indeed that the defendant would under such circumstances have in fact paid what was alleged to have been due to the plaintiffs. He concludes his summing up of the case in the following words:—

"Considering all this I disbelieve the defendant's plea of payment and hold the *bujhautas* and receipts filed by him not to be genuine."

The defendant appealed and it does not appear that the Munsif was then asked or thought fit to take any action under the provisions of s 476 of the Cr. P. C. The appeal was decided by the Additional Sessions Judge and Subordinate Judge of the Third Court of Gaya on the 5th February. The appeal was dismissed. The learned Judge, who again points out that, in view of the disputes which were going on between the parties, it was highly unlikely that the plaintiffs would grant receipts which would have imperilled their position in the other litigation which was principally concerned with a partition suit and who further draws attention to certain intrinsic improbabilities in connection with the genuineness of the *bujhautas* and receipts, agreed with the Munsif that neither the receipts nor the *bujhautas* were genuine. As I have mentioned before, very shortly after the appeal had been concluded, application was made by the plaintiffs to the Munsif of the Court before which the original suit had been tried, asking that action should be taken under the provisions of s. 476, Cr. P. C. The Munsif before whom this application came was not the same individual as the Munsif who had tried the case. He seems to have thought in his decision, given on the 23rd April last, refusing to take action, that no *prima facie* case of forgering or the like had been made out. He observes that neither the Trial nor Appellate Court had specifically found that the documents were forged and comments upon the fact that neither of those Courts had apparently thought fit of their own motion to direct a prosecution I need not point out that such reasoning is not exhaustive, for, if it was always to be left solely to the self-acting motion of the Courts concerned to institute a complaint, much of s. 476 would be surplusage; and, indeed, it is well-known that it is frequently only upon application made to it that a Court either under s. 476 or 476A of the Cr. P. C., takes action. The Munsif proceeds to state that although the Courts expressed the view that the documents were not genuine it does not follow that they were forged; it is again, to my mind, obvious that the questions whether the documents were forged or not by or on behalf of the petitioners or whether they were used in any way by or on behalf of them, they (the petitioners) knowing that they were forged are matters which are to be contemplated as the subject of the prosecution which has now eventually been ordered. The Munsif, however, remarks that the mere fact that neither the Trial nor Appellate Court took any action of their own motion under s. 476, Cr. P. C., proves that the matter was not considered sufficiently serious to justify a prosecution: I have already pointed out that this is fallacious reasoning. The Munsif, lastly, observes that the fact that the plaintiffs asked the Court to issue a complaint shows malice and grudge; but it is hardly to be understood necessarily that such is the case; or otherwise it would be difficult to envisage an instance where any private individual could successfully make an application under the provisions either of s. 476 or 476A of the Cr. P. C. I do not, therefore, think that the reasoning upon which the Munsif bases his refusal to make a complaint can be regarded as sound.

The applicants appealed to the District Judge of Gaya and on the 10th July last the learned Judge differed from the Munsif and instituted a complaint. He points out that both the Trial and the Appellate Courts had clearly found that the receipts and *bujhautas* were not genuine and he observes that the conclusions at which those Courts had arrived appeared to him to be based upon some good grounds: he also refers to some of those grounds. To my mind it is extremely difficult to see how it is possible for this Court to interfere with the decision to which the District Judge has come; and I may say, indeed, that had I been in the position of the Munsif before whom the application was made I have little doubt but that I should have adopted the view that a complaint ought to have been instituted.

The learned Counsel, who has appeared for the appellants here, has urged against the order of the District Judge instituting a complaint against his clients a variety of circumstances upon which he bases an argument that the reasons which were given by the Trial and Appellate Courts for thinking that the receipts and *bujhautas* were not genuine were mistaken. He points also to the fact that a second appeal against the appellate decree of the Subordinate Judge preferred to this Court has been admitted. It is true that in their application before the Munsif, asking him to institute a complaint, reference is made to the fact that the Government Examiner of documents had reported upon them in their (the applicants') favour and it would seem that the opinion of the Expert Examiner was before the Munsif, when the application was made to him. The Munsif, however, does not pay much attention to this report as he rightly points out that the Expert has not yet been cross examined. The value of the Expert's opinion, however, and the other matters which have been referred to by the learned Counsel for the appellants here are matters which it seems to me can only properly be gone into during the course of the prosecution proceedings which have been directed. To my mind there was no undue delay in the application to the Munsif. It is impossible for this Court to hold that the District Judge of Gaya has wrongly or unreasonably exercised his discretion. Two Courts have, rightly or wrongly, held that the documents in question are not genuine, and, under those circumstances, if the District Judge thinks that there is a case which ought to form the subject-matter of a prosecution it is not, in my, opinion, an occasion upon which this Court should, unless extraordinary circumstances were visible which do not appear here, interfere with what has been done.

Under those circumstances, in my view, the appeal should be dismissed.

Adami, J.—I agree.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 852 OF 1925.

December 18, 1925.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Duval.

TARAKESWAR MUKHOPADHYAY—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Case filed in one Court—Trial by another—Jurisdiction to file complaint.

It is the Court trying the case and not the Court in which the complaint was originally filed that is competent to make a complaint under s. 476, Cr. P. C. *Jeebun Krista Shaw* v. *Benoy Krista Shaw*, 6 C. W. N. 35 and *Putiram Ruidas* v. *Mahomed Kasem*, 3 C. W. N. 33, referred to.

Rule against an order of the Sessions Judge, Backergunge, dated the 3rd August 1925.

Babu *Suresh Chandra Talukdar* and *Ramendra Chandra Roy*, for the Petitioner.

Mr. *Ashraf Ali*, for the Crown.

JUDGMENT.—In this case the petitioner filed a petition of complaint on the 14th June 1924 in the Court of Mr. Suresh Chandra Sen, Deputy Magistrate, First Class, under ss. 395, 380 and 147, Indian Penal Code. Mr. Sen examined the petitioner on oath and thereafter the case was transferred to the file of Mr. L. C. Guha, Deputy Magistrate, First Class, for disposal. Mr. L. C. Guha held a local enquiry and then dismissed the petitioner's complaint under s. 203, Cr. P. C. He observed, however, that there was no occasion for proceedings against the petitioner under s. 211, Indian Penal Code. Mr. Sen before whom the petition of complaint had been filed thereafter made a complaint under s. 476, Cr. P. C., against the petitioner and sent the complaint to Mr. Das, Deputy Magistrate, for necessary action. After a preliminary enquiry the petitioner was committed to the Court of Session to take his trial under s. 211, Indian Penal Code. He was convicted by the Assistant Sessions Judge and sentenced to undergo rigorous imprisonment for a period of one year and a half. An appeal against the said conviction and sentence was summarily dismissed by Mr. Carter, Sessions Judge, on the 3rd August 1925.

It is now contended before us that the petitioner's case having been transferred from the file of Mr. Sen to that of Mr. Guha, Deputy Magistrate, who tried the case on the merits, the former had no jurisdiction to make the complaint under s. 476, Cr. P. C. The matter really depends upon the meaning of the words "which appears to have been committed in or in relation to a proceeding in that Court" occurring in s. 476, Cr. P. C. It will be noticed that the same words occurred in cl. (*b*) of sub-s. (1) of s. 195, Cr. P. C. Now, it has been held in cases under the old s. 195, Cr. P. C., that it is the Court trying the case which is the proper authority to grant sanction and not the Court before which proceedings are instituted and by which process is issued [see the cases of *Jeebun Krista Shaw* v *Benoy Krista Shaw* (1) and *Putiram Ruidas* v. *Mahomed Kasem* (2).] No doubt under the present Code, sanction to prosecute under s. 195 has been done away with and in its place a complaint has to be made in writing under s. 476, Cr. P. C. We think, however, that the ratio of the decisions referred to above applies and that if a complaint had to be made in this case it should have been made by Mr. Guha and not by Mr. Sen. In this view of the matter the contention urged before us succeeds and we make the Rule absolute. The result is that the conviction and sentence are set aside and the petitioner will be discharged from his bail-bonds.

R. L. *Rule made absolute.*

(1) 6 C. W. N. 35.
(2) 3 C. W. N. 33.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 410-B OF 1925.

July 21, 1925.

Present:—Mr Justice Brown.

SAYED ALLY—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 499, Excep. 9—Defamation—Statement made by party to judicial *proceeding, whether privileged—Absolute privilege, doctrine of, applicabilily of.*

The law of absolute privilege does not apply in India in the case of criminal prosecutions for perjury. In a prosecution for perjury, however, in respect of a statement made by a party to a judicial proceeding, the special position occupied by the party must not be lost sight of. [p. 601, col. 2.]

Parties and witnesses in all judicial proceedings are in a peculiar position and it is necessary, if their interests are to be safe-guarded, that they should be allowed to make statements freely subject to the ordinary law of perjury. Generally speaking, there would be a presumption that what they say is said *bona fide* in the protection of their own interests, and they would be protected by the provisions of the Ninth Exception to s. 499 of the Penal Code. [*ibid.*]

Criminal revision being review of an order of the Magistrate, Myaungmya, in Cr. Reg. No. 105 of 1924.

Mr. *D. Dutt*, for the Appellant.

JUDGMENT.—In a civil suit instituted by the petitioner he stated when examined as a witness in answer to a question by his own Advocate: "I cited Abdul Malik, the writer of the promissory note, as my witness. I don't want to examine him now as I heard that he has been bought by the other side." The petitioner was prosecuted for defamation by Abdul Malik, and was convicted under the provisions of s. 500 of the Indian Penal Code. He appealed to the Sessions Judge who confirmed the conviction, but reduced the sentence to a fine of Rs. 100. He has now come to this Court in revision against the conviction. The statement made by him was clearly defamatory, and I agree with the lower Court that he has quite failed to prove that Abdul Malik had been guilty of corrupt practices. In my view of the law, however, it does not necessarily follow that by making this statement the petitioner was guilty of a criminal offence under s. 499.

The contention put forward on his behalf is that the statement made by the petitioner in Court was absolutely privileged, and that he cannot be prosecuted for defamation with regard to it. Under English Law this would be the case, and there is authority for the view that the same law is applicable in India. The High Court of Madras took that view in the case of *Potaraju Venkata Reddy* v. *Emperor* (1) and the High Court of Bombay took the same view in the case of *Queen-Empress* v. *Babaji* (2).

But a contrary view has been taken by the High Courts of Calcutta and Allahabad and a Bench of this Court of which I was a member has held yesterday [*McDonnell* v. *Emperor* (3)] that the law of absolute privilege does not apply in India in the case of criminal prosecutions for perjury. The decision in our case had direct reference to the case of an Advocate, but the same principles would apply to the case of parties and witnesses. I must, therefore, hold that the law of absolute privilege is not applicable in India.

But although the law of absolute privilege does not apply in prosecutions of this nature, the special position occupied by witnesses and parties must not be lost sight of. I have been referred to the case of *Isuri Prasad Singh* v. *Umrao Singh* (4) where certain accused persons had stated in an application for transfer that the case against them had been falsely instituted at the instance of one Umrao Singh. It was held that having regard to the position in which the accused persons were it could not be held, that there had been a want of good faith. That case can be differentiated from the present case, as the persons in that case were accused of a criminal offence, whereas the petitioner occupied the position of a plaintiff in a civil prooeeding. But the same general principles are applicable in the case of parties and witnesses in all judical proceedings. They are in a peculiar position, and it is necessary, if their interests are to be safeguarded, that they should be allowed to make statements freely subject of course to the ordinary law of perjury. Generally speaking, there would be a presumption that what they said was said *bona fide* in the protection of their own interests, and that they would, therefore, be protected by the provisions of the Ninth Exception to s. 499 of the Indian Penal Code. Both the lower Courts have held that the burden of proving that a statement which is on the face of it defamatory falls within the provision of one of the Exceptions lies on the person accused, and this is no doubt perfectly correct. But the Magistrate and the Sessions Judge in the present case have, I think, overlooked the special position occupied by a person who is a party to or witness in a judicial proceeding, and they have not considered the special presumptions which may fairly be drawn in such cases. The petitioner brought evidence to show that he had reason to believe that money had been offered to the complainant. The Magistrate did hold that the evidence of these witnesses was unreliable but he placed the burden of proof very strictly on the petitioner. The Sessions Judge did not express any opinion on the subject as to whether these witnesses were or were not telling the truth, but held that even if their evidence were accepted as correct that still would not be sufficient. With this finding I am unable to agree. The witness Abdullah says that he was asked by the petitioner to make enquiries about a visit made to the complainant's house, and that he was told that there had been an offer to pay Mallick money. Shwe Babu corroborates this. Abdullah says he told the petitioner what he had heard. It is prefectly correct, as pointed out by the learned Sessions Judge, that this evidence, even if true, did not justify a statement that money had been accepted. But it would be sufficient to raise alarm in the mind of the petitioner with regard to his litigation and there would in such a case be a justifiable presumption that in saying what he did in Court he was acting *bona fide* in protection of his own interests in the litigation. It is to be noted that all he said was that he heard that Abdul Malik had been bought by the other side. He was not cross examined on this point at all and he was not asked what exactly it was he had heard. Had Abdullah and Shwe Babu been entirely false witnesses it would have been an easy matter for them to have made their case still stronger, and to have given evidence that would quite clearly have justified the statement of the petitioner. The conviction in this case was, in my opinion, upheld on erroneous grounds by the learned Sessions Judge, and it is by no means clear that the learned Magistrate would have held the petitioner to have been guilty had he had in mind the special position occupied by a person who was a witness and a party to a case. In all the circumstances of the present case I think that there was sufficient material on the record to justify a presumption that the statement was made by the petitioner *bona fide* in the protection of his own interests. That does not, of course, mean that I hold it proved that the complainant in the case was in any way guilty of improper conduct. The information received by the petitioner may have been incorrect or mistaken, and it is certainly not proved that the complainant took any money at all.

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(1) 14 Ind. Cas. 659; 36 M. 216; (1912) M. W. N. 476; 13 Cr. L. J. 275; 11 M. L. T. 416; 23 M. L. J. 39.

(2) 17 B. 127; 9 Ind. Dec. (N. S.) 83.

(3) 92 Ind. Cas. 737; A. I. R. 1925 Rang. 345; 3 R. 521; 27 Cr. L. J. 321; 4 Bur. L. J. 147.

(4) 22 A. 234; A. W. N. (1900) 46; 9 Ind. Dec. (N. S.) 1187.

But although the petitioner has not proved that he had any ground for his fears, there is sufficient ground for presuming that the remarks made by him in his special position as a litigant were made by him *bona fide* in the protection of his own interests. I do not think, therefore, that the conviction under s. 500 of the Indian Penal Code wss justified. I set aside the conviction of the petitioner, and direct that he be acquitted and released so far as this case is concerned; the fine, if paid, will be refunded to him.

Z. K. *Conviction set aside.*

BOMBAY HIGH COURT.

CRIMINAL APPEALS NOS. 134 AND 135 OF 1925

September 16, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

GULABCHAND DOSAJI—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 238, 269 (3), 418—Penal Code (Act XLV of 1860), ss. 411, 412—Trial by Jury—Conviction for minor offence triable with Assessors, legality of—Appeal on facts, whether lies.

Accused were charged with an offence under s 412 of the Penal Code, which was an offence triable by a Jury, and were tried by a Jury. The Jury brought in a verdict of guilty under s. 411 of the Code, which was an offence triable with the aid of Assessors:

Held, (1) that having regard to the provisions of s. 238 of the Cr. P. C, the accused could be convicted of an offence under s. 411 of the Penal Code;

(2) that the provisions of s. 418 of the Cr. P. C. were applicable to the case and that the accused were not entitled to appeal against their conviction on the facts.

Criminal appeals from convictions and sentences passed by the Sessions Judge, Poona.

Messrs. *Velinker* and *Amin*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Fawcett, J.—In the appeal No. 134, the first point taken is that the Jury wrongly convicted the accused of a minor offence under s. 411, which was one triable by the Judge with the aid of Assessors whereas the charge against him under s. 412 was triable by a Jury. I do not think it necessary to discuss this question at any length. The case is one to which the provisions of sub-s. (3) of s. 269 do not apply, inasmuch as no charge was framed against the accused under s. 411. It is certainly the case that the trial was actually one by a Jury; and no application was made (as it might have been, when the question of the possibility of the accused being convicted under s. 411 was discussed in the address of the Assistant Public Prosecutor) to have a separate charge framed under s. 411, so that the provisions of that subsection might apply. There is authority for saying the accused cannot, therefore, now complain of verdict having been given by the Jury and accepted by the Judge: *vide* the judgment of Chandavarkar, J., in *Mavsing Bechar* v *Emperor* (1). Apart from that we have a clear authority of a Divisional Bench of this Court in *Changouda Pirgouda* v. *Emperor* (2) for the view that in a case like the present, although there the point arose in a reverse way, the provisions of s. 238 must be regarded as absolutely uncontrolled, so that the Jury had authority to convict the accused of the minor offence under s. 411, and there is nothing invalid in that verdict being accepted by the Judge and the accused sentenced thereon. There are remarks to the same effect in the judgment of Candy, J., which preceded the Full Bench decision in *King-Emperor* v *Parbhushankar* (3) and there is authority of one of the Judges in *Pattikadan Ummaru* v. *Emperor* (4) to the same effect. It would lead to very great complications if the view put before us that the accused can go into the facts on his appeal in spite of the provisions of s. 418, were accepted. Accordingly, in my opinion, we should only consider the question whether there has been any misdirection or non-direction amounting to misdirection, which prejudiced the accused and which would justify our interference with the unanimous verdict of the Jury convicting him under s. 411. * * * * * *

It seems to me, therefore, that both the appeals fail and should be dismissed.

As regards the question of punishment, dacoities would not be so common, if the dacoits did not find it so easy to dispose of stolen property, and we do not think that the sentences are too severe. We, therefore, decline to interfere with regard to them.

Madgavkar, J.—A charge in the Sessions Division of Poona under s. 412, Indian Penal Code, is triable with the aid of a Jury and a charge under s. 411 with the aid of Assessors. In the present case the only charge against all the appellants was under s. 412, Indian Penal Code, and the trial was, therefore, rightly by a Jury. And under s. 238 of the Cr. P. C., the appellants could clearly be convicted under s. 411, Indian Penal Code. Under these circumstances, according to the Full Bench decision in *King-Emperor* v. *Parbhushankar* (3) the provisions of s. 418 of the Cr. P. C. apply, and the present appeal does not lie on facts. The law did not require the Court to frame a separate charge under s. 411, Indian Penal Code, nor did any of the parties so apply. If the view of the appellants, however, is accepted, the result would be that, so long as a Jury is of opinion that the appellants were not guilty of an offence under s. 412, or even under s. 411 they remain a Jury, but immediately they come to the conclusion that they are guilty under s. 411, they become Assessors. This is a view which the law does not permit and it is impossible to accept it.

I agree, therefore, with the view of my learned brother. The appeals must be dismissed.

Z. K. *Appeals dismissed.*

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(1) 2 Ind Cas. 480; 33 B. 423; 11 Bom. L. R. 350; 10 Cr L J. 30.

(2) 59 Ind. Cas 195; 22 Bom. L. R. 1241; 22 Cr. L. J. 51; 45 B. 619.

(3) 25 B. 680; 3 Bom. L. R. 278.

(4) 26 M. 243; 2 Weir 388 & 463.

RANGOON HIGH COURT.

CRIMINAL APPEAL NO. 106 OF 1925.
January 24, 1925.
Present:—Mr. Justice Maung Gyi.
GOPAL—PETITIONER
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 497—Adultery—Marriage, proof of—Statement of complainant, whether sufficient.

In a prosecution for adultery the marriage must be strictly proved. For the purposes of such a prosecution the marriage cannot be held to have been proved merely by the statement of the complainant.

Criminal appeal from an order of the Second Additional Magistrate, Rangoon, in Cr. Reg. No. 648 of 1924.

JUDGMENT.—The appellant, a Gurkha, was convicted of adultery and ordered to pay a fine of Rs. 50, or in default, to suffer two months' rigorous imprisonment.

In the first place, on the evidence, the prosecution have not proved that complainant and Jesuda were married.

Complainant, also a Gurkha, states that he and Jesuda were married according to Hindu rites at Maymyo, five years ago. The ceremony was performed by a Brahmin whose name he has forgotten. Til Bahadur and Sukawala, the parents of Jesuda, were present at the marriage ceremony and gave her in marriage when she was 12 years old. If they were married according to the Hindu rites there must have been witnesses also. Neither the Brahmin, nor the parents, nor any of the witnesses present at the marriage at Maymyo was called to prove the marriage. Jesuda was not called to give evidence till about six months after the case was filed and when complainant was about to be ordered to pay compensation to accused for bringing a false case.

In adultery cases marriage must be strictly proved. As this has not been done, I set aside the conviction and sentence and acquit the appellant. The fine if paid, will be refunded.

Z. K. *Conviction set aside.*

BOMBAY HIGH COURT.

Criminal Application for Revision No. 154 of 1925.

August 6, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

SHIVALINGAPPA NIJAPPA TUBCHI—Petitioner

versus

GURLINGAVA—Opposite Party.

Criminal Procedure Code (Act V of 1898), ss. 386 (1) (a), 488—Order for maintenance charged on joint estate—Sale and attachment of moveable property owned jointly by husband, whether permissible.

Where the amount of maintenance awarded under s. 488 of the Cr. P. C. is made a charge on the joint estate of the husband and his brothers, the order can be enforced by attachment and sale of the husband's share in moveable property owned jointly by the husband and his brothers.

Per *Fawcett, J.*—The words "moveable property belonging to the offender" in s. 386 (1) (a) of the Cr. P. C. are wide enough to cover the share of the offender in a joint Hindu family estate so far as it consists of moveable property, and an order for maintenance under s. 488 of the Code can, therefore, be enforced by the attachment and sale of such share, although this method of recovery should not ordinarily be resorted to.

Application for revision of an order of the Magistrate, First Class, Hukeri.

Mr. *A. G. Desai*, for the Petitioner.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

Mr. *Nilkanth Atmaram*, for the Opponent.

JUDGMENT.

Fawcett, J.—In this case one Gurlingava got an order for maintenance against her husband, Basappa, in October 1919 under s. 488, Cr. P. C. Under that order the amount awarded as maintenance to her was Rs. 15 per month and it was expressly declared that that amount was a charge on the joint estate. This refers to the fact that Basappa was a member of a joint Hindu family consisting of himself and two brothers, Dundappa and Shivalingappa. In the order with which we are now concerned it is stated by the Magistrate that these three brothers live separate, but their property is still undivided. Gurlingava applied to the Magistrate, First Class, Hukeri, praying that a cloth shop, which it was alleged belonged to the three joint brothers at Sankeshwar, should be attached and that the amount of maintenance due to her should be recovered in that manner. A warrant was issued for attachment of this property of the joint family accordingly, and the Police under this authority attached certain *saris* of the shop and produced them before the Magistrate. Shivalingappa then put in an application stating that the property attached by the Police was not joint property, but was his own self-acquired property, and asked that the attachment should, therefore, be removed. He further contended that in any case the amount that could be recovered was only Rs. 180 and not Rs. 645, as claimed by Gurlingava. This latter contention was allowed by the Magistrate in view of the amendment of s. 488, under which maintenance for only one year prior to the date of the warrant is recoverable. On the other point, after inquiry he held that the property attached was not the separate property of Shivalingappa but was joint property, and that Shivalingappa was in possession of that property as manager of the joint family. He accordingly held that under the order of 1919 the maintenance chargeable on the joint family estate could be recovered from Shivalingappa in the manner proposed, namely, by attachment and sale of the moveable property in question. From this order Shivalingappa has applied to us in revision.

The main contention of Mr. Desai on his behalf is that, assuming that the property in dispute is joint, as held by the First Class Magistrate, he has no jurisdiction to attach it under s. 488, Cr. P. C., read with s. 386 of the same Code. This contention is based upon the fact that s. 488, sub-s. (3), authorises the Magistrate in case of breach of the order to issue a warrant for levying the amount due in the manner provided for levying fines, that is to say, in the manner provided by s. 386. Under sub-s. (1) of that section the Court can issue a warrant for levy of the amount by attachment and sale of "any moveable property belonging to the offender", and there is a form provided for this particular warrant, namely, No. 37 of Sch. V, and a similar form for a warrant under s. 488, namely, No. 41, in that Schedule. Both these forms use the same language as that in cl. (*a*) of sub-s. (1) of s. 386, namely, moveable property "belonging to" the person against whom an order has been made either for maintenance or fine. The warrant in this particular case was issued accordingly, and we are not now concerned with the question of the issue of a warrant to a Collector of a District to realise the amount by execution under cl. (*b*) of sub-s. (1) of s. 386. Mr. Desai's contention is that the words "belonging to" mean "belonging exclusively to" the person concerned, and that a share in joint family property is not property belonging to Basappa which can be attached and sold under this particular power. He further refers us to the new sub-ss. (6A) and (6B) inserted in s. 88 of the Cr. P. C. in 1923, under which inquiries can be made into claims preferred or objections made to the attachment of any property attached under that section. He says that this indicates that the Legislature contemplated the possibility of an interest in the property being attached and dealt with under s. 88, and, therefore, has made provison for inquiries into such claims or objections, but that the same does not apply to s. 386 This argument, however, does not seem to me to be very cogent, because sub-s. (2) of s. 386 authorises the Local Government to make rules for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of a warrant. It, therefore, does at any rate provide machinery by which inquiries can be made into claims and objections in a similar manner to claims and objections under s. 88. The main question, however, still remains whether cl. (*a*) of s. 386, sub-s. (1), should be construed as referring to property solely belonging to a person, and as excluding any interest in joint family property or the like. There is no doubt authority for Mr. Desai's contention. In *Queen-Empress* v. *Sita Nath Mitra* (1) the question was referred to the High Court whether joint moveable property was saleable under s. 386, Cr. P. C., and the High Court in their order stated that "in regard to moveables we think the Magistrate can only attach moveables of which the deceased was sole owner". No reasons, however, are given for that particular ruling, and, therefore, it does not help us very much. There is another ruling to the same effect by the Madras High Court, recorded in Weir's Law of Offences and Criminal Procedure, 4th Edition, Vol. II, page 442. In that case the District Magistrate submitted for orders of the High Court certain proceedings in which a distress warrant had been issued for seizure and sale of moveable property belonging to the offender and two others, members of an undivided family. And the High Court say:—

> "The mode of levying pecuniary penalties must be strictly confined to the provisions of the law that gives the jurisdiction. Section 307 (386) of the Cr. P. C directs that the warrant for the levy of fine 'shall authorise the distress and sale of any moveable property belonging to *the offender*'. This language denotes things which may be taken by distress and then sold so as by the mere act of sale, to pass the property in them—not mere rights and interests or shares in joint moveables. In case where the fine cannot be levied by the distress and sale of the convict's own property there is the very sufficient remedy of an alternative term of imprisonment."

Now weight must, of course, be attached to that ruling. But it seems to me unduly to limit by Judge-made law the wide words "moveable property belonging to the offender". There are no doubt considerations in favour of the property that is attached ordinarily belonging exclusively to the offender. This clearly obviates disputes which cannot be dealt with by a Criminal Court, so well as by a Civil Court. On the other hand, I think, considerable weight must be attached to the fact that, if it is held that only moveable property solely belonging to the offender can be attached under s. 386, a person who, as a member of a joint Hindu family, has no separate property but a very valuable interest in the joint family property, entirely escapes the ordinary provision made for the recovery of a fine by attachment and sale of moveable property. I think that, before the Court holds that this was really intended by the Legislature, there should be clearer ground than exists at present for taking that view. I am supported in this by the corresponding provisions of the law in regard to recovery of a decretal debt by attachment and sale of the judgment-debtor's moveable property. The present law is contained in s. 60 of the C. P. C., under which (subject to certain exceptions) the "property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power, which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf", is liable to attachment and sale in execution of the decree against him. Thus it will be noted that this section uses the same words "belonging to". But Mr. Desai contends that the addition of the words "over which or the profits of which he has a disposing power", etc., extends the section to the case of a family property, and that the fact that the Legislature did not insert corresponding words in clause (*a*) of sub-s. (1) of s 386 supports his contention. No doubt that is an argument which would be entitled to consideration, if s. 60 of the C. P. C. was the sole law to be considered in connection with this question.

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(1) 20 C. 478; 10 Ind. Dec. (N. S.) 323.

The history of the attachability of a judgment-debtor's interest in joint family property goes back to very early times, before even a C. P. C. was enacted. Thus before Act VIII of 1859 was enacted, it had been held by the Sudder Diwani Adalat in this Province that a judgment-debtor's share in joint family property could be taken in execution under a judgment against him obtained by his personal creditor. The rulings to that effect will be found stated in *Vasudev Bhat* v. *Venkatesh Sanbhav* (2) and in the elaborate judgment of Westropp, C. J., it was held thus:

"It must be regarded as the settled law of this Presidency, not only that one of several co-parceners in a Hindu family may, before partition, and without the assent of his co-parceners, sell, mortgage, or otherwise alien, for valuable consideration, his share in the undivided family estate, moveable or immoveable, but also that such a share may be taken in execution under a judgment against him at the suit of his personal creditor."

Now the section in Act VIII of 1859 corresponding to s. 60 of the present Code is s. 205, which runs as follows:—

"The following property is liable to attachment and sale in execution of a decree, namely, lands, houses, goods, money, bank-notes...Government securities, bonds, or other securities for money debts, shares in the capital or joint stock of any Railway, banking, or other public company or corporation, and all other property whatsoever, moveable or immoveable, belonging to the defendant, and whether the same be held in his own name or by another person in trust for him or on his behalf."

It will be noticed that the words used are "property belonging to" the defendant, and there are no words about his disposing power, such as are now contained in s. 60 of the present Code.

The Privy Council in *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Prasad* (3) considered a case where the appellant had sued upon a chance of success under an award not yet made, which had been put to auction in execution and bought by him. Their Lordships held that, as this s. 205, to which I have just referred, used the word "property," and as a mere right of suit was not "property" but a title to recover future property, the judgment-creditor could not recover the amount he sought by that particular process. But the judgment also deals with the question whether such a share could not be attached and sold in execution under this s. 205. Their Lordships said (page 50*):

"Mr. Leith referred in his argument to

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(2) 10 B. H. C R. 139 at p. 160.

(3) 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656; 20 E. R. 701.

*Page of 14 M. I. A.—[*Ed.*]

the family property of Hindus, and urged that such a share in such property may be attached and sold in execution. No doubt can be entertained that such a share is property and that a decree-holder can reach it. It is specific, existing, and definite; but it is not properly the subject of seizure under this particular process, [that is to say the process by which the decree-holder had tried to get it in that particular case], but rather by process direct against the owner of it, whether by seizure or sequestration, or appointment of a Receiver."

In *Kalee Pudo Banerjee* v. *Choitun Pandah* (4) Couch, C. J., refers to this ruling, and suggests that a creditor of a member of a joint Hindu family under this s. 205 has a remedy against the property to which his debtor may be entitled, although it may be undivided property of the family, and it cannot be predicated that he has any definite share of it. That view has been followed at any rate in this Presidency. Therefore it seems to me that there is authority, in regard to the corresponding provisions of the C. P. C., for holding that the words "moveable property belonging to" suffice to cover a share in a joint Hindu family estate, so far as it consists of moveable property. Accordingly I am not prepared to go the length of Mr. Desai's contention and hold that, in no circumstances whatever, will a Magistrate be justified in directing the attachment of joint family property and having it sold.

On the other hand, as I have already said, that is a method of recovery which should not ordinarily be resorted to. But in the present case we have the fact that so long ago as 1919 an order, whether right or wrong, was passed, under which the maintenance was made chargeable on the joint family estate. It seems to me very improbable that the present applicant Shivalingappa, who is the real brother of Basappa, although living separate from him, did not become aware of this order; and certainly, if it had come to his notice, as I think it certainly must have, it was his duty to have moved the Court at that time to have it set aside, if he objected to it. In the present case, in view of that order and his not having set it aside, I do not think that in revision there is sufficient ground for our interfering with the action taken by the Magistrate. I would, therefore, dismiss this application.

Madgavkar, J.—I agree in the order proposed by my learned brother on two grounds:

The first is that there is an order by a competent Magistrate of 1919, directing the amount of maintenance to be a charge on the joint estate. That order has not been disturbed in appeal or in revision. The record and proceedings are not before us and it is impossible to say how far the present petitioner, the brother of the husband of Gurlingava, was or was not a party to that order and how far it was passed with his knowledge and consent. His present application is in revision against an order directing execution under s. 386 against certain *saris* in the shop which Gurlingava, the wife of Basappa, alleged, were his joint estate within the meaning of s. 488.

Secondly, the defence of the present petitioner before the Magistrate was that the *saris* which were attached were his own self-acquired property, and not joint property. On this point the Magistrate has recorded evidence and come to the conclusion that the *saris* were not the self-acquired property of the petitioner. These two grounds suffice, I think, to cause the present application to fail.

The third question argued in this application is whether the joint family property in which the offender has any interest, can or cannot be proceeded against under s. 386 of the Cr. P. C. The question to my mind is not free from doubt. The former prohibition against attachment of immoveable property belonging solely to the defaulter has been removed by the express words of cl. (6A) and (6B) of s. 68, Cr. P. C., as amended, so that the view of this Court under the old Code in *Reg* v. *Lallu Karwar* (5) no longer holds good. But as regards joint property, the Legislature, although it had before it the decision of the Calcutta High Court in *Queen-Empress* v. *Sita Nath Mitra* (1) and of the Madras High Court in the case in Weir's Law of Offences and Criminal Procedure Code, 4th Edition, Vol. II, page 442, has not in express terms amended the section. The matter is, therefore, arguable; and as it is not to my mind absolutely necessary for the decision of the present application, I reserve my opinion on it.

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(4) 22 W. R. 214.

(5) 5 B. H. C. R. Cr. 63.

Per Curiam.—On the application of Mr. Desai, the Government Pleader not objecting, we modify the Magistrate's order in the last paragraph so as to read as follows:—

"The Potgi is chargeable on the joint family estate and Shivalingappa being the manager it should be recovered by attachment and sale of the moveable joint property in his possession, namely, *saris* that were attached.

Z. K. .. *Application dismissed.*

RANGOON HIGH COURT.

CRIMINAL REVISION No. 664-B OF 1925.
September 10, 1925.
Present:—Mr. Justice Maung Ba.
MA U—PETITIONER
versus
MG. KYIN HTAT—RESPONDENT.

Chinese Customary Law—Marriage, proof of—Long cohabitation—Presumption—Criminal Procedure Code (Act V of 1898), s. 488.

For the purpose of determining, in a proceeding under s. 488, Cr. P. C., whether a valid marriage exists between a Burmese woman and a Chinese half-caste who claims to be a Confucian, the Court must find whether the requirements of the Chinese Customary Law have been fulfilled. Under that Law a marriage must be preceded by a betrothal contract and the usual ceremonies and festivities must be performed and celebrated. The Court may, however, draw a presumption of marriage from the intention of the parties, long cohabitation, habit and repute.

Criminal revision being review of an order of the First Additional Magistrate, Rangoon, in Cr. M. No. 86 of 1925.

Mr. *Kyaw Htoon*, for the Appellant.

Mr. *Faung*, for the Respondent.

JUDGMENT.—This case is a typical one showing the deplorable position of the women of Burma. Ma U, a Burmese woman of 33, formed an alliance with Maung Kyin Htat, a Chinese half-caste of 30, who claims to be a Confucian. He is a clerk in the Hong Kong Bank drawing a salary of Rs. 122 a month. But from the evidence of Mg. Kya Wa (P. W. No 4) who works as a clerk in the same Bank it is clear that Mg. Kyin Htat is also a Buddhist. Had he been a Burman Buddhist he and Ma U could have contracted a valid marriage by mutual consent without further ado. Ma U had a mother living and she consented to the union. Ma U states that Kyin Htat had no parents and that statement remains unrebutted.

As the law stands at present Chinese Customary Law is the law to be applied in determining the question whether Ma U is the wife of Kyin Htat so that she can claim maintenance under s. 488 of the Cr. P. C.

According to the family law of the Chinese by Von Mollendorff it is said that the usual ceremonies and festivities are indispensable and needful for the completion of a proper marriage and that such a marriage is to be preceded by a betrothal contract.

According to Alabaster's Notes on Chinese Criminal Law, three conditions are necessary to constitute a valid marriage, *viz.*, (1) consent of the parents; (2) certain formalities and ceremonies; and (3) suitability of the parties in the matter of their respective positions.

However, a Bench of the Chief Court in *Ma Thein Shin* v. *Ah Shein* (1) held, "that though Parker in his Essay on Comparative Chinese Family Law mentions six preliminary steps to a first-class marriage, yet explains that they are not indispensable and that the evidence of Chinese elders shows that the customs are not insisted upon in the case of Chinese marriages in Burma and that relaxation is permitted in the case of poor people." The learned Judge in that case gave effect to the intention of the parties and also allowed the presumption of marriage from long co-habitation with habit and repute to prevail.

In the present case not only were there no forms of marriage but proof was meagre as to the repute justifying such a presumption.

So, although it may possibly be a hard case, nothing can be done. The application is dismissed.

Z. K. *Application dismissed.*

(1) 24 Ind. Cas. 367; 7 B. L. T. 246; 8 L. B. R. 222.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 523 OF 1924.
September 2, 1925.
Present:—Sir Norman Macleod, KT, Chief Justice, and Mr. Justice Coyajee.

SIR GIRJAPRASAD CHINUBHAI—
APPELLANT
versus
PURSHOTTAM VITHALRAI VYAS—
RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 107, 123 —Oral gift of right of residence—Interest of donee, whether saleable—Acknowledgment in writing of gift, whether gift deed.

A gift cannot be created by a document signed by the person intended to be benefited by an oral gift in favour of the owner of the property acknowledging gift. [p. 609, col. 2; p. 610, col. 1.]

Where an oral gift is made as to the right of residence in a house unaccompanied by any powers of alienation, the donee cannot be said to have any saleable interest in the house which, on his insolvency, can be put to sale by the Receiver. [p. 6.9, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal from Order No. 3 of 1924, reversing a decree of the First Class Subordinate Judge at Ahmedabad, in Insolvency Petition No. 23 of 1923.

Mr. *K. N. Koyajee*, for the Appellant.
Mr. *H. V. Divatia*, for Respondent No. 2.

JUDGMENT.

Macleod, C. J.—This case originated in an application to the Subordinate Judge in the matter of the insolvency of one Vyas Purshottam Vithalrai under the provisions of the Bombay Provincial Insolvency Act for an order that the house mentioned in the application should not be sold by the Receiver as belonging to the insolvent's estate. It would appear that the house was the property of the late Sir Chinubhai. We assume for the present purpose that Sir Chinubhai gave possession of the house to the insolvent's father Vithalrai. No document was passed by Sir Chinubhai so as to transfer the title from himself to Vithalrai. But Vithalrai passed a document to Sir Chinubhari which, after reciting that a gift had been made to him of the property, stated that he had been put in possession of the house on certain conditions. He admitted that he and his heirs had no right to mortgage the house or sell or create any charge on it. They had only the right to reside in the house. The insolvent mortgaged the house to one Mahant Jugaldas Laldas, who opposed the application made by the son of Sir Chinubhai to prevent the Receiver from selling the house. The Trial Court held that the insolvent had no saleable right to the house but had the right of occupancy only and, therefore, the Receiver could not put the house in question for sale. The District Judge reversed this order holding that there had been an irrevocable gift of the house by Sir Chinubhai to the father of the insolvent, while the condition in restraint of mortgaging or selling the property was void, so that the title in the house was in the insolvent and not in the heir of Sir Chinubbai. Thelearned Judge said :—

"On all this evidence oral and documentary it appears to me that Sir Chinubhai intended to make a gift of the house to a Brahmin on the occasion of his daughter's death. There is no rent, there is no provision for eviction or re-entry in case of breach and it is impossible, in my opinion, to construe the document as lease. But if it is not a lease it can hardly be anything else but a gift, and a religious gift."

If this document had been executed by Sir Chinubhai in favour of the insolvent's father and contained words sufficient to pass a title in the property to him, then undoubtedly it would have constituted a gift. The question would then arise whether it would be a conditional gift which restrained the power of the donee with regard to mortgaging or selling the property. But this document is only evidence of an oral assignment which had been made between Sir Chinubhai and the insolvent's father. Assuming that Sir Chinubhai intended to make a gift of the property to the insolvent's father, he could not pass the title in the property without complying with the provisions of s. 123 of the Transfer of Property Act, which says:—"For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses." Therefore in any event it cannot possibly be said that this document signed by the insolvent's father could have effected a valid gift of the property within the provisions of that section. Although it has been held that the provisions of s. 107 of the Transfer of Property Act, which enact how a lease of immoveable property is to be made, are complied with if the lessee signs a document in favour of the owner, I am of opinion that a gift cannot be created by a document signed by the person intended to be benefited by an oral gift in favour of the owner of the property acknowledging the gift. In effect Ex. 31 is merely an admission by the insolvent's father that he was in possession of the house belonging to Sir Chinubhai with the right to reside in it and that he had no right either to mortgage or sell it. Whatever right the insolvent then had in the house so delivered into the possession of his father by Sir Chinubhai, it would be impossible to say that he had any interest in the house which could be put up by the Receiver for sale. Therefore we allow the appeal and restore the order of the Subordinate Judge.

The appellant to get his costs in this Court and in the Court below.

Coyajee, J.—I agree in holding that the insolvent Vyas Purshotam Vithalrai possessed no saleable interest in the property in question. It is contended before us that the document Ex. 31 executed by the insolvent's father Vithalrai in favour of Sir Chinubhai on December 30, 1909 could be regarded as a deed of gift. I find considerable difficulty in accepting that contention. The language of s. 123 of the Transfer of Property Act is clear. It requires that for the purpose of making a gift of immoveable property the transfer must be effected by a registered instrument signed by or on behalf of the donor. In this case Ex. 31 does not satisfy that requirement; and there is no evidence in proof of the allegation that Sir Chinubhai had transferred this property to Vithalrai in accordance with law. It was then contended that Ex. 31 is effective as a deed of gift, on the analogy that a *kabuliyat* signed by the lessee only is effective as a lease. There is no doubt, authority in favour of the view that a lease may be created by a registered instrument signed by the lessee and accepted by the lessor. But the answer to the respondent's contention is that whereas s. 123 requires that the registered instrument must be signed by or on behalf of the donor, s. 107 contains no such express provision.

R. L. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 45 OF 1923.
CONVERTED INTO
CIVIL REVISION PETITION No. 938 OF 1923.
October 28, 1925.
Present:—Mr. Justice Devadoss and
Mr. Justice Waller.
BANGARAMMAL—PETITIONER
versus
RAMANUJA IYENGAR AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Scheme, tentative—Removal of trustee—Procedure—Appeal.

A trustee appointed under a tentative scheme, which provided for its modification after a certain time but made no provision for the removal of the trustee, can be removed only by a regular suit under s. 92, C. P. C. Any removal of such a trustee otherwise than in a regular suit is without jurisdiction and liable to be set aside in revision.

Orders of the latter kind removing the trustees are not orders in execution and are, therefore, not appealable.

Sevak Jeranchod Bhogilal v. *Dakore Temple Committee*, 87 Ind. Cas. 313; 49 M. L. J. 25; 23 A. L. J. 555; A. I. R. 1925 P. C. 155; L. R. 6 A. (P. C.) 117; (1925) M. W. N. 474; 2 O. W. N. 535; 41 C. L. J. 628; 22 L. W. 246; 27 Bom. L. R. 872; 30 C. W. N. 459 (P. C.), followed.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order, dated the 8th August 1922, of the Court of the Subordinate Judge, Chingleput, in M. P. No. 398 of 1920, in O. S. No. 8 of 1911 on the file of the District Court of Chingleput.

Mr. *C. V. Ananthakrishna Iyer*, for the Petitioner.

Messrs. *V. Krishna Mohan* and *T. P. Srinivasachari*, for the Respondents.

JUDGMENT.

Waller, J.—In O. S. No. 8 of 1911 a scheme was drawn up for the administration of the Tiruvadandai temple. It consisted of five clauses, the last of which provided that "the scheme shall work tentatively for 3 years and may be modified hereafter by the Court on the motion of the trustees, the *sabha* or any person interested". Nothing further appears to have been done by any one thereafter and the tentative scheme remained in force till 1920. In that year an application was presented to the Court for modification of the scheme, coupled with a prayer for the removal of the 3rd defendant, from the trusteeship of the temple. In the result, the Court framed an entirely new scheme and granted the prayer for the removal of the 3rd defendant. It is against this last part of the Court's order that she appeals. The original scheme made no provisions for the removal of a trustee and it seems to us clear that the Courts had no power to remove the 3rd defendant except on a suit brought for the express purpose under s. 92, C. P. C. The order of the Subordinate Judge was, therefore, made without jurisdiction. It is, however, argued that no appeal lies against it. It has hitherto been the practice to treat orders of this kind as orders passed in execution and appealable as such. The Privy Council has, in a recent decision ruled that such orders do not come under s. 47, C. P. C.; *Sevuk Jeranchod Bhogilal* v. *Dakore Temple Committee* (1). We must hold that the 3rd defendant has no right of appeal. We see no reason why she should not be allowed to convert her appeal into a revision petition and it is converted accordingly. The order removing her was passed without jurisdiction and it is set aside with costs.

The additional Court-fee paid by petitioner will be refunded.

Devadoss, J.—I agree.

V. N. V. *Appeal dismissed.*
R. L. *Petition allowed.*

(1) 87 Ind. Cas. 313; 49 M. L. J. 25; 23 A. L. J. 555; A. I. R. 1925 P. C. 155; L. R. 6 A. (P. C.) 117; (1925) M. W. N. 474; 2 O. W. N. 535; 41 C. L. J. 628; 22 L. W. 246; 27 Bom. L. R. 872; 30 C. W. N. 459 (P. C.).

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 23 OF 1925.
February 7, 1925.
Present:—Justice Sir Benjamin Herbert Heald, KT., and Mr. Justice Chari.
MAUNG MYA AND OTHERS—APPELLANTS
versus
MA THIN TIN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit for possession—Claim for mesne profits not adjudicated upon—Subsequent suit to recover mesne profits, whether barred—Practice—Limitation, plea of, abandoned in Trial Court, whether can be taken in appeal.

It is open to a party to press in appeal a point of limitation, though the issue embodying the plea of limitation may have been abandoned in the Trial Court. [p. 612, col 1.]

In a suit for declaration and recovery of possession there was a prayer that the defendants be ordered to render true and full accounts of all receipts in their hands and expenditure since the estate in dispute had passed into their possession. The Court granted the plaintiffs a decree for declaration and possession and made a note at the end of the judgment to the effect that the relief with regard to the accounts could not be claimed in the suit. In a subsequent suit by the plaintiffs to recover mesne profits arising out of the property which was the subject-matter of the previous suit:

Held, (1) that the prayer for accounts in the previous suit was in substance a prayer for the recovery of mesne profits; [p. 612, col. 2.]

(2) that if the right to recover mesne profits was regarded as a relief arising out of the same cause of action as the right to obtain possession, then the effect of the note made in the judgment in the previous suit was to give leave to the plaintiffs to omit the relief with regard to mesne profits in that suit and to refer them to a separate suit for that purpose; [*ibid.*]

(3) that if the right to recover mesne profits was regarded as a claim arising out of the same cause of action out of which the right to obtain possession had arisen, the plaintiffs having asserted their claim in that suit and having prayed for a relief in respect of it, it could not be said that the plaintiffs had omitted to sue in respect of the claim or that they had intentionally relinquished it; [*ibid.*]

(4) that, therefore, the subsequent suit was not barred by the provisions of O. II, r. 2 of the C. P. C. [*ibid.*]

Mr. *Ray*, for the Appellants.

Mr. *Patker*, for the Respondents.

JUDGMENT.—The main point argued in this appeal is whether the larger part of the claim in the suit, out of which this appeal arises is barred by the provisions of O. II, r. 2 of the C. P. C. The facts are as follows:—The two respondents before us, Ma Thein Tin and Ma Than Tin, had, in a previous suit, sued the defendants for declaration of their title and for recovery of possession of certain lands. They also prayed for a third relief to which reference will be made later. They claimed as heirs of one Ba U who died a minor. The 1st and 2nd defendants were persons who had obtained Letters of Administration as guardians of Ba U to the estate of his grandfather to whom Ba U was one of the heirs The lands in suit had been taken possession of by them as administrators and guardians of Ba U. The 3rd defendant in that suit, Mg Ba Kin, was a rival claimant to the estate of Ba U. The plaintiffs succeeded in the suit and obtained a decree for the declaration and the possession they wanted.

In the suit now under appeal the same two persons Ma Thein Tin and Ma Than Tin sue the defendants for mesne profits of the lands for the Burmese years of 1281, 1282 and 1283. The 1st and 2nd defendants in the present suit were the 1st and 2nd defendants in the former suit. The remaining defendants are the heirs and legal representatives of one U Shwe Pe who was a surety for the 1st and 2nd defendants when they obtained Letters of Administration. In the written statement of the defendants a point of limitation was raised, *viz.*, that the claim for the mesne profits of the year 1281 was time-barred. At the trial this point of limitation was abandoned by the learned Pleader of the defendants. The learned Advocate for the defendants, who are the appellants before us, tried to raise again in appeal this point of limitation. It is, of course, open to the Advocate for the appellants to press in appeal this point of limitation, though the issue embodying this plea had been abandoned in the Trial Court by their pleader. A comparison of the dates, however, shows that there is no substance in this plea. The Burmese year 1281 began on the 15th April 1919 and ended on the 14th April 1920. The agricultural rents of that year would be received in December 1919, or January 1920, which is the time such rents are paid in this country. Even if the 1st and 2nd defendants be considered to have realised the rents on the 1st December 1919, the suit having been instituted on the 8th of November 1922, is well within time.

Turning now to the more important point raised in appeal it is argued that the claims for the years 1281, and 1282 are barred as they ought to have been included in the earlier suit.

This defence, however, was not pleaded in the written statement and no issue was raised on the point. As, however, the proceedings in the earlier suit are referred to in the plaint in this suit, and as the plaintiffs themselves successfully relied on the judgment in the earlier suit in support of their contention that one of the issues was *res judicata*, we allowed the Advocate for the appellant to raise and argue the point before us, since the point is one of law.

This question, whether a suit for possession bars a subsequent suit for mesne profits, is one which has given rise to a good deal of conflict of opinion. In the view we take of the question as arising in this particular case, it is not necessary for us to decide the point or make a reference to a Full Bench. In the earlier suit there was a third prayer in the plaint which is as follows:—"The defendants be ordered to render true and full accounts of all receipts in their hands and expenditure since the estate passed into their possession." As the property in suit is lands, the receipts can only refer to rents and profits of that land. This prayer, no doubt, is one for an account and possibly proceeded upon the assumption that there was an accountability on the part of the defendants. In substance, however, it is a prayer for mesne profits. There is no need to mention in such a prayer any particular sum as the amount claimed. It was well within the power of the Judge to treat it as a claim to mesne profits and direct an enquiry into the profits for at least three years prior to the date of the institution of the suit. (See O. XX, r. 12, C. P. C.) The learned Judge, however, did not do so, but at the end of the judgment made a note to the effect that the third relief is one not to be claimed on such a suit.

The right to recover mesne profits, assuming that that right and the right to obtain possession arise out of the same cause of action, may be considered as either a claim arising out of the cause of action, or a relief arising out of it. If the right to mesne profits be considered as a relief, then the effect of the learned Judge's order seems to us to give the plaintiffs leave to omit the relief in the suit and to refer them to a separate suit for that purpose. Such a leave under the new Civil Procedure Code can be given at any stage of the suit and not necessarily before the first hearing. If so, the plaintiffs' present suit cannot be barred. But even if the right to mesne profits be considered as a claim arising out of the cause of action, the suit is not barred. In the earlier case the plaintiffs did assert their claim and prayed for a relief in respect of it. The learned Judge held that that claim could not be enquired into in that suit. It cannot, therefore, be said that the plaintiffs omitted to sue in respect of the claim, or that they intentionally relinquished it. It is only when there is such an omission or intentional relinquishment that a second suit is barred.

For these reasons we hold that the present suit is not barred under the provisions of O. II, r. 2 of the C. P. C. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 209 OF 1925.

February 19, 1926.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Boys.

GIRDHARI LAL *alias* BANWARI LAL—JUDGMENT-DEBTOR—APPELLANT

versus

RAM CHARAN LAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 48, 151, O. XLVII, r. 1—Execution application—Dismissal for no fault of decree-holder — Restoration — Inherent powers—Review—Notice.

Where an execution application is dismissed, by reason of objections on the part of the judgment-debtor or action taken by Court or other cause, for which the decree-holder is not responsible, the right of the decree-holder to the final completion of the proceedings is not necessarily defeated, and further applications of the decree-holder to the Court executing the decree to go on from the point where the execution proceedings are arrested, are regarded as applications merely ancillary to the substantive application and no question of limitation under s. 48, C. P. C., can arise under such circumstances. [p. 614, col. 1.]

Rahim Ali Khan v. *Phul Chand*, 18 A. 482; A. W. N. (1896) 142; 8 Ind. Dec. (N. S.) 1028 and *Ram Sarup* v. *Dasrath Tewari*, 9 Ind. Cas. 817; 33 A. 517; 8 A. L. J. 412, followed.

Where an Execution Court strikes out execution proceedings in the absence of the decree-holder, on the ground that there is no bidder for the property at the Court-sale, and the decree-holder is not present at the time to ask for further action, it is a case in which the decree-holder is not responsible for dismissal of the proceedings, and the Court has power to revive them under s. 151, C. P. C. But where it purports to act under O. XLVII, r. 1, C. P. C. it is incumbent on it to give notice of the application filed by the decree-holder to the opposite party, and an omission to do so makes the order of restoration of proceedings defective. However, any such defect is cured, if the propriety of the order is not challenged for several months together. [p. 614, cols. 1 & 2.]

Execution second appeal from a decree of the Additional Subordinate Judge, Mainpuri, dated the 21st October 1924.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *N. P. Ashthana*, for the Respondent.

JUDGMENT.—This appeal arises out of an execution proceeding and the sole question for consideration is whether the application is barred by limitation It appears that a decree was obtained by Ram Charan against Girdhari Lal, the predecessor of the present appellant and certain other persons on the 30th of July 1910. The last application for execution was made on the 30th of July 1921; and in execution of that decree certain ancestral property was ordered to be sold. The proceedings connected with the sale were transferred to the Collector under s. 68 of the C. P. C. The Collector fixed a date for holding the sale; but on that date there was no bidder; and as the decree-holder was not present at the time to ask for further action, he sent the papers back to the Court which had directed the sale. The papers reached the Court on the 24th February 1923 and it passed an order on the same day striking out the execution proceeding for default.

On the 26th of February 1923 the decree-holder made an application stating that he was present on the date the auction was held and had just gone outside for a short time when the sale officer passed an order returning the papers. He prayed that the papers may be sent back to the Collector for proceeding with the sale. The Court thereupon passed an order in terms of the application, directing further proceedings in connection with the sale. While the sale proceedings, re-started by the Collector, were pending, an objection was filed by *Musammat* Parbati, one of the judgment-debtors that the order re-instating the proceedings was irregular, and that the decree was really barred by time. That objection was unsuccessful; and it was held by the Court, which had passed that decree and before which the execution proceeding was pending, that it had power to revive the previous execution proceeding which had been dismissed for no default of the decree-holder and without his knowledge; and that order was afterwards upheld on appeal. Girdhari Lal, another judgment-debtor, then intervened and filed the objection which has given rise to the present appeal, urging that the application for execution was barred by time and that the order of the Court sending the papers again to the Collector after the Collector had returned them was contrary to law. The Courts below have disallowed that objection, relying on the decisions in *Rahim Ali Khan* v. *Phul Chand* (1) and *Ram Sarup* v. *Dasrath Tewari* (2). The view taken in these cases was that where an application for execution had been made within the period of limitation and granted, that is, execution had been ordered in accordance with the prayer of the decree-holder, the right of the decree-

(1) 18 A. 482, A. W. N. (1896) 142; 8 Ind. Dec. (N. S.) 1028.

(2) 9 Ind. Cas. 817; 33 A. 517; 8 A. L. J. 412.

holder to obtain execution will not necessarily be defeated, if, by reason of objections on the part of the judgment-debtor or action taken by the Court or other cause, for which the decree-holder was not responsible, the final completion of the proceedings in execution initiated by the application could not have been obtained within the period provided by law; and that further applications of the decree-holder to the Court executing the decree to go on from the point where the execution proceedings had been arrested and to complete the execution of his decree would be regarded as applications merely ancillary to the substantive application and no question of limitation under s. 230 of the old C. P. C. would in those circumstances arise.

It is urged on behalf of the judgment-debtor-appellant that if the order of 26th of February 1923 was passed under O. XLVII, r. 1 of the C. P. C., it was without jurisdiction, as no notice had been issued to the judgment-debtor before that order was passed. It is further urged that O. IX, r. 13 was inapplicable to an execution proceeding and the Court was not competent to set aside its previous order of the 24th of February 1923 behind the back of the judgment-debtor. The application made by the decree-holder did not recite the provisions under which it was made. It was either an application for review under O. XLVII, r. 1 of the C. P. C., or an application to the Court to rectify its previous order and to revive the proceedings under s. 151 of the C. P. C. When the order of the 24th of February 1923 was passed, no notice appears to have been given to the decree-holder of the report which had been received from the Sale Officer; and no opportunity was granted to him to take further proceedings in the case. Even the Sale Officer had omitted to grant time to the decree-holder to take further proceedings in the matter. The decree-holder was not responsible, if there was no bidder present at the time of the auction, much less could he have been responsible for the alleged default if no notice had been given to him by the Court, before which the execution proceeding was pending of the papers having been received back nor opportunity to take further steps in execution of his decree. The order was passed *ex parte* as soon as the report of the Sale Officer was received; and it was open to the Court, which passed that order, when the omission was brought to its notice, to set aside its order and to restore or revive the proceeding under s. 151 of the C. P. C. If it purported to act under O. XLVII, r. 1 of the C. P. C., it was incumbent on it to give notice of the application filed by the decree-holder to the opposite party; but after the order was passed no steps appear to have been taken so long by any of the judgment-debtors to challenge the propriety of that order. The first objection was filed by *Musammat* Parbati on the 9th of July 1923 that is about five months after that order was passed and the last by Girdhari Lal on the 10th of May 1924 that is about fifteen months from the date of that order. No appeal or application in revision was filed to challenge the legality of that order; and it is too late for the judgment-debtor now to question its propriety. The judgment-debtor is obviously seeking by means of this petition to gain time. He and his co-judgment-debtors have succeeded in getting the sale put off from time to time and they have succeeded in that object this time again; and as the Courts below have pointed out his objection is frivolous and has no force. The order reviving or restoring the execution proceeding was not passed without jurisdiction; and even if it was irregular that irregularity was cured by the fact that it remained unchallenged so long and the decree is not barred by time.

It is urged that the judgment-debtor-appellant had no notice of that order, but as the sale proceeding went on before the Sale Officer for over fifteen months after that order was passed, he could hardly have remained ignorant of it.

The appeal fails and is dismissed with costs including in this Court fees on the higher scale.

N. H.
S. S. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 509 OF 1924.
January 20, 1926.
Present:—Mr. Justice LeRossignol
and Mr. Justice Martineau.
MESSRS. DUNI CHAND-DHANI RAM—
PETITIONERS
versus
THE COMMISSIONER OF INCOME TAX,
PUNJAB—RESPONDENT.

Income Tax Act (XI of 1922), ss 13, 22 (4), 23 (2), *37—Accounts, production of—Assessment without opportunity to justify accounts—Legality—Procedure of Income Tax Officers—Accounts as basis for assessment—Petty traders, accounts of.*

Production by an assessee of his accounts is a substantial compliance with the notice received under s. 22 (4), Income Tax Act, and the Income Tax Officer is not justified in rejecting the return and the accounts and in assessing on a rule of thumb until he has given notice to the assessee under s. 23 (2) of the Act to appear before him and justify his return. [p. 615, col. 2; p. 616, col. 2.]

When a return is furnished and accounts are put in, in support of that return, the accounts should be taken as the basis for assessment. They should not be rejected because they are complicated. Strictly regular accounts are not available particularly in the case of petty traders who very often have only a poor knowledge of accounts. [p. 616, col. 2.]

Section 37 of the Income Tax Act indicates that the procedure of the Income Tax Officers is of a judicial nature and in making assessment they should proceed on judicial principles. If evidence is produced by the assessee in support of his return it should be accepted unless it is rebutted by other admissible evidence and not by mere hearsay. [p. 616, col. 1.]

Petition praying that the Commissioner of Income-Tax, Punjab, be required to state the case under s. 66, cl. (3) of the Income Tax Act.

Lala *Jagan Nath Aggarwal*, for the Petitioners.

Mr. *C. H. Carden Noad*, Government Advocate, for the Respondent.

ORDER.—This is a case stated and referred by the Commissioner of Income-Tax, Punjab, under cl. (3) of s. 66 of the Income Tax Act of 1922. The learned Commissioner prefaces his reference with a suggestion that this Court has no jurisdiction to issue a *mandamus* in this case on the ground that the Commissioner's own order in review of the appellate order passed by his Assistant was equally with the appellate order of his Assistant incompetent. The learned Government Advocate states that he is unable to support this contention which obviously has no force. The Commissioner's order still subsists and has not been set aside and it would be opposed to all ideas of congruity, legal or other, to hold that an order cannot be challenged on the ground that it should never have been issued.

The disputed assessment, which is confined to an item of Rs. 10,000 in respect of interest, was in respect of the year 1922-23. The return authorised by s. 22 of the Act was made on the 9th September 1922, and that showed an income from interest of only Rs. 866. On the 12th February 1923, in obedience to an order issued under s. 22, cl. (4) the assessee produced his accounts before the Assessing Officer, and on the 23rd February received an assessment order to pay tax on an income of Rs. 30,000. The assessee applied for cancellation of the assessment under s. 27, but the Income Tax Officer rejected it on the 18th April 1923 by the following order:—

"Section 27 does not apply to this case; return was submitted, accounts were seen. The pleas raised are relating to appeal." The assessee then appealed to the Assistant Commissioner who entertained the appeal and remanded the case for fresh enquiry. The appeal was subsequently dismissed and an application made to the Commissioner for review met with the same fate, but on the merits.

Now, the main contention on behalf of the assessee is that he made a return which was recognised as a return. He produced all the books he had and if the Income-Tax Officer was not prepared to accept his accounts he should have acted in a judicial manner, and before proceeding to assess by a rule of thumb should have issued notice under s. 23 (2) to the assessee to appear and answer the criticisms directed against his return and accounts.

The procedure under the Income Tax Act is as follows:—

A return of income is called for from the assessee and must be furnished. If that return is not furnished the assessee places himself at the mercy of the Income Tax Officer who shall then make the assessment to the best of his judgment, and the assessee will have no right of appeal.

If a return is made it is open to the Assessing Officer to accept it and to base the assessment entirely upon it. If he is not prepared to accept it forthwith, he may issue notice to the assessee to appear before him and justify his return by his accounts. If the assessee, although he has furnished the return, fails to produce his accounts in support of that return he is placed in the same position as if he had made no return at all. If, however, he has made a return and has produced his accounts in obedience to an order under s. 22 (4), the Income Tax Officer is not justified in rejecting the return and the accounts and in assessing on a rule of thumb until he has given notice to the assessee under s. 23 (2) of the Act to appear before him and justify his return.

In this case no such notice was issued to the assessee. The Income-Tax Officer rejected his accounts which had been produced in compliance with a notice under s. 22 (4) and proceeded forthwith to make the assessment to the best of his judgment. In this connection we should like to draw the attention of the learned Commissioner to the great laxity which prevails in the office of the Income Tax Officers in the matter of the issue of notices. Probably with the object of avoiding the multiplicity of notice form, a form is used which may be a notice either under s. 22 (4) or under s 23 (2). If the notice is under s. 22 (4) certain erasures are necessary before the notice issues. If the notice is one under s. 23 (2) other portions of the notice must be erased. We find, however, that notices issue without any erasures so that it is not possible for the assessee to know whether he is being summoned under s. 22 (4) or s. 23 (2). Section 37 of the Act indicates that the procedure of Income Tax Officers is of a judicail nature, and in making his assessment the Income Tax Officer should proceed on judicial principles. If evidence is produced by the assessee in support of his return it should be accepted unless it is rebutted by other admissible evidence and not by mere hearsay.

Next, s. 13 is invoked as justifying the assessment by the Income-Tax Officer. That section provides that if no method of accounting had been regularly employed, or if the method employed is such that, in the opinion of the Income Tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income Tax Officer may determine. Now, the Income Tax Officer's application of this section was as follows:—"As regards income from interest the Inspector's estimate seems to me a little high. My own estimate is about Rs. 10,000. We do not regard this wholly arbitrary assessment as one justified by s. 13, for the Income Tax Officer does not lay down any basis, nor does he indicate how he arrives at his estimate of Rs. 10,000. Had he found that the sums loaned were a certain figure, and had he calculated a flat rate upon those sums, we should have regarded his action as in conformity with the provisions of the section. But a bare statement that his estimate is so and so we regard as a mere guess without any obvious basis. Had the Income Tax Officer even said 'the income from interest last year was Rs. 10,000 and the assessee has shown me no reason for holding that his income from interest has diminished this year' even that would have shown some appreciation of the limitations placed upon him by s. 13.

When a return is furnished and accounts are put in, in support of that return, the accounts should be taken as the basis for assessment. They should not be rejected because they are complicated. Strictly regular accounts are not available particularly in the case of petty traders who very often have only a poor knowledge accounts.

We accept the view that the production by the petitioner of his accounts was a substantial compliance with the notice received under s. 22 (4) and we hold the assessment illegal inasmuch as he received no opportunity under s. 23 (2) to appear and meet the objections to the return and accounts produced by him. The petitioner shall receive costs of this reference from the respondent.

R. L. *Petition accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 111 OF 1924.

February 18, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir George Claus Rankin, KT.

SUDHIR CHANDRA DAS—PLAINTIFF—APPELLANT

versus

Srimati INDUMATI CHAUDHURANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, powers of—Family arrangement.

A Hindu widow is entitled to protect a right purported to be given to her under her husband's Will, and to make a compromise with a contesting party in defence of that right, provided always that the transaction as a whole is fair and reasonable from the point of view of reversioners. [p. 623, col. 2.]

A Hindu died leaving behind a widow and four married daughters. By a Will left by him, the widow was given authority to adopt a son, and was also appointed executor of the estate. An application being made by the widow for a Probate of the Will, certain objections were raised to it by the daughters, and an administrator *pendente lite* was appointed thereon. Some sort of family settlement was brought about among the members by the intervention of friends, the objections were withdrawn, and the widow paid a sum of Rs. 30,000 to one of the daughters in pursuance of the settlement. Subsequently, in accordance with the provisions of the Will, the widow adopted a son who about seven years after the settlement brought a suit contesting the payment of Rs. 30,000 to the daughter:

Held, (1) that *qua* executor it was a breach of trust for the widow to spend the testator's property in buying off disputes about the Will; [p. 623, cols. 1 & 2.]

(2) that, however, whether the Will was bad or good everything went to the widow herself as a Hindu widow and she was fully entitled to represent the estate, and consequently a payment out of the estate was payment out of the beneficiary interest which at the moment was the widow's; [p. 623, col. 2.]

(3) that the arrangement which was made, was within the powers of the widow, and it was a beneficial and not an improper arrangement; [p. 620, col. 2.]

(4) that the fact of the estate being at the time of making the arrangement in the control of the administrator *pendente lite* did not affect her powers to make it. [p. 620, col. 2.]

A family arrangement by a Hindu widow, a limited owner, entered into with reversioners, themselves limited owners, cannot cure an act which is otherwise wrong. [p. 623, col. 2.]

There can be no family arrangement in the strict sense of the term, where it is not proved who the parties were to the settlement and what were the terms settled upon. [*ibid.*]

Appeal against an order of Mr. Justice C. C. Ghose, dated the 12th March 1924.

Messrs. *N. Sarkar* and *S. K. Chakrvarti*, for the Appellant.

Sir *B. C. Mitter* and Mr. *S. M. Bose*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the plaintiff Sudhir Chandra Dass against the judgment of my learned brother Mr. Justice C. C. Ghose which was delivered on the 12th of March 1924.

The facts of this case are, I hope, entirely out of the ordinary at all events, as far as my experience goes, they are unprecedented.

For the purpose of my judgment it is necessary to state the material facts which are as follows:

The question arises with regard to the estate of one Srish Chandra Das. He died on the 12th day of December 1904 leaving a widow whose name was Raseswari Chowdhurani his eldest daughter was Sarojini Chowdhurani, who was married to Bankim Chandra Chowdhury. Sarojini had a son whose name was Nirmal Chandra Chowdhury. This son Nirmal was afterwards, as I shall have to mention, adopted by Raseswari, and he took the name of Sudhir Chandra Dass and he is the plaintiff in this case.

The second daughter of Srish Chandra Das was Indumati Chaudhurani. She was married to Bepin Behary Biswas.

The third daughter was Promila Sundari Chowdhurani who was married to a man called Gnanada Nath Roy Choudhuri and the fourth daughter was Sukumari Chaudhrani who was married to Sudhirendra Nath Roy Chowdhuri.

All the four daughters were married at the time of Srish Chandra Das' death.

Srish Chandra Das made a Will by which he appointed his widow Raseswari executrix and one Rajoni Mohan Das executor of his estate; and, the Will provided that they should be entitled as executors to take out Probate without security.

A further provision in the Will was that the testator gave verbal authority to his wife to take a son in adoption; and, he stated in writing that his wife should be competent to take his first daughter's son Nirmal Chandra Das and failing him any other person in adoption.

The Will provided that the son so adopted should be the proprietor of the estate to be left by the testator, and that a monthly allowance at the rate of Rs. 100, should be paid to the testator's first two daughters and that two houses should be given to them.

This Will is alleged to have been executed on the 11th of December 1904 a day before the testator died.

On the 22nd day of February 1905, the executrix and the executor applied for Probate of the Will; Indumati filed a caveat; and, subsequently administrator *pendente lite* was appointed.

On the 22nd day of May 1905, certain petitions were presented one by the executrix and the executor another on behalf of Indumati, the third on behalf of Sarojini, the fourth on behalf of Sukumari and another one on behalf of Promila, with the object of withdrawing the objections to the Will which had been raised by Indumati and of Probate being granted to the executors. It is not necessary to refer in detail to the terms of these petitions except in the case of the one which was presented on behalf of Indumati.

In her petition Indumati stated that she had found after enquiry that it was not possible for her to maintain her objection; and it proceeded as follows: "Under these circumstances it will not be good to proceed with the case and be harassed and create disturbance and unpleasant-ness in the family. So, I, Indumati Dasi the objectrix withdraw all objections regarding the Will propounded and filed by the applicants, and acknowledge that the Will filed in the case is the genuine Will of my father and executed by him; and with a view to avoid all costs likely to be incurred in the case and harassment to be subjected to and to establish cordial relationship in the family and as a consideration for this compromise, and in excess of the provisions of the Will the executors have made a proper arrangement by providing for support maintenance and education of my present and future children. It being inconvenient to give me one house in Digbazar under the provision of the Will, the executors in lieu thereof have given me two houses described in Schedule below for my residence which are to be considered as one and they have consented to execute a proper document therefor within two weeks of the estate having come into their hands and they have further agreed to give me my monthly allowance of Rs. 100 according to the provisions of the Will.

The result of these petitions was that on the 24th of May 1905, Probate was granted to the executrix and executor in common form.

The administrator *pendente lite* was discharged, and, Raseswari the widow of the testator, came into possession of the estate.

In pursuance of the provisions of the Will, Raseswari the widow adopted the plaintiff on the 26th of April 1906; and a monthly allowance was paid to Indumati for a period of about six years; it was not until the 27th of April 1912 that this suit was brought by the plaintiff, the adopted son. The suit was brought among other things for the administration of the estate, and, on the 6th day of May 1913, a preliminary administration decree was made. An advertisement for creditors was issued; and, on the 18th of March 1914, Indumati filed a claim as a creditor of the estate for arrears of the monthly allowance of Rs. 100 and for provision for the payment of the allowance in the future.

A long period elapsed before anything was done with a view to investigating Indumati's claim. We were informed that there was litigation in respect of this Will, which litigation was instituted by a third party, and it was not until June 1921 that Indumati's claim, and the claims of others, were referred to the Assistant Referee for report.

The Assistant Referee held an enquiry which occupied a long time (as to the proceedings before him I shall find it necessary to say a word or two later on) and, on the 25th of April 1922, he made a report, the effect of which was as follows, that Indumati Chowdhurani was entitled to get Rs. 100 a month from the estate since the death of the testator but that she would not be entitled to draw her said annuity from the estate, which was due to her since *Chaitra* 1318 *B. S.* unless and until she should make good to the said estate the sum of Rs. 30,000 which was paid to her on the 22nd day of May 1905 out of the said estate.

Indumati filed objections to this report: I need not refer to them in detail they are set out in the paper-book at pages 12, 13 and 14.

Those objections were heard by, my learned brother Mr. Justice Greaves; and a point was taken before the learned Judge that it was not open to him in those proceedings to investigate the question whether the alleged payment of Rs. 30,000 was a breach of trust. The learned Judge came to the conclusion that the contention was right, and that it was not open to him to come to a decision on that point, with the result that the learned Judge allowed the exceptions and set aside that portion of the report which dealt with the impounding of Indumati's Rs. 100 a month and which purported to establish her liability for the breach of trust with regard to the sum of Rs. 30,000. Then there was an appeal from the decision to this Court, and the Court of Appeal directed that the matter should be remitted for further investigation by a learned Judge on the Original Side and that he should be at liberty to enquire into any of the points which were open to the parties in respect of the Assistant Referee's report.

The matter was then heard by my learned brother Mr. Justice C. C. Ghose; and he came to the conclusion that Indumati was entitled to the monthly allowance of Rs. 100 without making restitution of the sum of Rs. 30,000 and it is from that judgment that this appeal has been preferred.

It seems to me necessary now to state what was the case of Indumati at different stages of these proceedings:

It was alleged on behalf of the plaintiff that the executrix and the executor had paid to Indumati, or to her husband on her behalf, the sum of Rs. 30,000 for the purpose of inducing Indumati to withdraw the caveat which she had entered against the Will, and it was alleged that such payment was a breach of trust of which Indumati was cognisant and that Indumati could not claim any further payment of the monthly allowance until she repaid the sum of Rs. 30,000.

Indumati's case at the enquiry before the Assistant Referee was that she had not received the sum of Rs. 30,000 and that it had never been paid to her or to any one on her behalf; and there is no doubt that the proceedings before the Assistant Referee were unduly prolonged by reason of the case which Indumati set up.

We were informed that Bankim Chunder who was the chief witness on behalf of the plaintiff had been cross-examined for no less than eight days at the instance of Indumati.

When the case came to this Court on appeal from my learned brother Mr. Justice Greaves, the learned Counsel who then appeared for Indumati, admitted that the sum of Rs. 30,000 had been paid to Indumati but he asserted that the sum had not been paid out of the funds belonging to the estate; and, in particular he did not admit that Indumati had signed the receipt for the Rs. 30,000 which will be found at page 270 of the paper-book and which had been put to Indumati in the course of the proceedings before the Assistant Referee. I think it is apparent that the reason for the learned Counsel's refusal to admit that Indumati had signed that receipt was that if it were admitted, it would show that the payment had been made by the executrix and the executor with money out of the estate; for the receipt runs as follows:—

"Sreemati Raseswari Chowdhurani and Srijukta Babu Rajani Mohan Das executor estate of Babu Srish Chandra Das deceased.

"Written by Sreemati Indumati Dassee wife of Babu Bepin Behari Biswas whose receipt this is. You agreed to pay me the sum of Rs. 30,000 on the basis of the settlement arrived at in the Probate Case No. 32/8 of 1905 etc, I grant you this receipt having got payment of the said sum of Rs. 30,000 dated 22nd day of May 1905 corresponding to 8th *Jaitha*, 1312 *B. S.*"

It purports to be written by Gagan Chandra Ghose, Pleader and to be signed at the side by Indumati.

The effect of the decision of this Court, on appeal from my learned brother Mr. Justice Greaves was that the main question which was to be decided by the learned Judge on the further hearing was whether the sum of Rs 30,000 had been paid out of the estate, although any other question which might be available to the parties on the objections to the report could be investigated.

My learned brother Mr. Justice Ghose, found that the money was paid out of the estate. He came to the conclusion that there was a family settlement arrived at, for the purpose of putting an end to possible litigation; that Raseswari was not only the executrix but also the widow of the deceased and that the settlement was within the authority of the widow and that it was a settlement which was arrived at to preserve the harmony, affection and honour of the family and that it was a *bona fide* and fair compromise.

When the case was argued, on the hearing of this appeal, the learned Counsel who appeared for Indumati, admitted, as he was bound to admit, that the sum of Rs. 30,000 had in fact been paid. He further admitted that the receipt, which had been denied by Indumati at the hearing before the Assistant Referee and which had not been admitted by the learned Counsel when the case first came to the Appeal Court was signed by Indumati. The learned Counsel for Indumati, however, still argued that the money had not been paid out of the estate and he contested the learned Judge's finding to that effect. He further argued that even if the money were paid out of the estate it was a *bona fide* compromise made for the purpose of putting an end to litigation and it was within the authority of the widow to make it: that many years had elapsed before any proceedings were taken to contest that settlement; that it was made by the widow after consulting people who were competent to advise her; and consequently he argued that the appeal ought not to succeed.

The first question on the merits of the appeal, is whether the money was paid out of the estate.

In my judgment it is clear that the money was paid to Indumati or to her husband on her behalf on the 22nd day of May 1905, that the executrix and the executor had not got sufficient funds of the estate at the time: that it was raised in the manner which is set out in the learned Judge's judgment; that the widow Raseswari had herself advanced Rs. 4,696 that Bankim Chandra Saha through his wife, advanced Rs. 303 odd annas, and that Rs. 15,000 and Rs. 10,000 were raised elsewhere: and, I have no doubt that on or about the 5th of October 1905 the parties, who had advanced the moneys were re-paid out of the moneys of the estate. Whether the money was actually paid in cash or whether the transaction was effected or completed by making entries to the credit of the different parties, against which they were entitled to draw, to my mind is of no importance in this case. I am convinced that the arrangement was that Rs. 30,000 should be paid to Indumati, that she should withdraw her opposition to the Will and that eventually the money should be paid out of the funds of the estate. It is obvious that it was to the interest of Raseswari to be in a position to establish the validity of the Will. It is also obvious that Bankim, whose son was to be adopted by the widow, would naturally be anxious to see the validity of the Will established: on the other hand, Indumati, if the validity of the Will could be impugned, would benefit thereby; because if Srish Chandra Das died intestate, the widow would succeed to a widow's interest in the estate, and after her death the daughters would succeed to the estate; and, under those circumstances I have no doubt that Bankim, the widow, Indumati and her husband and the executor entered into the arrangement to which I have referred. Whether the money was paid out of the estate on the 5th of October 1905 or on some other date, to my mind, is of no importance whatever, having regard to the arrangement which was undoubtedly made on or about the 22nd day of May 1905.

The other part of the case to which it is necessary for me to refer is whether the learned Judge's conclusion as to the arrangement should be upheld.

I have had some doubt as to whether Indumati should be allowed to succeed upon the allegation of the settlement, on the basis that the money was paid out of the funds of the estate, because it is clear from the petition which was filed against the finding of the Assistant Referee, that she was asserting that the money had not been paid out of the estate as for instance, she stated that the Assistant Referee erred in holding that the sum of Rs. 30,000 was paid to her on the 22nd day of May 1905 out of the estate. She further asserted that the Assistant Referee erred in holding that the money was paid out of the estate on behalf of the executors and was paid to buy off her opposition to the Will, whereas he should have held upon a true construction of the petition of compromise that it was a settlement of family disputes amongst the members of the family brought about by friends and relations and for the good of the family and the state, and for the purposes set out in the consent petitions filed by Indumati and by the executors and executrix on the 22nd May 1905.

Therefore, it seems to me that the case which Indumati was asserting was first of all that the money was not paid out of the estate, and, secondly that the money was paid in pursuance of the family settlement irrespective of the funds of the estate.

I have come to the conclusion, however, that this case ought to be decided upon the facts which have been proved in the course of the enquiry.

The question whether Indumati ought to be mulcted in costs or deprived of costs by reason of the false case which she set up is another matter: but for the purposes of doing justice between the parties, in my opinion, we ought to decide the case on the facts as the learned Judge found them and as I think they ought to be found.

I have already stated that I am convinced that the sum of Rs. 30,000 in effect was paid out of the estate. I am also satisfied that the arrangement, which was made, was within the powers of Raseswari, who was the widow of the testator and that it was a beneficial and certainly not an improper arrangement.

It was argued by Mr. Sircar on behalf of the appellant that at the time this arrangement was made, Raseswari had no control over the estate because a caveat had been entered by Indumati and an administrator *pendente lite* was in control of the estate. That may be. But it seems to me, there are two answers to that argument: in the first place the arrangement may very well have been made by the widow knowing that if it were carried out the administrator *pendent lite* would be discharged and she and her co-executor would obtain control of the estate. In the second place, even though the administrator *pendente lite* was in control of the estate on the 22nd day of May 1905 still she, as the widow, was entitled to the whole of the beneficial interest in the estate at the time; and it would be open to her to make the arrangement to have referred.

It is also material to point out that as a result of the arrangement, which was arrived at by the widow and her co-executor, the validity of the Will was, for the time being at all events, established and that the widow was able to adopt the plaintiff as the son of the deceased man. If the validity of the Will had not been established, it might well be that there would have been little or no evidence of any authority vested in the widow to adopt a son. In consequence of this arrangement the validity of the Will was established and the right of the widow to adopt a son was made clear, and, it hardly lies in the mouth of the plaintiff, who becomes entitled to the estate by means of the arrangement, which the widow made to come forward at this late stage and assert that the arrangement was beyond the powers of the widow and was a a breach of trust.

The result is that, in my judgment, on the facts of the case the appeal fails and should be dismissed.

When this matter was before the Appeal Court on the previous occasion, Mr. Justice Richardson and I disposed by our order of the costs of that appeal, but we left it to the learned Judge, who would hear the case on further consideration to decide as to what should be done about the costs of the proceedings before the Assistant Referee and of the proceedings before my learned brother Mr. Justice Greaves. But my learned brother Mr. Justice Ghose has not dealt with those costs and we have been asked by the parties, instead of remitting the matter to the learned Judge to deal with their costs in this Court. It is clear that the proceedings before the Assistant Referee were prolonged to an excessive degree in consequence of the false case which Indumati set up and by the course which those representing her took. It would perhaps be strictly proper to direct that she should pay the costs of the issues in respect of which she failed, but it would be difficult for the Taxing Officer to arrive at any satisfactory conclusion on that basis; and, therefore, we are of opinion that the proper order to make with regard to the proceedings before the Assistant Referee is that Indumati should pay half the costs of the plaintiff in respect of those proceedings.

The proceedings in this appeal have been prolonged and the paper-book has been increased in size in consequence of the case put forward by Indumati and the attitude adopted by her advisers before the Assistant Referee; in the proceedings before my learned brother Mr. Justice Greaves, Indumati took the point that it was not open to the learned Judge to investigate the question of the alleged breach of trust a point which was given up by her learned Counsel in the Court of Appeal. We are, therefore, of opinion that each party should pay his or her own costs in respect of the proceedings in this appeal and before Mr. Justice Greaves.

We do not interfere with the order of Mr. Justice Ghose as regards the costs of the proceedings before him because the matter was within his direction.

We have been informed that a Receiver, appointed by the Court is in possession of the estate.

The Receiver, therefore, will be at liberty to set off the costs payable by Indumati to the plaintiff against the arrears of allowance due to Indumati.

The Receiver will also be at liberty to proceed to pay the monthly allowance to Indumati as it accrues due.

Rankin, J.—I agree.

This question arises in course of a suit brought in 1912 for the administration of the estate of the deceased Srish who died on the 12th of December 1904. The matter was raised in years which are comparatively recent and a very long time after the actual events had come into question.

The question has been smothered in contentions which, in my judgment, come to nothing: and I propose to state shortly (disregarding the contentions which come to nothing) the position as I see it. When the testator died he had been in an extremely dangerous state for some little time. The learned Judge has made a reference to these matters, and it has been objected that the facts mentioned by him were not properly proved but it turns out that it was brought to the notice of the learned Judge, that the whole question of the validity of this Will was the subject of a litigation which came up to this Court and was disposed of by a judgment which is reported.

I propose to mention only two facts which seem to me to be important.

One is that, although the deceased appears to have given some instructions for the Will in time, at the actual moment when he signed the Will he was unable to do more than sign his initials and he was in such a state of mind that he was not probably able to make a good Will if he had not given his instructions before. The actual proof of those facts it is not, I think necessary to worry about, because there is nothing to be gained by sending this case back in order that the ultimate decision of this Court with regard to this Will might be formally proved. The testator having died at the end of 1904, we know that a violent dispute arose between Raseswari the widow and the daughter Indumati. We know that Indumati entered a caveat and we know that it was only upon her withdrawing the objections that in May 1905 this Will could be proved in common form.

The testator had four daughters, all of them married. Promila and Sukumari appear to have been married to husbands who were comparatively well off. Indumati and Sarojini were not so happily circumstanced and accordingly the testator by his Will gave to each of those two daughters a house and an annuity of Rs. 100 a month. It seems that Indumati's husband Bipin Behari Biswas had been living with the testator who paid all his expenses and generally kept him and his family Indumati when her father died became distinctly objectionable apparently to her mother and distinctly hostile to the Will. The younger daughters had nothing to get from the Will. The eldest daughter Saronji had a son Nirmal who was likely if the Will stood to inherit the whole property, but Indumati and her husband were likely to be much worse off in these circumstances after her father's death than they had been before. It is in evidence apparently that a very objectionable family dispute took place and it is quite clear that Indumati was not minded to let this Will be established if she could help it, and she was prepared apparently to do whatever was possible to prevent her right, after her mother's death, being brought to an end by any adoption.

In these circumstances, the position was this: Raseswari as a Hindu widow, was, in my judgment, certainly entitled to spend what was necessary from the corpus as well as from the income of the estate to defend the right given her by her husband to adopt a son to him. Of that I imagine there can be no doubt. Bankim and his wife Sarojini were plainly very anxious that the Will should be established and that Nirmal should be adopted.

Bankim in giving his evidence before the Assistant Referee professed to have known very little about the settlement to have taken no part in the arranging of the settlement but merely to have had the good fortune to have been present when certain transactions were actually carried out. That is all nonsense. It is perfectly plain from the circumstances of this case that the moving spirits with regard to this compromise were Bankim and Saronji acting on behalf of Nirmal. As a matter of fact, books of account show that a telegraphic draft of Rs. 15,000 was sent in his name to Dacca for the purpose of this settlement. It is equally plain that a small sum of money of Rs. 300 odd that was necessary to make up the Rs. 30,000 was provided, after a some little trouble, by Bankim or on his account. So far as the third daughter was concerned, we know this, that her husband who appears to be a gentleman of some position was one of the many well-wishers of the members of the family who, Bankim admits, were anxious that this matter should be settled by a private arrangement and without litigation.

As regards the fourth daughter all we know is that when the time came, she too presented a petition to facilitate Probate being granted of this Will and presented it, as it happened by the same Pleader, who was acting for Sarojini on the 22nd day of May. It is perfectly clear that Indumati's objection to the Will was notorious to the family, if not to the whole neighbourhood. At no time does it appear that the two younger sisters or any one on their behalf made any objection to what had happened. It is perfectly plain that they would know what happened and would be very anxious indeed to ascertain how these disputes between sisters were to be brought to an end. In these circumstances, we find that on the 22nd day of May, there is in the petition of Indumati a statement that "as a consideration of this compromise, and in excess of the provision of the Will the executors have made a proper arrangement by providing for support, maintenance and education of my present and future children." Then the petition goes on to state that whereas it was inconvenient to give her one house in Digbazar the executors were to give her two houses which should be considered as one.

Now, there was a compromise. It was not necessary to get the approval of the Probate Court for that compromise. It was apparently not thought necessary to be frank in telling the Court what that compromise exactly was; but that there was a compromise is perfectly clear and it is obvious that there would be no use in compromising such a matter with one person unless all the people who were likely to object to this Will could be brought into the compromise. Now, what took place was, in my judgment, this. With the knowledge and at the instigation of all the people certainly of all the daughters and their husbands these executors—the widow and Rajani agreed to find Rs. 30,000 to buy off Indumati's objections. That it was ever dreamt by any one that the Rs. 30,000 should not come out of the estate I do not believe for a moment, in particular for the reason that there was no other fund that it could come out of. That it did come out of the estate is also, I think, clear. But the position was that an administrator *pendente lite* was in charge of the assets and the compromise took effect the administrator was to clear off, to wind up his management and go. Accordingly, in order that Indumati might not be given a mere promise, the arrangement which appears in the books was made to the effect that money was scraped up from four different sources. One of them was the Calcutta branch of the banking business itself; another was a sum of money lent by a stranger; Raseswari lent some of her own, and Bankim lent the remainder. That having put up and Probate having been granted the books prove to demonstration that the estate before the end of that financial year made records in its books whereby it assumed liability for that Rs. 30,000. So far as it is possible to say, everybody acted upon that assumption at least till 1912.

In these circumstances, there has been much unnecessary dispute about whether this was a settlement on behalf of the estate or a settlement on the personal responsibility of the executors. It is quite clear that *qua* executors it was a breach of trust for the widow and Rajani to spend the testator's property in buying off disputes about this Will; and, if the matter had ended there, there would be no difficulty. But in this case, whether the Will was bad or whether it was good, everything went to the widow herself as the estate of a Hindu widow. The estate was the widow's. She was fully entitled to represent it and consequently a payment out of the estate necessarily means, as things stood, a payment out of that beneficiary's interest which at the moment was the widow's. There is nothing to be gained in endeavouring to make the distinction as between personal responsibility and whether the money was coming out of the estate.

The next thing is this. The widow had a limited interest. If this were a case in which that limit was got over by showing that the widow had obtained consent of all the nearest reversioners the transaction certainly could not upon this evidence be supported in that way. The reversioners after the widow were the four daughters who, again, were limited owners. You do not come to an unlimited owner until you find out who was the person who on the death of the four daughters, if there was no adoption, would take the succession. If there was anything wrong in the widows's action you cannot cure it in that way. I am not prepared to say that the matter can be put beyond reach of controversy by regarding it as a family settlement in the strict sense of the expression, because who the parties to the settlement were, or what the terms were, I think was not satisfactorily proved: but you have, I think, to examine this matter on the footing that a Hindu widow was entitled to protect the right that her husband had purported to give by his Will that she should make an adoption and to make a compromise in defence of that right provided always that the transaction, as a whole, was fair and reasonable from the point of view of reversioners. Looking at it in that way, the consent of the other members of the family carries one a very long way indeed towards the validity of this compromise. So far as I can see, it was a reasonable compromise which appeared to the members of the family at the time as such. Bankim and Sarojini were most anxious that their son should be adopted. The younger daughters were not in the least anxious to preserve their possible right after their mother's death. Indumat alone was anxious to prevent

Nirmal from becoming the adopted son; and the widow, in these circumstances, having apparently taken all the advice she could by this compromise permitted Rs. 30,000 for the sake of family peace and dignity to come out of the estate which if she chose, would be hers during the whole of her lifetime.

By these means Bankim and Sarojini's son was adopted. He was adopted in 1906 entirely on the strength of this Probate long before anybody ever thought of seeking a revocation; and, time goes on till 1912 when, he being still a minor, a serious dispute in the family arose. Then the Will is attacked; it is set aside and it is proved finally after a great deal of controversy and a very expensive litigation the result of which must for long have been uncertain.

That being the picture which you get from the evidence of the case we are only concerned not with whether Indumati's allowance should be stopped to answer this debt of Rs. 30,000 to the estate. We are not concerned with the rights of the creditors at all. It is a pure question as between the beneficiaries of the estate. The order for administration was not made till 1913 and it is no part of the intention of such an order to rip up all previous transactions or to make people put back money unless it is established that the transaction was invalid. It seems to me, in these circumstances, that for Sudhir who has become the proprietor of the estate and executor of this Will to say in course of this suit that Indumati's Rs. 100 a month should be stopped because the transaction of 1905 was invalid and a breach of trust is a contention which requires better evidence than we have got. The evidence of Bankim has much in it to show that the transaction was perfectly reasonable and fair. He certainly thought it so and the family thought it so, and for many years it was acted upon. In these circumstances, although I am bound to say that Indumati and her advisers by refraining as long as possible from having any dealings with the obvious truth of the matter have placed their case in great jeopardy, I do not hold it proved that she owes Rs. 30,000 to the estate or that her allowance can be set off against the debt. I think, therefore, in the end that that judgment of the learned Judge on this matter should be upheld.

S. S. & N. H. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 87 OF 1923.

January 8, 1926.

Present:—Mr. Justice Adami and Mr. Justice Kulwant Sahay.

MATHURA PRASAD SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAGESHWAR PRASAD SINGH —PLAINTIFF—RESPONDENT.

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 3 (1), 12—Estate coming under Act—"Bar" of pending proceedings, meaning of—Revival of proceedings—Limitation Act (IX of 1908), s. 15.

The real meaning of the word "bar" used with regard to pending proceedings in cl. (1) of s. 3 of the Chota Nagpur Encumbered Estates Act is that they should be stayed so long as the management continues and not that, except in the circumstances laid down in s. 12, the bar shall be absolute. Even if, in cases which do not fall under the purview of s. 12, no revivor of proceedings is allowed, the provisions of s. 15 of the Limitation Act must apply thereto. [p. 626, col. 2.]

Similarly any process, execution or attachment, which became null and void on the publication of an order under s. 2 of the Chota Nagpur Encumbered Estates Act, can be revived, after its cancellation, under s. 15 of the Limitation Act, although s. 12 of the Estates Act does not apply thereto. [*ibid.*]

Jyoti Prasad Singh Deo v. *Ranjit Singh*, 63 Ind. Cas. 743; 6 P. L. J. 328; (1922) Pat. 152; 3 P. L. T. 94; A. I. R. 1922 Pat. 287, referred to.

The provisions of s. 12 of the Chota Nagpur Encumbered Estates Act relating to the revival of barred proceedings and debts should not be strictly construed. [p. 625, col. 2.]

Appeal from a decision of the Special Subordinate Judge, Palamau, dated the 16th February 1923.

Mr. *Ganga Charan Mukherji*, for the Appellants.

Messrs. *S. M. Mullick* and *Hareshwar Prasad Sinha*, for the Respondent.

JUDGMENT.

Adami, J.—This appeal arises out of a suit for the recovery of Rs. 20,705-7-1 as principal and interest due upon a hand-note executed by defendant No. 1 as *karta* of the family on behalf of himself and his brother defendant No. 2. The hand-note was executed in favour of the father of the plaintiff on the 18th of October 1902 for a sum of Rs. 6,198. The loan was taken for the purpose of meeting the cost of litigation and saving the joint family property. On the 18th of June, 1904, the defendants applied to the Deputy Commissioner for protection under the Chota Nagpur Encumbered Estates Act, and on the 30th of October 1904, an order was passed vesting their estate under a manager under the provisions of the Act. The order was published in the Gazette on the 11th of January 1905. After publication of the order the manager called upon the creditors to submit their claims. The defendants in their application had given a list of their debts and the second item in the schedule is this debt of Rs. 6,198 on the bond of 18th of October 1902. Interest at 1 per cent. per month had risen to Rs. 829-11-0 and the total debt was Rs. 7,027-11-0. The application was signed and verified by both the defendants. The Manager proceeded to determine the claims under s. 8 of Act VI of 1876 and the defendants admitted the claim. The Manager thereafter drew up a scheme for the re-payment of this debt of Rs. 6,198 and interest Rs. 914. That scheme is Ex. 4. The scheme was submitted to the Commissioner under s. 11 of the Act and was approved by him. According to s. 11 a scheme "when approved by the Commissioner shall be carried into effect." I am referring to Act VI of 1876 as it stood before the amending Act, Bihar and Orissa Act VIII of 1922. The Manager, however, failed to carry out the scheme so far as it affected this debt, and no money was received from him by the plaintiffs. On the 21st of June 1921 the estate was released from the operation of the Act by notification under orders from the Board of Revenue. The notification was published in the Gazette on the 13th of July 1921. The notification did not state under what section the release was ordered. It merely stated that the provisions of the Act had ceased to apply to the proprietor of the estate. Thereafter the plaintiff Lalu Jogeshwar Prasad Singh instituted a suit out of which this appeal arises on the 9th of May 1922. The plaintiff claims that the period during which the estate was under protection of the Act should be excluded in computing limitation. The plaint also alleges that the defendants admitted the debt both when they submitted their application for protection and also when the Manager was determining the claims.

The defendants pleaded that the suit was barred by limitation and that there was no legal necessity for the loan in 1902. Defendant No. 1 admitted execution of the hand-note but denied that consideration had passed. He alleged that in 1904, when he was intending to apply for protection under the Chota Nagpur Encumbered Estates Act, knowing that he had a daughter to marry and that it would be hard to obtain money from the Manager, he executed several hand-notes in collusion with and in favour of various relatives, so that those relatives might submit claims to the Manager and get the money from him and make the money over to the defendant so that he could spend it on his necessary expenses. Defendant No. 2 denied that he was any party to the loan, or that defendant No. 1 borrowed the money for family necessity. He alleged that he was separate from defendant No. 1 and was not bound by the hand-note.

The learned Subordinate Judge considered with great care the question whether the period during which the estate was under protection could be excluded when computing the period of limitation. He noticed that the second clause of s. 12 of the Act does not meet the present case, because the estate was released after the Commissioner had given approval, and, therefore, the provisions of the sixth clause to that section could not be applied to the case in their strict interpretation, but he found himself unable to put a strict interpretation upon the section and found that the sixth clause provides in general terms for all cases where the estate is released from management before the debts have been paid off. He held that s. 12 applied to the case and that the plaintiff was entitled to the benefit of the section. He also found that the provisions of s. 15 of the Limitation Act applied and enabled the plaintiff to exclude the period of protection. He disbelieved the defendant's story about the absence of consideration and also the story about the taking of the money in order to provide for the defendant's daughter's marriage. He held that defendant No. 1 borrowed the money as *karta* of the joint family for the purposes of the family and that defendant No. 2 was liable. He decreed the plaintiff's suit.

Mr. Ganga Charan Mukherji has argued this appeal with great ability on behalf of the defendants appellants. The main part of his argument has been devoted to the question of limitation. The three questions which arise under this head are: Whether s. 12 of the Chota Nagpur Encumbered Estates Act, cl. (6), saves the suit from being barred by limitation, secondly, whether if s. 12, cl. (6) does not apply, s. 15 of the Limitation Act applies, and, thirdly, whether there was such acknowledgment by the defendants as would save the suit from being barred by limitation. Mr. Mukherji has taken us through the sections of the Encumbered Estates Act and his argument is that the first clause of s. 3 of the Act is an absolute bar to all proceedings and suits after the publication of an order under s. 2 of the Act. He points out that the sixth clause of s. 12 refers only to release covered by cl. (2) of the section, that is to say "if the Commissioner, at any time before a scheme has been approved by him under s. 11, thinks that the provisions of this Act should not continue to apply to the case of the holder of the said property or his heir." In the present case the estate was released after approval of the scheme by the Commissioner, and, therefore, the sixth clause cannot apply and there can be no revival of claims. His contention is that the first clause of s. 3 which is the bar to all proceedings still holds good even though the estate has been released because sub-cl. (6) of s. 12 does not apply in the circumstances of this case. There is no doubt, as has been often remarked, that the Chota Nagpur Encumbered Estates Act, 1876 is inartistic in its drafting. That this has been recognised with regard to such circumstances as we find in the present case is shown by the amendments made by the Legislature by the Bihar and Orissa Act VIII of 1922, whereby in s. 4 the following words have been added to the second clause of s. 12: "Or if after a scheme has been so approved an application is made under s. 11B for the relinquishment of the property." The framers of the Act do not seem to have contemplated that when a scheme has once been approved and has to be carried into effect under s. 11, there could be release under any circumstances other than those mentioned in the first three clauses of s. 12, and, as the Act stood before the amendment of 1922, the strict wording of the Act seems to show that no revivor was contemplated in circumstances other than those mentioned in cl. (2) of s. 12. The learned Subordinate Judge has, I think, taken the right view in holding that too strict interpretation cannot be placed on s. 12.

Section 3, it is true, states that on the publication of order under s. 2 all pending proceedings shall be barred and all processes, executions and attachments for or in respect of debts and liabilities shall become null and void, whereas the second and third clauses are limited in their operation to the period during which such management continues. It is contended that save in the case mentioned in s. 12, cl. (6) the bar shall be absolute and that no process or execution or attachment can, after the publication of an order under s. 2, be served or made. But surely when the order itself is cancelled by a subsequent notification, the effect of the first clause of s. 3 disappears. It could never have been in contemplation of the Legislature that the mere approval by the Commissioner of a scheme should for ever deprive all creditors of redress. But I think it is quite clear that, even were it to be held that as the Act is drafted no revivor of proceedings is allowed, the provision of s. 15 of the Limitation Act must apply. Though the word "bar" is used with regard to pending proceedings in cl. (1) of s. 3, its real meaning is clearly that they should be stayed for cl. (6) of s. 12 shows that in certain circumstances proceedings may be revived. In the present case we have not to do with proceedings which were pending at the time the notification was published; the question is whether any process can issue or any suit be instituted after the order of release. Clause (1) of s. 3 states that processes, executions and attachments shall become null and void on the publication of an order under s. 2, after that order has been cancelled there is no bar to any process, execution or attachment; there has really been merely a stay. The order under s 2 bringing the estate under protection was a vesting order staying all proceedings, and under s. 15 of the Limitation Act I am satisfied that there should be a revivor the period of protection being excluded. I would refer to the case of *Jyoti Prasad Singh Deo* v. *Ranjit Singh* (1). It is true that there Das, J., did not consider the difficulty which we have now before us with regard to the wording of cl. (2) of s. 12, but it may be that in that case the point did not arise. The general principles, however, are given as to the right of revivor. I am quite satisfied that the plaintiff is entitled to exclude the time during which he was barred from suing on the debt due to him by reason of the estate being under protection.

Mr. Mukherji has argued that after the Manager had examined the claim and had judicially determined the debt under s. 8 of the Act, the plaintiff could have sued the

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(1) 63 Ind. Cas. 743; 6 P. L. J. 328; (1922) Pat. 152; 3 P. L. T. 94; A. I. R. 1922 Pat. 287.

Manager within three years of the determination of the debt; but I think that this contention cannot in any way be upheld for under the wording of clause (1) of s. 3 any such suit would be barred. Secondly, it is contended that when the Manager heard the claims and determined the debt and thereafter drew up a scheme, he was in fact contracting with the plaintiff to pay the debt in a certain manner and within a certain time; and when in 1916, which was the last date of payment under the scheme he had failed to pay to the plaintiff, the plaintiff might have sued him on the contract; but it is clear that in a case like this there was no contract between the Manager and the plaintiff. The Manager determined the scheme without reference to the wishes of the plaintiff.

Thirdly, it is argued that, even if a suit in respect of such determined debt was barred during the period of management, what would revive after release from management would be the debt determined by the Manager and not the original debt. In the present case the Manager determined the original debt to be due but decided that he would pay interest at 6 per cent. and not at 12 per cent. per annum. After the release the whole scheme came to nothing and anything arranged in the scheme would not affect the revival of the original debt at the original rate of interest. Mr. Mukherji would have us hold that the determination of a debt by the Manager is a judicial proceeding and his decision as to what the debt is amounts to a decree. But here the original and determined debts are exactly the same and so the point does not arise I must hold that the plaintiff was entitled to exclude the period of management. It is certainly hard on the defendants that their debts should have been allowed to accumulate for so long a time as 19½ years, but it has to be remembered that through the protection of the Act the defendants' property has been preserved. The plaintiff has also suffered in not being able to obtain re-payment of the debt during so long a period.

The debt would be barred, even if the period of management were excluded, if the defendants had not in 1904 acknowledged their indebtedness. The schedule to their application in 1904 cites and admits the debt. That application is signed and verified by both the defendants. Again when the debt was examined by the Manager under s. 8 the defendants both admitted it, and in his written statement defendant No. 1 acknowledged that he admitted the debt before the Manager. These acknowledgments save the claim from the bar of limitation.

With regard to the passing of consideration the learned Subordinate Judge has, I think, correctly found that consideration passed. The defendant has brought no evidence to show that he gave hand-notes in favour of his relatives for the purpose of obtaining money from the Manager. As to the liability of defendant No. 2, it is clearly shown, I think, that he joined with defendant No. 1 in conducting the litigation. Furthermore he joined with defendant No. 1 in presenting the application for protection and in that application admitted his joint indebtedness. Defendant No. 2 failed to prove that he was separate from defendant No. 1.

With regard to the legal necessity, defendant No. 1 himself says that there was litigation over Lot Chando which continued for a long time. It is argued that there is no evidence that the plaintiff made enquiries as to the necessity of the loan; but it is clear that necessity was pressing, because the litigation was proceeding. I can see no reason to differ from the finding arrived at by the learned Subordinate Judge, and I would, therefore, dismiss the appeal with costs.

Kulwant Sahay, J.—I agree.

S. S. *Appeal dismissed.*
N. H.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL PETITION No. 523 OF 1925.
February 8, 1926.
Present:—Mr. Justice Jai Lal.
ABDUL RAB AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS—PETITIONERS
versus
RAHIM BAKHSH *alias* ABDUL WAHAB —DEFENDANT—RESPONDENT.

Lahore High Court Rules, Vol. V, Ch. XVII, r. 8 —Fees of Counsel—Appeal from order of allotment of properties in partition suit—Power of Court to fix fees.

An appeal from an order allotting certain properties to the respective parties in a suit for partition of immoveable property, after passing of the preliminary but before the final decree, is an appeal from an order in miscellaneous proceedings and the Court has discretion to fix fees of the Counsel as in miscellaneous proceedings.

Petition for review of an order of Mr. Justice Jai Lal, in Civil Miscellaneous Appeal No. 113 of 1925, dated the 22nd June 1925.

Lala *Mool Chand*, R.S., for the Petitioners.

Lala *Moti Sagar*, R. B., and Mr. *Shamair Chand* and Lala *Sardha Ram*, R. S., for the Respondent.

ORDER.—A preliminary decree for partition of immovable property was granted against the appellant. Before a final decree was drawn up some proposals were sanctioned by the Senior Subordinate Judge as to the allotment of certain properties to the respective parties. The appellant filed an appeal in this Court from an order passed by the Trial Court sanctioning such an allotment. The value for purposes of jurisdiction was mentioned as Rs. 80,795-10-8. This was the value of the original suit. A Court-fee stamp of Rs. 4 was affixed to the memorandum of appeal. The appeal was expressly stated to be from an order and the prayer was " to set aside the order of the lower Court under s. 47 of the C. P. C." When the appeal came up for hearing on an objection by the respondents that no final decree having been drawn up, the appeal was incompetent, it was withdrawn by the appellant. It was consequently dismissed with costs. On the report of the Office I fixed Rs. 100 as the fees of the respondents. An application was made by the respondents asking me to review my order fixing the fees on the ground that the fees awarded were too low and that I had no jurisdiction to fix the fees. It was contended in the course of arguments that the fee should have been awarded *ad valorem* as in a regular appeal from decree and that this was not an appeal from an order passed in miscellaneous proceedings. The learned Counsel for the appellant, on the other hand, contended that his appeal was expressly from an order passed under s. 47 of the C. P. C. and was covered by r. 8, of Ch. XVII, on page 42 of the Rules and Orders of this Court, Volume V, and that in any case r. 15 gave me full power to fix the fees. In my opinion the contention of the learned Counsel for the appellant is correct.

The appeal was expressly from an order passed in miscellaneous proceedings, it was withdrawn on an objection that the order was not final one and that consequently it was not appealable; it follows, therefore, it was in my discretion to fix the fees of Counsel as in miscellaneous proceedings. That being so the present application does not lie and is hereby dismissed. The parties will bear their own costs.

R. L. *Application dismissed.*

RANGOON HIGH COURT.

CIVIL REVISION NO. 276 OF 1924.
May 22, 1925.
Present:—Mr. Justice Dass.
M. K. M. V. CHETTY FIRM—
PETITIONERS
versus
MA MYA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Promissory note given in satisfaction of antecedent liability—Suit on pro-note, dismissal of—Suit to enforce antecedent liability, whether barred.

The provisions of r. 2 of O. II of the C. P. C. are directed to securing the exhaustion of the relief in respect of a cause of action and not the inclusion in one and the same action of different causes of action, even though they arise out of the same transaction. [p. 629, col. 1.]

Where a promissory note is given in satisfaction of an already existing liability, a claim founded on the promissory note and a claim founded on the original liability are based on different causes of action, though they may arise in respect of the same transaction. Where, therefore, in such a case, a suit to recover on the promissory note is dismissed, a subsequent suit to enforce the original liability is not barred by the provisions of r. 2 of O. II of the C. P. C. [*ibid.*]

Appeal against a decree of the Township Court, Tackkyi, in S. C. S. No. 68 of 1924.

JUDGMENT.—One M. K. M. V. Chetty Firm filed a suit against the present respondents for the recovery of Rs. 63 due on a promissory note. The suit was dismissed as the plaintiff failed to prove the execution of the promissory note by the person who was alleged to have executed the same.

The plaintiff now sues for the recovery of Rs. 67-4-0 being the amount lent by the plaintiff to the defendant and for which the defendant had executed the promissory note on which the first suit was filed. The present suit was dismissed by the lower Court under the provisions of ss. 11 and 12 of the C. P. C. The lower Court was wrong in holding that ss. 11 and 12 of the C. P. C., apply to the facts of the case. There is no question of *res judicata* involved in this case at all. The only point that requires consideration is whether O. II, r. 2 of the C. P. C. applies and whether under that

Order the plaintiff is precluded, from filing the present suit. Order II, r. 2 provides that "every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; and that the plaintiff cannot afterwards sue for a part of a claim omitted from an action or (without leave) for another remedy for the same cause of action".

The point to be considered is whether the suit on the promissory note and the suit for the original loan are based on the same cause of action or different causes of action. I am of opinion that though the two actions arise out of the same transaction, they are in respect of different causes of action, and, therefore, the plaintiff is entitled to file the present suit.

In the case of *Saminathan Chetty* v. *Palaniappa Chetty* (1) their Lordships make these observations: "Their Lordships are of opinion that the learned Judge took an erroneous view of the object and meaning of this section. It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph, in their Lordships' opinion, is not intended to be an illustration of the foregoing provisions, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the section." These observations are made by their Lordships of the Privy Council with reference to s. 34 of the Ceylon C. P. C., 1889, which is in the same terms as O. II, r. 2 of the Indian C. P. C.

It is clear, therefore, that a claim on the promissory note and a claim founded on the original loan are different causes of action though they may arise out of the same transaction. As long as the promissory note was outstanding, there was no right of action otherwise than upon the note and the plaintiff, therefore could not have included his claim on the original cause of action in his claim on the promissory note.

I, therefore, set aside the decree of the lower Court and remand the case for trial on its merits. The petitioner will get his costs in this Court.

Z. K. *Case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1000 OF 1925.
February 16, 1926.
Present:—Mr. Justice Martineau and
Mr. Justice Dalip Singh.
FIRM AMBA PARSHAD-GOPI NATH
—PLAINTIFFS—APPELLANTS
versus
FIRM JAWALA DAT-RAM KANWAR
—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Copy of Trial Court judgment filed with delay—Delay due to Counsel's mistake—Extension of time—Contract for several lots of goods—Contract indivisible—Limitation, starting point of.

Where a copy of the first Court's judgment is filed after the period of limitation for the second appeal owing to the delay caused by mistake on the part of the appellant's Counsel in asking for a copy of the decree instead of judgment in his reminder to the copying department, though originally it was the copy of the judgment that had been applied for, the delay would be excused and time extended. [p. 630, col. 1.]

Where the contract for the supply of several lots of goods is indivisible and not an instalment one, limitation in respect of all lots would run from the date when the last lot is due to arrive. [p. 631, col. 1.]

Phul Chand-Fateh Chand v. *Chhote Lal-Amba Pershad*, 90 Ind. Cas. 654; A. I. R. 1925 Lah. 513; 7 L. L. J. 360, followed.

Bilasiram Thakursidass v. *Ezekiel Abraham Gubbay*, 33 Ind. Cas. 1; 43 C. 305; 20 C. W. N. 240; 23 C. L. J. 62, distinguished.

Second appeal from a decree of the District Judge, Delhi, dated the 23rd December 1924, modifying that of the Subordinate Judge, Second Class, Delhi, dated the 5th March 1924.

Lala *Jagan Nath Aggarwal*, for the Appellants.

Lala *Sardha Ram*, R. S., for the Respondents.

JUDGMENT.—A preliminary objection is taken for the respondent that this appeal is time-barred, as, although it was filed on the 31st March 1925, it was not accompanied by a copy of the first Court's judgment, and that copy was not put in till the 17th April, after the expiry of the period of limitation, the 9th April being the last date on which the appeal could have been filed. The appellants had first applied on the 26th February for copies of the lower Appellate Court's judgment and decree, and these were completed on the 4th March and delivered to the appellants by value payable post on the 17th. On the 21st March an application was made by the appellant Amba Parshad's Vakil for an urgent copy of the first Court's judgment. The preparation of the copy was delayed, and it appears that on the 31st March the appellant's Vakil called attention to the matter, but in his reminder spoke of a copy of the decree being required, with the result that on the 3rd April a copy of the decree was supplied to the appellant's Vakil instead of a copy of the judgment. On this coming to the notice of the appellant Amba Parshad he wired to his Vakil to apply again for a copy of the first Court's judgment, and the latter made an application on the 8th April, obtained the copy on the 14th, and filed it in Court on the 17th.

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(1) 26 Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617; 17 New Law Rep. 56; 83 L. J. P. C. 131; (1914) A. C. 618; 110 L. T. 913 (P. C.).

The appellants had a sufficient reason for not applying for a copy of the first Court's judgment until they had obtained a copy of the judgment of the lower Appellate Court, which it was necessary for them to see in order to decide whether they should file a second appeal. Their Vakil was no doubt to blame for the mistake in saying on the 31st March that a copy of the first Court's decree was required, but on the other hand the application of the 21st March had been for a copy of the first Court's judgment and not for a copy of the decree. When ultimately a copy of the judgment was obtained on the 14th April, very little time was lost in filing it. We think, taking all the circumstances into consideration, that there was sufficient cause for the copy of the Trial Court's judgment not being filed within the prescribed period of limitation, and the appeal may, therefore, be admitted under s. 5 of the Limitation Act.

The suit out of which the appeal has arisen was one for damages for non-delivery of goods which the defendants had contracted to sell to the plaintiffs. The contract was for the sale of 11 bales of mulls at Rs. 4-15-6 per piece, at Karachi godown, according to the Karachi System November (1916) shipment, 4 lots, 60 days' grace, at 8 annas discount, forwarding charges at 4 annas a piece, delivery of goods to be taken against payment on arrival of Railway receipt. The question involved in the case is one of limitation. It is not disputed that the words "November (1916) shipment, 4 lots" meant that the goods were to be shipped in four monthly lots commencing from November 1916. Allowing two months' grace, four months for the transit of the goods from England to Karachi, and one month for their conveyance from Karachi to Delhi, the Courts below have found that the due date for the first lot of goods was the end of June 1917, and that the suit, which was instituted more than three years after that date, namely. on the 15th July 1920, was barred by limitation so far as the first lot of goods was concerned, but within time as regards the remaining three lots, which were to be delivered in July, August and September respectively. The Subordinate Judge passed a decree for Rs. 1,057. The District Judge on appeal enhanced the amount to Rs. 1,150 12 and allowed interest on that amount from the date of his decree at 6 per cent per annum.

In this second appeal, which has been filed by the plaintiffs it is contended on their behalf (*i*) that it has been shown by the evidence of the salesman of the firm of Ralli Brothers, the importers of the goods, that the first lot of goods, *i. e.*, those of the November shipment, were arriving in India up to September 1917, and that the suit in regard to that lot is consequently within time, and (2) that even if that has not been shown, still the whole suit is within time, as the contract was not an instalment contract, but was an entire contract for the four lots of goods, so that time in respect of all four lots would run from the date when the last lot was due to arrive.

With regard to the first point the evidence of the salesman of Ralli Brothers is not very clear, as, although he has said that the goods of the shipments from November 1916 to February 1917 reached Karachi up to the 8th September 1917, he has not made a statement in regard to the goods of the November shipment in particular. But we think that the second contention is correct, and it is supported by a judgment of a Division Bench of this Court reported in *Phul Chand-Fateh Chand* v. *Chhote Lal-Amba Pershad* (1) in which it was held that a contract for the sale of certain goods

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(1) 90 Ind. Cas. 654; A. R. 1925 L 513 7 L. L, J, 360.

"November lot 3 grace 60 days" was an indivisible one and that the due date did not arrive until the last shipment under the contract reached Karachi. Mr. Sardha Ram for the respondents points out that it is stated in cl. 7 of the printed form of indent that each shipment is to be treated as a separate contract. But it was only the sold note, executed by the defendants, which was written on that form, the form being the one used by the Hindustani Mercantile Association, and the printed form was not used for the bought note (D-1), which was executed by the plaintiffs. Clause 7 of the printed form of the indent cannot, therefore, be held to be binding on the plaintiffs.

Counsel for the respondents has relied on *Bilasiram Thakrsidass* v. *Ezekiel Abraham Gubbay* (2) but that ruling cannot be taken as a guide for the decision of the present case, for there it was a consideration of the particular terms of the contract and of the conduct of the parties and the circumstances which led the Court to the conclusion that delivery of the goods in instalments had been contemplated. Similarly other rulings cited before us in cases relating to contracts in which the goods were to be delivered at particular times or in a particular manner are of no assistance in the present case. In the contract in this case it was not mentioned that the goods were to be delivered on any particular date or dates, and we can see no reason for supposing that the parties intended that each lot was to be delivered separately. The defendants have, in our opinion, failed to show that they could not have tendered the goods of the November shipment at the time when the remaining shipments were due and we hold, therefore, that the whole suit is within time.

The damages have to be calculated with reference to the rate prevailing in September 1917, the last month in which the goods could have been delivered. That rate was Rs. 6-8-6 per piece. The damages work out at more than Rs. 2,057, which is the amount claimed by the plaintiffs.

Nothing has been said in argument in regard to the eleventh ground of appeal.

We accept the appeal and alter the decree to one for Rs. 2,057 with interest thereon at Rs. 6 per cent. per annum from the date of the lower Appellate Court's decree till realization. The respondents will pay the appellants' costs proportionately in all the Courts.

R. L. *Appeal accepted.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3356 OF 1924.

November 11, 1924.

Present:—Mr. Justice Marten.

MAHOMEDALLY EBRAHIMJI LEHERI —PLAINTIFF

versus

Haji ABDULLAH KAZIM—DEFENDANTS.

Landlord and tenant—Monthly tenancy—Notice to quit expiring on last day of tenancy, validity of—Notice expiring with expiration of Bombay Rent (War Restrictions) Act, validity of.

In the case of a monthly tenancy a month's notice to quit expiring on the last day of the tenancy is a valid notice so as to terminate the tenancy. [p. 632, col. 1.]

[Case-law referred to.]

There was nothing in the Bombay Rent (War Restrictions) Act which prevented a landlord from giving a notice to quit expiring with the expiration of that Act.

FACTS.—The plaintiff, a house proprietor in Bombay, served his tenant, the defendant, with one month's notice to quit commencing from the 31st July 1924, when the protection afforded by the Bombay Rent (War Restrictions) Act so far as business premises were concerned came to an end. The defendant having failed to comply with the terms of the notice by the 31st August 1924, the date of expiry of the notice, a suit for ejectment was brought against him by the plaintiff on the 15th September 1924.

Mr. *Davar*, for the Plaintiff.

JUDGMENT.—It is clearly proved here that the plaintiff is the owner of a building known as Leheri Mansion in Sandhurt Road and that the defendant is a monthly tenant of a portion of that property. Under the decree of March 24, 1924, in Suit No. 4017 of 1923, the standard rent of that property has been fixed at Rs. 530 per mensem. I find as a fact that the monthly tenancy runs from the first day of each month to the last day of each month according to the English dates.

On July 31, 1924, the attorneys for the plaintiff gave the defendant notice to quit in the following terms so far as material:—

"We have to call upon you to quit and

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(2) 33 Ind. Cas. 1; 43 C. 305; 20 C. W. N. 240; 23 C. L. J. 62.

deliver quiet and peaceful possession of the portion...occupied by you for the purposes of your hotel as our client's monthly tenant at the end of next month (*i. e.*, August 31, 1924). In default our client will file an ejectment suit against you to recover possession of the said premises at your risk as to costs, which please note."

The point is whether a notice to quit on the last day of the month, *viz.*, August 31, 1924, is invalid inasmuch as the tenancy would not expire until the end of the day constituting August 31, 1924. Counsel has pointed out that under s. 106 of the Transfer of Property Act, a notice to quit may be by a notice expiring with the end of a month of the tenancy, in the absence of any contract or local usage to the contrary. In the present case, I think, having regard to what is said in *Bhojabhai* v. *Hayem Samuel* (1), that local custom probably requires a month's notice in the case of property in Bombay like the property in the present case, and that accordingly the fifteen days' notice mentioned in s. 106 would be insufficient.

But there is nothing whatever in the local practice, so far as I am aware, to suggest that a notice expiring with the end of a month of the tenancy would not be a proper notice in the case of a month's notice as opposed to a fifteen days' notice. On the contrary in *Kikabhai* v. *Kalu* (2) a case which was decided by Sir Charles Farran and Mr. Justice Hosking, a notice was given to quit on March 31, 1892, and that was held to be a good notice. That was a case where the tenancy was an annual tenancy and where the notice to be given was a six months' notice. So that case is in effect an authority for the proposition that a notice to quit on the last day of the tenancy is a valid notice.

Then Counsel has been good enough to draw my attention to a recent English case of *Simmons* v. *Crossley* (3) where the question was what notice must be given to determine a monthly tenancy. What happened there was that the landlord thinking that the tenancy was a longer than a monthly tenancy gave a six months' notice to determine the tenancy, and notice was given to quit on September 29. That date, it will be observed, is one day short of the actual end of the month, *viz.*, September 30. Accordingly it was argued that the notice to quit was bad inasmuch as it was given for one day short of the end of the month and that it could not be given for any day other than the last day of the month. There Counsel for the tenant contended that the notice must expire either on the last day of one month or on the first day of the next month calculated at the date of its commencement and at no other time.

But the actual decision of the Court was that all that was required was a reasonable notice, and that it can be given for some day other than the last day of a month. But there it will be observed the notice was a very long one. If the length of notice had been under a month, then it would clearly have been invalid, but being so long as six months the Court held that the landlord could fix a different date for the termination than the mere end of a calender month. Many authorities were there cited by the learned Judges, and the importance of the case to us in the present suit is that it was conceded that a notice expiring on the last day of a month would be good.

So, too, in *Ismail Khan Mahomed* v. *Jaigun Bibi* (4) the English case of *Page* v. *More* (5) was relied on by the tenant as showing that a notice to quit at noon on the last day is bad. But that case was held distinguishable in the Calcutta case where the notice to quit was not at any particular time on the last day of the tenancy but merely before it. I, however, notice that according to page 572 of the report the notice to quit was not "before" the last day but "by" the last day of the particular Chait year.

Then in *Harihar Banerjee* v. *Ramsashi Roy* (6) their lordships of the Privy Council have considered this question of notices to quit, and they say:—

"It has not been suggested, and could not, their Lordships think, be successfuly contended, that the principles they lay down are not equally applicable to cases arising in India. They establish that notice to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances, and further, that they are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat quam pereat.*"

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(1) 22 B. 754 at p. 758; 11 Ind. Dec. (N. s.) 1086.

(2) 22 B. 241; 11 Ind. Dec. (N. s.) 743.

(3) (1922) 2 K. B. 95; 91 L. J. K. B. 643; 127 L. T. 37; 20 L. G. R. 653; 66 S. J. 524; 38 T. L. R. 571.

(4) 27 C. 570; 4 C. W. N. 210; 14 Ind. Dec. (N. s.) 374.

(5) (1850) 15 Q. B. 684; 117 E. R. 618; 81 R. R. 749.

(6) 48 Ind. Cas. 277; 21 Bom. L. R. 522 at pp. 531, 532; 23 C. W. N. 77; 16 A. L. J. 969; 35 M. L. J. 707; 29 C. L. J. 117; 9 L. W. 148; 25 M. L. T. 159; 46 C. 458; (1919) M. W. N. 471; 1 U. P. L. R. (P. C.) 56; 45 I. A. 222 (P. C.).

On these authorities then I hold that this notice did not mean that the tenant was to give up possession at any definite hour prior to midnight on August 31, 1924, and that accordingly the notice, in my opinion, was a valid notice. It is clear that the Bombay Rent (War Restrictions) Act expired on or before August 31, 1924, and in my opinion there was nothing in that Act which would prevent the landlord from giving notice to quit at the expiration of that Act.

[The plaintiff was given a decree for ejectment.—*Ed.*]

Z. K. *Suit decreed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1181 OF 1922.
December 16, 1925.
Present:—Mr. Justice LeRossignol and Mr. Justice Fforde.

HAKAM RAI—PLAINTIFF—APPELLANT
versus
GANGA RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Partnership, dissolution of, suit for—Onus as to factum *of partnership—Evidence of partnership.*

In a suit for dissolution of partnership the onus of proving the *factum* of partnership is on the plaintiff. Where there is no agreement of the partnership, it is necessary for the plaintiff that the conduct of the parties towards one another, the mode in which they have dealt with one another and the mode in which each has with the knowledge of the other dealt with other people, raises a necessary presumption that a partnership was entered into. As a rule in the absence of direct evidence of partnership the relationship is shown by books of account, by correspondence, by the evidence of employees, by admissions and so forth. [p. 633, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, Gujranwala, dated the 20th January 1922.

Messrs. *M. L. Puri* and *Bal Kishan*, for the Appellant.

Lala *Jagan Nath Aggarwal* and Lala *Jagan Nath Bhandari*, for the Respondents.

JUDGMENT. — Plaintiff-appellant brought the suit out of which this appeal arises for the dissolution of partnership of a firm called Ganga Ram-Gokal Chand. The defendant Ganga Ram is a brother of the appellant and the defendant Gokal Chand is the son of Ganga Ram.

The defence is that the appellant is not and never was a partner in the firm in question. The suit was dismissed on the ground (1) that it was barred by O. II, r. 2, and (2) that the plaintiff had not shown that he was a partner of this firm.

It appears that the parties to the present appeal were partners in certain saltpetre works at Chhapanwali and Gujranwala. The appellant brought a suit for dissolution of partnership in each of these undertakings, but subsequently he admitted that there was only one partnership in respect of the saltpetre works, namely, the Chhapanwali concern, and that Gujranwala undertaking was merely a branch of the Chhapanwali business. A decree has been given for the dissolution of the partnership in the Chappanwali enterprise and it has been agreed that the accounts of the Gujranwala concern shall be taken in that dissolution matter.

The firm of Ganga Ram Gokal Chand was formed for the purpose of carrying on money-lending and real estate business. The onus is upon the appellant to show that he is a partner in this business. There is no written agreement of partnership and, therefore, it is necessary for the plaintiff to show that the conduct of the parties towards one another, the mode in which they have dealt with one another, and the mode in which each has with the knowledge of the other dealt with other people, raises a necessary presumption that a partnership was entered into. As a rule, in the absence of direct evidence of partnership the relationship is shown by books of account, by correspondence, by the evidence of employees, by admissions, and so forth. In the present case there is no such evidence and the plaintiff is driven to rely upon two circumstances which he claims show that he supplied capital for the working of this firm and was a sleeping partner in it. One of these circumstances is that Ganga Ram had drawn certain sums from the Chhapanwali business and transferred these sums to the Ganga Ram Gokal Chand firm. The appellant alleges that these sums were portions of the Chhapanwali capital and accordingly is the joint capital of himself and the respondents, and this shows that he has contributed working capital to the Ganga-Ram-Gokal Chand concern. The answer to this, however, is that the sums drawn from the Chhapanwali business were drawn by Ganga Ram himself, debited to himself alone, and placed by him in the Ganga Ram-Gokal Chand concern. The only inference to be drawn from this circumstance is that Ganga Ram was drawing some of his own money out of the Chhapanwali partnership in order to help and finance his other enterprise. There is no evidence that the appellant himself put any money whatsoever into this latter concern.

The other circumstance relied on by the appellant is a vague statement by Gokal Chand made on cross-examination that the Ganga Ram-Gokal Chand firm paid for a number of years some money to the Chhapanwali factory as income-tax. This may mean that the Ganga Ram-Gokal Chand firm were helping the Chhapanwali business by advancing money to discharge a portion of their income-tax liabilities but it is not sufficient as proof that the partners in the one concern are necessarily partners in the other.

These are the only two circumstances which can possibly be relied upon by the appellant as establishing his contention that the Ganga Ram-Gokal Chand enterprise is a branch of the main trading concern at Chhapanwali.

In our opinion this evidence is wholly insufficient to establish the partnership. Agreeing as we do, therefore, with the Trial Court that the appellant has not shown himself to be a partner in the firm of Ganga Ram-Gokal Chand, we dismiss the appeal with costs.

R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 365 OF 1923.

November 13, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

NORI VENKATAKRISHNAYYA—DEFENDANT No. 6—PETITIONER—APPELLANT

versus

KUNDRITHI BYRAGI AND OTHERS—RESPONDENTS.

Hindu Law—Sums misappropriated by father as trustee—Sons, liability of.

Under the Hindu Law a son is liable to account for amounts collected by his father in his capacity as trustee but subsequently misappropriated by him. The fact that the misappropriation amounts to a criminal offence does not affect his liability.

Garudu Sanyasayya v. *Nerella Muthemma*, 48 Ind. Cas. 740; 85 M. L. J. 661; 9 L. W. 1; 25 M. L. T. 86, followed.

Appeal against an order of the Court of the Subordinate Judge, Bapatla, in E. A. No. 1564 of 1921, in O. S. No. 87 of 1918.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *K. Kameswara Rao*, for the Respondents.

JUDGMENT.—The contention of Mr. Ramadoss in this appeal is that the debt incurred by the father was in the capacity of a trustee and, therefore, he must have been considered to have criminally misappropriated the trust funds and that the son's share cannot be made liable for such a debt.

There is nothing to show that the first defendant misappropriated any amount so as to bring him within the clutches of the Criminal Law and all that was found against him was that certain sums of money for which he was accountable were not accounted for by him and in a scheme suit he was ordered to pay the amount which came into his hands. We do not think that will amount to misappropriation or breach of trust within the meaning of s. 403 or 406 of the Indian Penal Code. If he had been found guilty of breach of trust, he would have been removed from his office of trusteeship. But he has been allowed to continue. Therefore, we cannot hold that he was guilty of breach of trust.

Even if it is found that he misappropriated the amount which came into his hands we do not think the sons can escape the liability to pay their father's debt. Mr. Ramadoss relied strongly upon *Durbar Khachar* v. *Khachar Harsur* (1). That case was considered by the learned Chief Justice and Mr. Justice Seshagiri Iyer in *Garudu Sanyasayya* v. *Nerella Muthemma* (2). There they held that "under the Hindu Law, a person was liable to account for amounts collected by his father and grandfather in their capacity as trustees but subsequently misappropriated by them. The fact that the misappropriation amounts to a criminal offence did not affect his liability." We are entirely in accord with the principle of this decision. Therefore, we consider that there is nothing in this contention.

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(1) 32 B. 348; 10 Bom. L. R. 297.

(2) 48 Ind. Cas. 740; 35 M. L. J. 661; 9 L. W. 1; 25 M. L. T. 86.

The next point is that the son, the appellant, was specifically exonerated by the decree. The decree has not been produced before us. There is nothing to show that his share of the family property was exonerated. If there was anything in this point it would have been pressed before the learned Judges who remanded the suit for disposal on the merits.

No doubt this point was raised in the grounds of appeal but it evidently was not pressed. There are no materials before us for holding that the appellant's share was exonerated by the decree passed in the scheme suit.

The next question is one of fact. The contention of the appellant that he was divided from his father was disbelieved by the lower Court. We have been taken through the evidence on his side and we find that the evidence is not only unsatisfactory but even if believed does not go to show that the property attached fell to the share of the appellant on partition. The evidence as to partition is very unsatisfactory and we have no reason to differ from the finding of the learned Judge which we consider to be correct.

The appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1531 OF 1921.

May 28, 1925.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

Bhai JAWAHAR SINGH AND SONS—DEFENDANTS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 39, 48—Contract, refusal to perform—Other party, remedies of—Rescission of contract—Lahore High Court Rules and Orders, Vol. V, Ch. XX, r. 1—Documents, printing of.

Where a person who has contracted to supply goods to another writes to say that he will not supply the goods, the latter has three courses open to him. He can write back accepting the position and so fulfil the requirements of s. 39 of the Contract Act. He can also act upon the refusal by going to the open market and purchasing the goods therefrom. In either of these cases he can sue for damages. If he does not adopt either of these courses, he can ignore the refusal and treat the contract as still subsisting. But if he does so, it must *inure* for the benefit of both sides, and s. 48 of the Contract Act will apply. [p. 637, col. 2.]

Therefore, where a person has contracted to supply goods to another throughout the year according to his requirements, the latter, on a refusal by the former to supply the goods, must accept or reject the offer of rescission there and then. It is not possible for him to go on accepting the offer by instalments throughout the year. If he does not take action by word or deed, he cannot keep alive the contract for his own purpose and treat it as rescinded so far as any benefit to the other party is concerned. In other words if he does not adopt either of the alternative courses by which he can put an end to the contract, he must inform the other party of his requirements as they arise, to enable him, if he wishes, to carry out the contract as it affects the remaining instalments. [*ibid.*]

The party on whom the duty falls for having a document printed is not the party which relies on the document in the sense that he produced it, but the party for whom in appeal the document is necessary and essential, and it is as necessary and essential to an appellant who impugns the correctness of a document or contends that it has not been correctly weighed and interpreted that it should be printed, as that the judgment which he attacks should be printed. [p, 638, col. 2.]

First appeal from a decree of the Senior Sub-Judge, Lahore, dated the 31st May 1921.

Lala *Moti Sagar*, R. B., and Lala *Durga Das*, for the Appellants.

Messrs. *Noad* and *Ram Lal*, for the Respondent.

JUDGMENT.—In this suit the Secretary of State sued a firm Bhai Jawahar Singh and Sons, claiming damages for the breach of a contract. He was given a decree for the full amount claimed of Rs. 24,328-11-1, and the defendant firm appeals. The facts as stated in the plaint are that the Inspector-General of Prisons invited tenders for the supply of yarn suitable for the manufacture of prisoners' clothing etc., etc. for a period of 12 months. In reply to this letter the defendant firm tendered. The tender was accepted and a formal agreement was executed on the 18th of August 1917. The terms of the agreement were that the defendants were to supply cotton yarn to the various Jails in the Province in accordance with demands to be made by them. Several orders of October and November were not complied with and a letter was written on the 7th of November drawing the attention of the defendant firm to this fact and threatening it that unless the goods were supplied they would be purchased in the open market and the difference would be charged to them. Further defaults were made and on the 6th of December the Inspector-General served a registered notice upon the defendants calling upon them to comply with the demands and pointing out the consequences which would follow upon failure to do so. To this the defendant firm replied by a letter dated the 14th of December 1917 printed at page 62 in which they asserted that the plaintiff had broken the contract by ordering cotton which was not covered by the terms of that contract, demanded their security back and the payment of outstanding bills and recited categorically that under these circumstances they were compelled to rescind the contract. In the following month the Inspector-General issued instructions to the Superintendents of various Jails that, as the firm was unable to supply yarn, purchases might be made in the open market up till the date on which the contract would have terminated. In the present suit the plaintiff claims damages representing the difference between the prices that were actually paid in the open market for the cotton required and the prices at which the defendants had contracted to supply. In their reply, the defendants traversed most of the allegations made by the plaintiff. They contended that the agreement was bad on account of vagueness, that the contention contained in their letter of the 14th of December was quite correct, that it was the plaintiff who had broken the contract by ordering goods not covered by the terms of the contract and by delaying payment for the goods supplied, and that they themselves had committed no breach whatever. They questioned the correctness of the plaintiffs allegation as to the purchase of the goods and the rates paid. In para. 5 of the plaint it had been stated that owing to a rise in the price of cotton yarn the defendants stopped supplying yarn to the Jails. To this the defendants' reply was that "It is not admitted that the rate of yarn rose in the month of October 1917 and that the defendants accordingly stopped supplying goods. The rest of the para. is not denied." This we can only read as meaning that they did stop supplying goods but that the reason was not as given in the plaint. The defendants also took a point regarding what are called half counts, which was definitely dropped in appeal. On the 18th of January 1919 Mr. Mahtab Singh, who was appearing for the plaintiff, stated that the defendants had broken the contract on the 14th of December and refused to carry out the terms of the contract. On these pleadings 15 issues were framed and the Trial Court held that a breach had been committed on the 14th of December which entitled the plaintiff to claim damages, and that the amount of damages was proved by the evidence which consisted of the oral statements of various Jailors and of the documents produced by them. It held that the agreement was not bad for vagueness and that the plaintiff had not committed any breach by ordering cotton for purposes not indicated in the contract.

On appeal the points pressed by Counsel are that the agreement was bad for vagueness, that the plaintiff did commit a breach by ordering goods not covered by the terms, that the defendants did not commit any breach and that this letter dated 14th of December amounted to nothing more than an offer or notice intimating their intention not to carry out the terms of the contract, that this was a nullity until either acted upon or accepted by the plaintiff and as it was not so accepted nor acted upon, it had no effect whatsoever. He further contends that even if damages be decreed against him, the plaintiff has not proved the amount which he is liable to pay. The point regarding the vagueness of the terms of the contract is not seriously pressed. The contract is for an indefinite supply of cotton to be ascertained at subsequent dates. The quantities were subsequently ascertained as the requirement of the various Jails materialized.

So far as the purpose for which the cotton was to be used is concerned, the defendants took their stand on the terms of the letter calling for tenders as recited in the plaint. This stated that cotton yarn was required for prisoners' clothing, etc., etc. In the letter printed at page 62, in which the defendants stated very clearly that they had no intention of carrying out the contract they omitted the words "etc. etc." and said that "the contract was limited to supply of cotton for the manufacture of prisoners' clothing only." This was not the case and the interpretation placed upon the invitation by the defendants themselves may be seen from their tender printed at page 4, the schedule at page 5 signed by them, and the agreement at page 6 in which they make no mention of the purposes for which the cotton was required and merely speak of "the said goods." In the schedule at page 5 one of the descriptions of supplies required is "bump yarn for ropes," and the defendants have been wholly unable to explain how this could be required for prisoners' clothing. It is then urged that the words "etc. etc." must be read as meaning *ejusdem generis*. The requirements of prisoners, under this head so far as we know, are confined to clothing and woollen blankets, and the words "etc. etc." cannot, therefore, refer to their requirements. It is admitted by the plaintiff that he did order yarn for manufacturing muslins, dusters and other articles, and supplied these manufactured articles not only to other Governments Departments but also to the general public. We are of opinion that the words "etc., etc." cover all purposes for which cotton is required in the Jails whether for the manufacture of good or for internal consumption. It has not been contended that any unreasonable quantity of cotton was demanded nor that the defendants were prejudiced or injured in any way by the nature of the demands and the qualities required being of an unexpected or unprecedented description. We hold that the contract was good and valid. The questions remain of whether the contract has been broken, and if so, who is responsible for the breach.

The position taken by the defendants is that the preliminary stages consisting of their repeated failures to supply the goods ordered and the action taken by the plaintiff in writing to them on the 6th of December 1917 must be ignored as mere preliminaries and that the first step towards the breach was committed by them in writing their letter of the 14th of December 1917, in which they categorically refused to carry out the contract. This, it is pointed out amounted only to a notice or offer under s. 39 and unless it was accepted or acted upon, it was wholly inoperative and void. The plaintiff on the other side contends that, even if this view be taken, he did act upon their letter, in that he stopped sending further demands and did supply his requirements from the open market. He contends that the fact that he did so piecemeal or on various dates throughout the year as requirements arose is wholly immaterial. We have been referred by Counsel to *Bilasiram Thakursidass* v. *Ezekiel Abraham Gubbay* (1) *Rash Behary Shaha* v. *Nrittya Gopal Nundy* (2) and *Manindra Chandra Nanday* v. *Aswini Kumar Acharyya* (3) and we agree with Mr. Moti Sagar that this position, as defined by him, is quite correct so far as the future requirements were concerned presuming always that this letter of the 14th of December amounts to a notice or offer under s. 39.

The plaintiff's claim may be divided into two halves, the first being the damages claimed on account of the high price of the goods purchased to supply the deficit caused by the failure of the defendants to carry out the orders received before the 14th of December, and the second consists of the damages claimed on account of the purchases made at high prices during the remainder of the year and it appears to be that while the plaintiff is entitled to the first he is not entitled to the second. On receiving this letter of the 14th of Decembar the plaintiff had three courses open to him. He could write acknowledging its receipt and accepting the position as there defined, and so fulfil the requirements of s. 39. He could also act upon the letter by going into the open market and purchasing his requirements for the year, and in either case he could sue the defendants for damages, these damages being calculated at the date, *i. e.*, at a future date on which the requirements would arise, this calculation being necessarily a matter of guess work. If he did not adopt either of these alternatives he could ignore the letter and treat the contract as still subsisting. But, if he did so, it must *inure* for the benefit of both sides, and s. 48 of the Contract Act would apply. It was not possible for him to go on accepting the offer of the 14th of December in instalments throughout the year. The various authorities quoted do not say definitely in so many words that he could not do so, but they make it quite clear, in our opinion; that this is the position. If he does not take action by word or deed he cannot keep the contract alive for his own purpose and treat it as rescinded so far as any benefit, which might accrue to the defendants, is concerned. In other words if he does not adopt either of the alternative courses, whereby he can put an end to the contract, he must inform the defendants of his requirements as they arise so as to enable them if they wish, to repent and to carry out their contract so far as it affects the remaining instalments. We do not wish to be understood to lay down that the purchase must be made as one transaction and that reasonable latitude would not be allowed to the promisee in providing himself with the goods. This latitude would doubtless cover the purchase from several sellers extended over a reasonable time, but in our opinion it could not cover the facts of this case so far as it includes the waiting for the actual amounts to be ascertained and the extension of the purchases over many months.

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(1) 33 Ind. Cas. 1; 43 C. 305; 20 C. W. N. 240; 23 C. L. J 62.

(2) 33 C. 477; 3 C. L. J. 249.

(3) 60 Ind. Cas. 337; 48 C. 427; 32 C. L. J. 168; 25 C. W. N. 297.

In this case the plaintiff did not adopt any of the three courses open to him in its entirety. He accepted the offer of the 14th of December in so far as he went into the market and supplied his wants represented by the goods he had ordered and which the defendants had failed to supply. He might at the same time have supplied his future wants which would accrue during the rest of the year. But the fact that he did not do so does not, in our opinion, debar him from claiming damages on the amount of goods which he did buy there and then. It was unnecessary for him to communicate the fact of his purchase; his action in making the purchase was sufficient. We, therefore, find that he is entitled to the first part of his claim only.

The ultimate position of the plaintiff is that continued defaults were made which constituted a notice to him of the defendants not to be bound by the contract and not to carry out its provisions. He replied in his letter of the 6th December in which he had accepted the notice and left it open to the defendants to withdraw it by carrying out their part of the bargain. As explained in *Bilasiram Thakursidas* v. *Ezekeil Abraham Gubbay* (1) this letter is not sufficiently definite by itself to terminate the contract, and even though the defendants by their reply of the 14th December, definitely refused to accept the opportunity given them that refusal cannot be treated as dating back in such a way as to render the unconditional acceptance contained in the letter of the 6th December an unconditional and absolute acceptance except to the extent described above. There is, therefore, in our opinion, no such definite acceptance and no such definite act on the part of the plaintiff, as is required by s. 39. The contract was, therefore, kept alive so far as the late requirements are concerned.

As regards the measure of damages to which the plaintiff is entitled it is contended by Counsel that the plaintiff is entitled to none as he has not followed the procedure laid down in the agreement and called upon the Superintendents of the various Jails to assess the damages, and after their doing so he has not allowed one month to the defendants in which to appeal against their decision to the Inspector-General. He relies on para. 4 of the contract. We are of opinion that there is no force in this contention. It is not a question of a reference to arbitration. The Superintendents of the Jails or any other subordinates of the Secretary of State could only sue for damages in accordance with s. 74 of the Contract Act, and it is these damages which the plaintiff claimed.

Regarding the actual amount and the rates, etc., the defendants contend that their appeal must succeed because the respondent has failed to print all the documents on which he relies, and quotes *Kartar Singh* v. *Labh Singh* (4) in support of this view. In our opinion this ruling does not place the interpretation, which they wish, on the rules regarding printing. In that case it is clearly stated that the District Judge considered one document only and rested his decision thereon. The Judges of this Court took a different view of the value of that document and thus finally decided the case. The respondent wished to rely upon other documents which he had not asked to have printed and some of which were apparently named but not considered by the District Judge. In this case it is not a question of mere reference to the documents for the Trial Court has clearly relied upon them and considered them in its judgment and based its decision upon them, and, therefore, we are of opinion that under r. 1, Ch. XX of the Rules and Orders of the High Court, Volume V, it was the duty of the appellant to print these documents. In the second place the portion of this ruling which follows the decision regarding the one document is, in our opinion, an *obiter dictum.* The old rule was very clear and the recent amendment of 1922 runs as follows:—"(1) (*a*) Plaint and Pleas (*b*). Such documents either referred to in the plaint as forming the basis of the suit or considered by the lower Court in its judgment as may be specified by either party in response to a notice within the period of 30 days etc.."

And the party on whom the duty falls is not the party, which relies on the document in the sense that he produced it, but the party for whose case in appeal the document is necessary and essential, and it is as necessary and essential to an appellant who impugns the correctness of a document or contends that it has not been correctly weighed and interpreted that it should be printed as that the judgment, which he attacks, should be printed. The test is whether the appeal can proceed and can be argued without it, and whether the appeal is self-contained. What the appellant does in this case is to contend that the lower Court was wrong and must be held to have given a wrong decision, because the respondent did not have certain documents printed. If in addition to the documents considered by the lower Court in its judgment or referred to in the plaint other documents are required by the other side, it is for that side, which requires them, to have them printed, Counsel points to r. 5 (1), the last two lines of which seem to contain a mistake. Whether they do or do not, the earlier part of the Chapter is, in our opinion, quite clear. The defendants-appellants have not seen fit to have any of the documents printed which they wish to attack, and cannot, therefore, refer to them, and they are unable to show that the damages awarded by the Trial Court have not been correctly calculated.

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(4) 74 Ind. Cas. 685; 5 L. L J. 190; A. I. R. 1923 Lah. 355.

The only question remaining is up to what purchases or rather damages on purchases of goods indented for before the 14th December are to be allowed. Counsel for the defendants has suggested that if the various pleas of vagueness, etc., are not successful purchases up to the 31st December should be allowed. We do not consider this would give a reasonable opportunity for the purchase of the goods and we take the 31st January 1918, as the last day on which the plaintiff was entitled to act and render the defendants liable. Before the 14th December the plaintiff had made good the defaults of the defendants and acted upon their refusal to the extent of purchasing goods for which he had to pay Rs. 619-13 more than the contract rates. Between the 14th December and the 31st January he similarly purchased goods for which he had to pay Rs. 3,428-14 more than the contract price. While keeping in mind that the purchases are not to be allowed to exceed the indents we have not confined the purchases strictly to the identical Jails and have allowed a purchase of the same amount as a previous indent even if shown against another Jail. The final result is, therefore, that the plaintiff is entitled to Rs. 4,048-11. We accept the appeal of the defendants in so far as to reduce the amount of damages to Rs. 4,048-11.

The defendants have succeeded on a highly technical point and the equities are entirely with the plaintiff, whose suit has failed to the extent of 5/6ths because he did not observe the very strict and very technical requirements of the law. We leave the parties to bear their own costs throughout.

N. H. *Appeal partly accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 197 OF 1923.
October 7, 1925.
Present:—Justice Sir Charles Gordon Spencer, KT.

MYLAVARAPPA RANGAPPA NAIDU—
DEFENDANT NO. 1—APPELLANT
versus
BASANNA SIMON AND OTHERS—
PLAINTIFFS NOS. 1 TO 4—RESPONDENTS.

Estoppel—Transfer as guardian of minor—Subsequent transfer as owner—Subsequent transferee, whether estopped—Mortgage—Redemption before time—Cause of action—Suit for possession—Premature suit for redemption—Period expiring during pendency of suit—Decree, whether can be granted—Procedure.

Where a Hindu widow, as guardian of her alleged adopted son, mortgages certain property as belonging to the son, and subsequently transfers the same property in her own right as a Hindu widow, the transferee from the widow is not estopped from asserting his vendor's title. In fact there is no question of estoppel in such a case. [p. 640, col. 2.]

A mortgagor cannot be allowed to redeem the mortgage before the expiry of the term mentioned in the mortgage-deed, unless there is a contract to the contrary in favour of the mortgagor. [p. 641, col. 2.]

Especially in the case of a usufructuary mortgage, the mortgagee is entitled to insist on his full term of enjoyment where there are no clear words in the mortgage-deed permitting the mortgagor to redeem before the expiry of the period. [p. 642, col. 1.]

Bakhtawar Begum v. *Husaini Khanam*, 23 Ind. Cas. 355; 36 A. 195; 18 C. W. N. 586; 26 M L. J. 474; 12 A. L. J. 473; 19 C L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 41 I. A. 84 (P. C.) and *Bir Mohamed Rowther* v. *Nagoor Rowther*, 25 Ind. Cas. 576; 27 M. L. J. 483; 16 M. L. T. 163, followed.

A party suing for possession must show that on the date of the suit he is entitled to the relief. [p. 642, col. 2.]

A suit for redemption of a usufructuary mortgage, which is premature, cannot be decreed on the period of mortgage expiring during pendency of the suit. In such a case the only course is to dismiss the suit with liberty to bring a fresh one on a proper cause of action. [*ibid.*]

Ramanadan Chetti v. *Pulikutti Servai*, 21 M. 288; 8 M. L. J. 121; 7 Ind. Dec. (N. S.) 559, followed.

Subbaraya Chetty v. *Nachiar Ammal*, 44 Ind. Cas. 863; (1918) M. W. N. 199; 7 L. W. 403, not followed.

Second appeal against a decree of the Court of the Additional Subordinate Judge, Vizagapatam, in A. S. No. 19 of 1922, preferred against that of the Court of the District Munsif, Vizagapatam, in O. S. No. 243 of 1919.

Messrs. *A. Krishnaswami Iyer* and *K. Kameswara Rao*, for the Appellant.

Messrs. *T. M. Krishnaswami Iyer* and *P. Bapiraju*, for the Respondents.

JUDGMENT.—This is a suit for redemption. The plaintiffs obtained a decree for redemption in the Court of the District Munsif of Vizagapatam and the decision was confirmed on appeal. The defendants, who represent the mortgagees, contend that the plaintiffs' suit is not maintainable, first, because the plaintiffs have no *locus standi* to maintain the suit as they are estopped from asserting that their vendor had any title to convey to them; and secondly, because the term of the mortgage has not expired and the suit is premature.

The lands in dispute were the property of one Anga Narasimhulu who died in 1901 leaving a widow Rangamma and two daughters. After his death the widow put forward Anga Ramaswami as having been adopted to her deceased husband. On 6th April 1902 she executed a usufructuary mortgage for Rs. 1,000 in favour of the first defendant. The mortgagor under this document was her adopted son Ramaswami represented by his guardian the adoptive mother. On 2nd May 1906, another usufructuary mortgage was executed by the widow as guardian of her adopted son for Rs. 1,400. In this mortgage the prior mortgage of 6th April 1902 was merged. This mortgage, Ex. B, is sought to be redeemed in the present suit. On 2nd July 1910 Rangamma sold the suit property to the plaintiffs' father. On 6th July 1910 the adopted son who also had attained majority, sold the property to Vaddadi Ramaswami, who in his turn on 11th January 1912 sold the same property to Mylavarappa Venkata Rao. The plaintiffs' father brought a suit in 1910, O. S. No. 61 of 1910 on the file of the Court of the Subordinate Judge of Vizagapatam, to eject the present appellants after declaring the mortgage in their favour to be invalid. That suit was dismissed, the plaintiff's right to redeem the mortgage being left open and he being given liberty to bring another suit. In 1912 the two daughters instituted a suit O. S. No. 18 of 1912 in the Court of the Subordinate Judge of Vizagapatam to declare the adoption of Anga Ramaswami invalid. It was held that the adoption was not proved, and this decision was confirmed by the High Court on appeal. One other fact requires to be mentioned, namely, that Rangamma executed a Will on 3rd April 1902 bequeathing all her properties in favour of her adopted son and two daughters one-third to him and two-thirds to the daughters. As Rangamma is still alive, though not a party to the present suit, it is unnecessary to consider the effect of this testamentary disposition.

On the first point the appellant's Vakil argues that the mortgage having been given in the name of the adopted son, the plaintiffs who claim by purchase from the widow have no equity of redemption in their favour, and the adopted son having sold the property to Vaddadi Ramaswami who again conveyed it to Mylavarapu Venkata Rao, it is suggested that, if any one has the equity of redemption, it must be Mylavarapu Venkata Rao. Again he contends that the widow, having executed the plaint mortgage-deed as guardian of her adopted son, would be estopped from claiming any right of redemption in herself and that the plaintiffs, being representatives of the interest of the widow, are similarly estopped.

In my opinion, there is no estoppel in this case. The plaintiffs' father purchased the property under Ex. A from the widow who sold it in her own right and not as guardian of her adopted son. In fact she would have had no right to sell the property on his behalf if the adoption was a valid one as by that time he had attained his majority. The validity of the adoption was the subject of O. S. No. 18 of 1912. It has not been put in issue in this suit although the Subordinate Judge in his judgment states that there was in fact no adoption. The appellants who claim to set up *jus tertii* in Venkata Rao as a defence to plaintiffs' suit do not themselves claim under Venkata Rao. The plaintiffs have never made any representation as to the ownership of the property conflicting with their case in the present suit and defendants have not been misled by their conduct. Their father purchased the widow's interest in the suit property under Ex. A and as possessing that interest, they certainly have the right to redeem the property from any encumbrances upon it, as they are persons having an interest within the meaning of s. 91 of the Transfer of Property Act. The defendants could only defeat the plaintiffs' right to redeem by showing that at the date of the plaintiffs' father's purchase the widow had no interest to convey. This they have not done, as they have not attempted to show that Anga Ramaswami was validly adopted.

I now pass on to the second question whether the suit is premature. The mortgage-deed, Ex. B, is a peculiar document. It provides that the rent of the land should go towards the interest due upon the principal and that the mortgagee should keep the surplus as a deposit with him. As the rate of interest was 6 per cent. and the amount of the principal was Rs. 1,400, Rs.84 out of the rent of Rs. 147 went towards interest and the balance of Rs. 63 was to be kept by the mortgagee towards the discharge of the principal. Then there is a provision that the principal shall be discharged by seven instalments of not less than Rs. 200 each within 15 years' time. Finally the mortgagor contracts to take back the land and the bond at the end of the mortgage (*thanahaakarna*) which does not appear to mean upon the mortgage amount being cleared off (*thanakathirina*). The time for the payment of the instalments is not specified. Apparently the mortgagor was at liberty to pay off the instalments at any short intervals at his pleasure provided that not less than Rs. 200 were paid at a time. There is no express provision in Ex. B that on payment of the whole of the mortgage amount at any time before the expiry of 15 years, the mortgagor can recover the land. It is conceivable that the parties intended this, but failed to express their intention in proper language. As such a term gives an advantage to the mortgagor, it was necessary that it should be clearly expressed. The mortgage-deed being dated 2nd May 1906, the term of the mortgage did not expire till 2nd May 1921 and this suit, having been instituted on 23rd April 1919 is *prima facie* premature. In the plaint the cause of action is stated to have arisen on the date when the mortgagor gave notice of his intention to redeem, which is obviously wrong.

In *Bakhtawar Begam* v. *Husaini Khanam* (1) their Lordships of the Judicial Committee quote the judgment of the Allahabad High Court to this effect.

" Ordinarily, a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is, that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced and, therefore, it is not competent for either party to disturb that relation."

They go on to observe in their own words:—

" But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor."

In *Bir Mohamed Rowther* v. *Nagoor Rowther* (2) a Bench of this Court, following the Privy Council ruling, held that a mortgagor could not be allowed to redeem the mortgage before the expiry of the term mentioned in the mortgage-deed, unless there was a contract to the contrary in favour of the mortgagor. In *Vadju* v. *Vadju* (3) it was held that the mere use of the word " within" was not sufficient indication that the mortgagor might redeem before the expiration of the term. Westropp, C. J., stated the general principle to be that the right to redeem and the right to foreclose must ordinarily be regarded as co-extensive. He remarked that if there was an intention to make the mortgagor's position more favourable than the mortgagee's, some stronger expression should have been used in the document than the Marathi word "*ant*" which signifies "within a certain date." In *Rose Ammal* v. *Rajarathnam Ammal* (4) Shephard, J., observed that the rule of mutuality is not an inflexible and universal one and that if the parties intend that redemption should take place only at the end of the given term, they should indicate that intention in the words of the deed. This seems to put the onus on the wrong shoulders, as the learned Judge was dealing with an exception to a general rule. In *Chandu* v *Kozhi Poojari* (5) Wallis, C. J., and Seshagiri Iyer, J., referred to the mortgagor's right to redeem before the end of the period and to the Privy Council decision in *Bakhtawar Begam* v. *Husaini Khanam* (1) and they allowed redemption to be made in view of the provision in the mortgage before them providing for payment by the mortgagor on or before a certain date. In *Dronamraju Lakshmi* v. *Immani Seshayya* (6) Devadoss, J., allowed a mortgagor to redeem before the expiry of the term, as an equitable remedy called for in the circumstances of that case.

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(1) 23 Ind. Cas. 355; 36 A. 195; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 41 I. A. 84 (P. C.).

(2) 25 Ind. Cas. 576; 27 M. L. J. 483; 16 M. L. T. 163.

(3) 5 B. 22; 3 Ind. Dec. (N. s.) 16.

(4) 23 M. 33; 8 Ind. Dec. (N. s.) 418.

(5) 30 Ind. Cas. 370; 29 M. L. J. 86.

In the document before me there are no clear words which permit the mortgagor to pay the whole of the principal on or before the expiry of the mortgage term and to obtain possession of the land. As it is a usufructuary mortgage, the mortgagee is entitled to insist on the term which provides for 15 years' enjoyment (see Shephard and Brown's Commentary on s. 60 of the Transfer of Property Act, page 260 of 7th Edition). The mortgagee under the terms, of this document, could not enforce his rights until the full 15 years were over. There must be mutuality in such an agreement. It is provided that the profit or loss arising from the yield of the mortgage land should be borne by the mortgagee. He may have been unwilling to take a mortgage for less than 15 years, and he may fairly have expected the losses in unfavourable years to be made good by gains in more favourable years. I think that I am bound to follow the decision in *Bakhtawar Begam* v. *Husaini Khanam* (1) and the decision of a Bench of this Court in *Bir Mohamed Rowther* v. *Nagoor Rowther* (2).

The respondents' Vakil has pointed out that although the cause of action for redemption may not have arisen at the date of the plaint, more than 15 years had elapsed at the date of the hearing at the first and the second appeals. The Subordinate Judge has also relied on this circumstance. *Subbaraya Chetty* v. *Nachiar Ammal* (7) a Bench of this Court under special circumstances granted a decree where the cause of action arose subsequent to the date of the suit. That case is inconsistent with the decision in *Ramanadan Chetti* v. *Pulikutti Servai* (8) where the rule of procedure that a party suing for possession must show that on the date of the suit he was entitled to relief is followed. Suits for possession are exceptions to the general rule. In *Doraisami Pillai* v. *Chinnia Goundan* (9) it was held that a suit for redemption was liable to be dismissed on the pleadings in the plaint, and the plaintiff during the pending of the suit obtained a conveyance which cured his want of title and he was allowed to amend his plaint and obtain a decree for redemption. In that case the flaw in the plaintiffs' right to redeem was not that his suit was premature in point of time but that he had not got title from the true owner. The case is not an authority for the proposition that if a suit is premature at the date of institution, a decree can nevertheless be granted. In my opinion the only course where the plaintiff brings his suit before the cause of action arises, is to dismiss the suit with liberty to bring a fresh suit upon a proper cause of action.

The second appeal is, therefore, allowed and the suit will be dismissed with costs throughout.

V. N. V.

N. H. *Appeal dismissed.*

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(6) 90 Ind. Cas. 138; 48 M. L. J. 363; A. I. R. 1925 Mad. 825.

(7) 44 Ind. Cas. 863; (1918) M. W. N. 199; 7 L. W. 403.

(8) 21 M. 288; 8 M. L. J. 121; 7 Ind. Dec. (N. S.) 559.

(9) 43 Ind. Cas. 560; 34 M. L. J. 258; 22 M. L. J. 538; (1918) M. W. N. 89; 7 L. W. 335.

MADRAS HIGH COURT.
FULL BENCH.

ORIGINAL SIDE APPEAL No. 47 OF 1924.

January 18, 1926.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Krishnan, and Mr. Justice Beasley.

S. HARI RAO—APPELLANT

versus

THE OFFICIAL ASSIGNEE, HIGH COURT, MADRAS AND OTHERS—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), s. 101—Party aggrieved—Order of Court confirming sale of insolvent's property by Official Assignee—Appeal.

An insolvent has, after adjudication, no legal interest in his estate and has no right to interfere in the realisation of that estate and cannot be treated as aggrieved by any order passed in the course of such realisation.

The insolvent, therefore, has no right of appeal against an order by Court confirming a sale of part of the estate which was originally his and subsequently vested in the Official Assignee.

Sakhawat Ali v. *Rada Mohan*, 49 Ind. Cas. 816; 41 A. 243, followed.

Ex parte Sheffield, (1879) 10 Ch. D. 434; 40 L. T. 15; 27 W. R. 622 and *In re Leadbitter & Harvey*, (1879) 10 Ch. D. 388; 48 L. J. Ch. 242; 39 L. T. 286; 27 W. R. 267, relied on.

Observations of Oldfield, J., in *Sivasubramania Pillai* v. *Theethiappa Pillai*, 75 Ind. Cas. 572; 45 M. L. J. 166; 18 L. W. 636; (1923) M. W. N. 895; A. I. R. 1924 Mad. 163; 47 M. 120, dissented from.

Appeal from an order of Mr. Justice Waller, dated the 4th March 1924, passed in the exercise of its order and issuing judgment of the High Court in Insolvency Petition No. 218 of 1922.

This Original Side Appeal coming on for hearing on the 7th October 1925, upon reading the grounds of appeal, the said order in I. P. No. 218 of 1922 and the material papers in the case and upon hearing Mr. *M. S. Venkatarama Iyer*, for Respondents Nos. 2 and 4, and Messrs. *P. R. Srinivasa Aiyangar* and *A. Rajagopala Aiyangar*, for the Appellant, on the preliminary objection raised by the said Vakil for Respondents Nos. 2 and 4 that the appellant-insolvent has no right to appeal, and Respondents Nos. 1 and 3 not appearing in person or by Pleader the Court (Coutts Trotter, C. J. and Mr. Visvanatha Sastri, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

We refer the following question to a Full Bench:—

"Whether the decision in *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) is correct or whether the decision in *Sakhawat Ali* v. *Radha Mohan* (2) should be followed."

Messrs. *P. R. Srinivasa Iyenger* and *A. Rajagopala Iyenger*, for the Appellant.

Mr. *S. Venkatarama Iyer*, for the Respondents.

JUDGMENT OF THE FULL BENCH.

Coutts Trotter, C. J.—The question raised here is whether the insolvent has a right of appeal against an order confirming a sale of part of the estate which was originally his and subsequently vested in the Official Assignee, an order which he sought to oppose. The matter was referred to a Full Bench in view of what were represented to be the directly conflicting decision of this Court in *Siva Subramania Pillai* v. *Theethiappa Pillai* (1) and of the Allahabad High Court in *Sakhawat Ali* v. *Radha Mohan* (2). We observe that the English decisions on the subject were not cited so far as appears from the report of the Madras Court. We have examined those decisions and come to the conclusion that they ought to be followed.

The only ground on which the insolvent's right to appeal can be based is that he is a person aggrieved because his estate having vested in the Official Assignee, he is nevertheless entitled to say that, if all the claims of the creditors who had proved were set aside or discharged, by payment he would have an interest in the surplus which might be left over. The leading English cases, *Ex parte Sheffield* (3) and *In re Leadbitter & Harvey* (4) have disposed of this contention on grounds which we think, are unanswerable. The insolvent has no legal interest but has merely a hope of expectation and as James, L. J, pointed out, the mischief of allowing a bankrupt on the contingent chance of his ultimately acquiring title to some surplus which might never be realised to interfere with and embarrass the administration of the estate would be immeasurable. We are of opinion that the insolvent has no right of appeal which will, therefore, stand dismissed. The question referred to us was perhaps not rightly framed, and I say so with more freedom because I drafted it myself. I have had the advantage of perusing the judgment about to be delivered by Krishnan, J., and I see that we can follow the ruling in the case of *Sakhawat Ali* v. *Radha Mohan* (2) without necessity of saying that *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) was wrongly decided. The right claimed by the insolvent in the latter case was to object to a creditor's proof and that is not directly before us.

Beasley, J.—I concur.

Krishnan, J.—I agree with the learned Chief Justice that we should follow the view expressed in *Sakhawat Ali* v. *Radha Mohan* (2) which is in accordance with the view taken in the English cases cited to us *Ex parte Sheffield* (3) and *In re Leadbeater Harvey* (4). As pointed out in those rulings, the insolvent has after adjudication no legal interest in his estate which has vested in the Official Assignee and he had, therefore, no legal right to interfere in the realisation of that estate and he cannot be treated as aggrieved by any order passed in the course of such realisation. It is true that if any surplus remains after the creditors are paid in full, such amount will be paid over to the insolvent and it is also true that if a certain proportion of his debt is paid from his assets, he will be entitled to a discharge. But these are merely expectations as pointed out in the English cases which may or may not be realised. They do not give any legal right to the insolvent to interfere in the realisation of his property which is entirely left to the Official Assignee. The reasoning to the contrary in the judgment of Oldfield, J., in *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) cannot be supported. That case itself was, however, one of an appeal by the insolvent against an order admitting proof of a creditor to which he had objected. The question whether the insolvent is a person aggrieved in such circumstances does not arise in the present case and I express no opinion on the point.

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(1) 75 Ind. Cas. 572; 45 M. L. J. 166; 18 L. W. 636; (1923) M. W. N. 895; A. I. R. 1924 Mad. 163; 47 M. 120.

(2) 49 Ind. Cas. 816; 41 A. 243.

(3) (1879) 10 Ch. D. 434; 40 L. T. 15; 27 W. R. 622.

(4) (1879) 10 Ch. D. 388; 48 L. J. Ch. 242; 39 L. T. 286; 27 W. R. 267.

I would answer the reference by saying that the ruling in *Sakhawat Ali* v. *Radha Mohan* (2) should be followed and that no appeal lies in the present case, and I agree in dismissing the appeal.

V. N. V. *Appeal dismissed.*
R. L.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 293 OF 1923.
October 30, 1924.
Present:—Mr. Dalal, J. C.
JAGANNATH PRASAD AND ANOTHER —PLAINTIFFS—APPELLANTS
versus
THE AGENT, G. I. P. RAILWAY COMPANY—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 7—Suit for damages against Railway Company—Loss of goods—Failure to put padlocks on waggons—Wilful neglect.

A Railway Company cannot be held guilty of wilful neglect by not putting on padlocks on the waggons immediately on hearing that thefts were frequent between two Railway Sattions on running trains.

Bengal & North Western Railway Co. v. *Haji Mutsaddi*, 7 Ind. Cas. 160; 7 A. L. J. 833, distinguished.

Second appeal against a decree of the Additional District Judge, Gonda, dated the 6th July 1923, preferred against that of the Munsif, Tarabganj, dated the 19th September 1922.

Mr. *Bisheshwar Nath*, for the Appellants.
Mr. *G. N. Mukerji*, for the Respondent.

JUDGMENT.—A bale of cloth was consigned at the Victoria Terminus Railway Station for delivery at Nawabganj on the B. N. W. Railway. The evidence produced by the G. I. P. Railway Co., consisted of the statements of two officials, a Guard of a goods train and a transhipment clerk posted at Bhusawal Railway Station. The Guard deposed that the seals of the waggon in which this particular bale was contained were intact at the Pichaura Railway Station at 1-33 A. M., but were found to be broken when the train arrived at Bhusawal at 3-25 A. M. According to him the waggon was detached so that its contents may be checked and a watchman re-sealed the doors. Next day at 8 A. M. the transhipment clerk took over the custody of the waggon and checked the contents at 12-45 P. M. when this particular bale was found short. It was argued that the servants of the Railway Company were negligent. The testimony of the two Raliway servants does not give rise to any such conclusion. The transhipment clerk first said that the doors of the waggon were open but afterwards corrected himself and stated that they were not open when he took charge of the waggon. It would not be possible to check the contents at night. The waggon was re-sealed and a watchman deputed to keep watch. There is no reason to suspect that this bale disappeared or was stolen while the waggon stood in the Bhusawal stationyard. The lower Appellate Court was correct in holding that the loss was not due to theft by or to the wilful neglect of the servants of the G. I. P. Railway Company.

The next allegation was that the Railway Administration was guilty of wilful neglect. It appears that at the time of this loss there were frequent thefts on running trains between Pichaura and Bhusawal. It was argued that seals were not sufficient protection under those circumstances and padlocks ought to have been put on waggons. It must, however, be remembered that a large number of padlocks could not suddenly appear as if by magic. Steps had to be taken to supply padlocks for a contingency like this and the Guard stated that the padlocks were subsequently supplied. I do not think that the Company could be held guilty of wilful neglect by not putting on padlocks immediately on hearing that thefts were frequent between two Railway Stations on running trains. The case reported as *Bengal & North Western Railway Co.* v. *Haji Mutsaddi* (1) was quoted on behalf of the appellant. There, however, the Subordinate Courts had held the Company to be guilty of wilful neglect and the High Court refused to interfere when it was found that seals instead of padlocks were used to safeguard the contents of the waggons. In the present case the finding is against the appellant and this Court is called upon to reverse it. The considerations, therefore, would be different here from those before the High Court in the case quoted above. No wilful neglect of the Railway Administration is, therefore, proved.

When the appellant has failed to prove wilful neglect, the point is not reached of inquiry whether the loss was occasioned by theft or by robbery from a running train.

It is, therefore, not necessary to inquire whether the word "robbery" in the Risk Note included theft or not.

I dismiss this appeal with costs.

G. H. *Appeal dismissed.*

(1) 7 Ind. Cas. 160; 7 A. L. J. 833.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 35 OF 1925.

November 19, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

HIRALAL AMBALAL—APPELLANT

versus

MANILAL MAGANLAL—RESPONDENT.

Execution of decree—Stay of execution—Executing Court staying execution on furnishing surety for interest—Appellate Court subsequently staying execution on payment of security—Effect on previous surety.

Where a judgment-debtor obtains a stay order from the Executing Court pending the decision of appeal on his furnishing a surety for the payment of interest from the date of the decree upto a particular time, an order by the Appellate Court for stay of execution on judgment-debtor's furnishing security for a particular sum puts an end to the future liability for interest of the previous surety from the date of such order.

First appeal against the decision of the First Class Subordinate Judge at Ahmedabad, in Darkhast No. 508 of 1924.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *R. J. Thakor*, for the Respondent.

JUDGMENT.—This appeal raises an interesting question regarding the liability of persons who pass surety bonds on behalf of appellants who come to this Court asking for a rule for stay of proceedings on what are called the usual terms. On the application by the appellant that the sale of his house in execution of a decree against him might be stayed pending the disposal of an appeal in this Court, it was ordered that the attachment should continue and that on the applicant undertaking not to alienate the property in question and to furnish security to the First Class Subordinate Judge for interest on the decretal amount from the date of decree till end of June 1924, the sale should be stayed until the hearning of the said appeal by this Court, unless the opposite party showed cause why execution by sale of the attached house should not be stayed within one month from the service of notice. Thereafter the present appellant passed a bond whereby he bound himself and his heirs and executors that whatever decree or order finally binding would be passed would be accepted by him and fulfilled. If he neglected to do that, then he the obligor, his heirs and executors, gave a binding to pay the sum up to Rs. 1,100 as might be fixed by the Court in respect of interest from the date of the decree of the Court up to June 1924. On August 9, 1923, the rule came on for argument. An order was made that the sale of the appellant's house should be stayed on the applicant giving security to the extent of Rs. 5,000 and if he failed to give that security, the execution should proceed. That is an entirely different order, and, in our opinion, put an end to the obligation of the present appellant, as he in effect bound himself to pay, if the judgment-debtor made default, such interest as would fall due from the date of the decree till the question, whether the debtor's property should be sold, came before the Court. A date was mentioned, no doubt, in the bond, *viz.*, June 1924, but that date would clearly be subordinate to any order which would be made by the Court in the matter of the stay application. The result must be that the appeal will be allowed to this extent that the surety will only be liable for interest up to August 9, 1923, and not until September 17, 1923, as held by the First Class Subordinate Judge.

The cross-objections will be dismissed. There will be no order as to costs.

R. L. *Appeal allowed in part.*

LAHORE HIGH COURT.

MISCELLANEOUS APPEAL NO. 1941 OF 1925.

January 13, 1926.

Present:—Mr. Justice Broadway.

GAURI SHANKAR—DEFENDANT—APPELLANT

versus

ANANT RAM—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870), Sch. I, Art. 1—Appeal from decree on award—Court-fee.

An appeal from a decree based on an award filed through the intervention of Court must bear *ad valorem* Court-fee.

Lala Dharam Das v. *Ajudhia Pershad,* 70 P. R. 1881 and *Hari Mohan Singh* v. *Kali Prosad Chaliba,* 33 C. 11, referred to.

Appeal against a decree of the District Judge, Amritsar, dated the 25th May 1925, reversing that of the Second Class Sub-Judge, Amritsar, dated the 15th March 1924.

Mr. *Lal Chand Mehra,* for the Appellant.

Lala *Badri Das,* R. B., for the Respondent.

JUDGMENT.—A suit was pending in the Court of the Subordinate Judge, Amritsar, between Anant Ram and Gauri Mal. During the pendency of the suit, the parties took action under para. 1 of the Second Schedule to the C. P. C. of 1908, and the dispute between them was duly referred to arbitration. An award followed to which objection was taken. The objection was set aside and judgment pronounced according to the award as required by para. 16 (1). A decree followed upon that judgment so pronounced.

Gauri Mal thereupon preferred an appeal to the learned District Judge attacking the judgment pronounced under para. 16 (1). Objection was taken to the hearing of the appeal on the ground, that it was improperly stamped. This objection was given effect to by the Additional District Judge and the appellant was directed to make good the necessary Court-fee. This he refused to do and the appeal was rejected. Gauri Mal has now come up to this Court through Mr. Lal Chand Mehra, and I have heard Mr. Badri Das for the respondent.

It was argued by Mr. Mehra that inasmuch as the order filing the award was appealable under s 104 (*f*) of the C. P. C., such an appeal would lie with a Court-fee of Re. 1. As a matter of fact there are authorities which lay down that although an appeal under s. 104 (*f*) is competent notwithstanding the fact that an award though filed has been the basis of a decree in its terms, nevertheless the Court-fee payable on such an appeal would be *ad valorem*: see in this connection *Lala Dharam Das* v. *Ajudhia Pershad* (1) and *Hari Mohan Singh* v. *Kali Prosad Chaliba* (2). It is, however, not necessary for me to discuss this matter any further inasmuch as the view taken by the District Judge is correct in this particular case. Mr. Lal Chand Mehra claimed to be entitled to appeal under s. 104 (*f*), C. P. C. A reference to that section, however, shows that it relates to an order filing or refusing to file an award in an arbitration without the intervention of the Court. In the present case, the arbitration was made under the provisions of para. 1 of the Second Schedule and that being the case there was no order necessary nor was one passed within the meaning of s. 104 (*f*).

In the present case the proceedings were governed by para. 16, and Mr. Lal Chand has been unable to show me under what law he is entitled to appeal against the judgment pronounced under para. 16. Whether or not an appeal against the decree was competent, the Court-fee, undoubtedly, should have been paid as calculated by the learned District Judge.

This appeal is, therefore, dismissed with costs.

R. L *Appeal dismissed.*

(1) 70 P. R. 1881.

(2) 33 C. 11.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 594 OF 1925.

January 8, 1926.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

MANEKLAL VADILAL—PLAINTIFF—APPELLANT

versus

CHANDULAL BALABHAI SHAH—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 12—Set-off—Court-fee not paid—District Judge, power of, in appeal—Document admitted without Court-fee—Party's right to object.

It is open to an Appellate Court to direct a defendant, who has obtained a set-off in the Trial Court without paying Court-fee on his written statement, to pay the Court-fee before allowance of the set-off.

Where once a document, such as an unstamped written statement of a defendant claiming a set-off, has been admitted in the Trial Court without objection, it is not for the plaintiff to say in appeal that the document should be struck off from the record; the Court is entitled to allow the defendant on payment of proper fee, to rely upon the set-off.

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 523 of 1924, summarily dismissing the appeal from the decision of the Joint Subordinate Judge at Ahmedabad, in Suit No. 1038 of 1923.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *R. J. Thakor*, for the Respondent.

JUDGMENT.—The plaintiff sued on a writing to recover Rs. 1,000 with interest at nine per cent. from September 24, 1920. The defendant claimed that, after he executed that writing, there were share dealings between himself and the plaintiff, with the result that the plaintiff became indebted to the defendant to the extent of Rs. 971-14-0. The Judge allowed the defendant to set-off his claim, holding that the plaintiff's claim for interest during the period of two years was improper, and found that nothing was due to the plaintiff, and dismissed the suit.

In appeal the District Judge dealt with the contention of the plaintiff that the set-off was wrongly allowed, as no Court-fees were paid by pointing out that the provisions of the Court Fees Act were not to be made the means of harassing an opponent. He refers to some decision of the Privy Council without giving the exact reference. It is quite true that the objection as to Court-fees should have been taken in the lower Court. But it is open to the District Judge under s. 12 of the Court Fees Act, to direct the defendant to pay the Court-fees on his written statement before the set-off could be allowed. As a matter of fact in a case of this nature, when once a document is admitted by the lower Court, it is not for the plaintiff to say that the document should be struck off from the record; the Court is entitled to allow the defendant, on payment of the proper fee, to rely upon the set-off.

We dismiss the appeal with costs therefore, but direct that the respondent should pay the proper Court-fee on his written statement within a week after the record reaches the lower Court.

N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 199 OF 1923.

April 30, 1924.

Present:—Mr. Hallifax, A. J. C.

HARIDAYAL—DEFENDANT—APPELLANT

versus

SUNDERLAL—PLAINTIFF—RESPONDENT.

Interest Act (XXXII of 1839), s. 1, applicability of —Contract Act (IX of 1872), s. 73—Payment made by plaintiff on behalf of defendant—Interest, whether can be allowed.

The Interest Act forbids nothing. It permits the Court to allow interest in certain circumstances, but does not limit the allowance of interest to those circumstances. [p. 648, col. 1.]

It is hard to imagine a case in which the Court is permitted to allow interest by the Interest Act, which it is not expressly permitted to allow by some later Act, so that the Act as it contains nothing prohibitory is now obsolete unless such a case exists. [p. 648, col. 2.]

Where one person makes a payment on behalf of another under the mistaken impression shared by both of them that he is bound to make the payment, he is entitled to recover the amount of the payment from the person on whose behalf it was paid together with interest. [p. 648, col. 1.]

Appeal against a decree of the Additional District Judge, Bilaspur, dated the 19th January 1923, confirming that of the Second Subordinate Judge, Bilaspur, dated the 25th of September 1922.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *F. C. Ghosh*, for the Respondent.

JUDGMENT.—The village, in respect of which the decree in this suit orders payment by a co-sharer of the remuneration of a *lambardar* to the plaintiff-respondent, has been divided into *pattis* since he was appointed to that office for the whole *mahal* and no further appointments have been made. The plaintiff, therefore, is not the *lambardar* of the defendant's *patti*; when the partition was made he ceased to be the nominal *lambardar* even of his own *patti*, though for that *patti* only he remained so for all practical purposes, as was explained in *Ramakrishna Puri* v. *Tanba* (1). He cannot, therefore, claim the remuneration of a *lambardar* in respect of the defendant's *patti*.

On his behalf it is urged that the plea of his not being the *lambardar* was never raised in the Courts below, where it was impliedly admitted that he was, in the plea that he had agreed to forego the remuneration. It was certainly never pleaded that he was not the nominal *lambardar* of the defendant's *patti* and of the others that made up the whole *mahal*, but it was very clearly pleaded that he performed none of the duties of that office and had none of the responsibilities of it in respect of the defendant's *patti*. The plaintiff is certainly not entitled to any remuneration as *lambardar* of that *patti*, even if he could be so entitled in the absence of a fixation of the rate of remuneration by the Deputy Commissioner, which is doubtful.

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(1) 71 Ind. Cas. 777; 19 N. L. R. 59; A. I. R. 1923 Nag. 153; 6 N. L. J. 85.

It is admitted for the defendant-appellant that he is bound to re-pay to the plaintiff the sums the latter paid on his behalf, although he paid them under the mistaken impression, shared by the defendant, that he was bound to do so as *lambardar*. It is, however, contended that no interest should have been awarded for the period before the suit, and reliance is placed on the provisions of the Interest Act of 1839 as explained by the Madras High Court in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (2).

The learned Judges held in that case that though s. 73 of the Contract Act, especially in the light of illustration (*n*) attached to it, undoubtedly applies to contracts or obligations resembling those created by contract to pay money, yet "to construe the section as giving a right to interest even in those cases in which it could not be awarded according to the provisions of Act XXXII of 1839, would be to hold that the latter enactment was virtually repealed by the former", which is "totally opposed to the maxim *generalia specialibus non derogant*."

In respect for the learned Judges I have made a very anxious examination and comparison of the single section of the Interest Act and s. 73 of the Contract Act, but I can find no conflict of any kind between them. If there were any conflict, then I would say that at least an equally possible interpretation of the Latin maxim mentioned is that the very general provisions of the Interest Act cannot detract from the special provision made in s. 73 of the Contract Act. The Interest Act forbids nothing. It permits the Court to allow interest in certain circumstances, but does not limit the allowance of interest to those circumstances; indeed it expressly provides in its concluding words "that interest shall be payable in all cases in which it is not payable by law".

The ruling was followed by the same Court without comment and apparently on the principle of *stare decisis* in *Subramania Aiyar* v. *Subramania Aiyar* (3) but in the Bombay High Court Chandavarkar and Pratt, JJ., mentioned it, in *Saunadanappa* v. *Shivbasawa* (4) and took the contrary view, for reasons with which I am in respectful agreement. I find it hard to imagine a case in which the Court is permitted to allow interest by Act XXXII of 1839 which it is not expressly permitted to allow by some later Act, so that, as it contains nothing prohibitory, it is now obsolete unless such a case exists.

The only other contention raised for the appellant is that he ought not in any case to be made to pay interest on a sum of Rs. 30 which he sent to the respondent by money order on the 25th of February 1920, five days after it was due to be paid into the treasury. It appears that this money order was taken to the respondent's house, but he was away at that time, and the money was returned to the appellant by the Post Office. In the circumstances the appellant could only assume that the respondent had refused to accept the money as he has done not infrequently. The respondent, on the other hand, knew that the money had been brought to his house in his absence and returned in circumstances which were bound to lead the appellant to believe that he had refused to accept it, but he did nothing to correct that impression. I think, therefore, that he was not entitled to interest on the amount, nor to his costs in respect of it.

In the result then there will be a reduction in the amount decreed of Rs. 86-4 for the *lambardar's* remuneration, on which no interest was allowed, and of Rs. 8-5-3 as the interest on the sum of Rs. 30 which has been mentioned, making a total of Rs. 94-9 3. It has already been held that the plaintiff is not to get his costs in respect of a further sum of Rs. 30. The sum claimed in the lower Courts was Rs. 358 11-6. The total costs in those Courts will, therefore, be paid in the proportion of one by the plaintiff and three by the defendant. In this Court the defendant claimed a reduction of Rs. 135 in the decretal amount and the costs. The reduction granted is one of Rs 94-9-3 and the costs in respect of the claim for Rs. 30, which amount to a couple of annas more than Rs. 5. Costs in this Court will, therefore, be paid in the proportion of one by the appellant and three by the respondent.

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(2) 20 M. 481; 7 M. L. J. 263; 7 Ind. Dec. (N. S.) 341.

(3) 31 M. 250; 3 M. L. T. 278; 18 M. L. J. 245.

(4) 31 B. 354; 9 Bom. L. R. 439.

Z. K. *Order accordingly.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 13 OF 1924.
September 2, 1925.
Present:—Mr. Justice Fawcett and
Mr. Justice Madgavkar.
BODHRAO GOPALRAO MUTALIK—
PLAINTIFFS—APPELLANTS
versus
SHRINIVAS ATMARAM JOG—
DEFENDANTS—RESPONDENTS.

Bombay Regulation XVI of 1827, s. 20, construction of—Grantee from Deshpande, alienation by—Restriction.

Section 20 of the Bombay Regulation XVI of 1827 must be strictly construed. The section covers the case of an alienation of *watan* lands by an incumbent of the hereditary office of Deshpande and not an alienation by any grantee of that incumbent. [p. 650, col. 1.]

Therefore, sale of a land forming part of a Deshpande *watan* granted by the Deshpande thereof to a *mutalik* as remuneration for services as a *mutalik*, in execution of a decree against the *mutalik*, is permissible.

First appeal from the decision of the First Class, Subordinate Judge at Dharwar, in Civil Suit No. 368 of 1920.

Messrs. *G. S. Rao* and *H. B. Gumaste*, for the Appellants.

Mr. *G. N. Thakor* (with him Mr. *A. G. Desai*), for the Respondents.

JUDGMENT.

Fawcett, J.—The main facts underlying this litigation are as follows :—

The Deshpande of the Karadgi Mahal granted certain lands to the plaintiffs' ancestor, on condition that he should enjoy the same as remuneration for his services as a *mutalik* (*i. e.*, deputy) of the Deshpande. The lands came into the possession of Narso Venkaji, who was the father of the plaintiffs Nos. 4, 5 and 8, and in execution of a decree passed against Narso the lands were sold to one Bashetappa at a Court auction in 1869. Bashetappa sold the lands to one Mahantappa, who in turn sold them to Balvant, the father of the defendant No. 4. The sale to Bashetappa was subject to a mortgage, and in 1881 the father of defendant No. 3 brought a suit against the mortgagees in possession of the lands. He obtained a decree, in execution of which he got possession of the lands in suit, and the defendants have been in possession ever since. Narso died on September 30, 1916, and the plaintiffs sued to recover the lands on the allegation that the alienation of the lands was only valid for Narso's lifetime, so that upon his death they became entitled to them.

The lower Court has held that the plaint lands were service *watan* lands of the Deshpandes of Mahal Karadgi, that the plaintiffs are the hereditary *mutaliks* of these Deshpandes, that the plaint lands were assigned to the plaintiffs' family for the performance of the duties of this *mutalikship*, and that the plaintiffs are *watandars* in respect of those lands. But, on the other hand, it has held that Narso was the absolute owner of these lands in 1869; and that the Court sale in that year was a valid sale of such absolute ownership. The learned First Class Subordinate Judge holds that, in the circumstances, the sale is not affected by s. 20 of Regulation XVI of 1827, and that accordingly the plaintiffs are not entitled to recover the lands. He dismissed their suit with costs.

The main question, therefore, in this appeal is whether the alienation of 1869 is one which falls within the prohibition contained is s. 20 of the Regulation of 1827. This section must be read with the preceding s. 19, which prescribes that the Collector shall keep a book recording the lands and allowances attached to hereditary District or village offices, and that record shall specify the allowances, whether from land, ready money, fees or other perquisites, etc., received for such offices. Then s. 20. clause first, says:—

"The allowances so derived by a sole proprietor or occupant of an hereditary District or village revenue office, shall in future be considered strictly as the official remuneration of the person filling the office, and as such shall not be subject to alienation by any incumbent."

It has been held by this Court in *Ravlojirav* v. *Balvantrav Venkatesh* (1) and by the Privy Council in *Padapa* v. *Swamirao*

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(1) 5 B. 437; 3 Ind. Dec. (N. S.) 288,

Shrinivas (2) that an alienation which contravenes these provisions is void *ab initio* as against the heir of the alienor. But the question on which the appellant has to satisfy us is that these lands are allowances attached to the office of *mutalik*, which come within the benefit of the prohibition against alienation. On this point I find no error in the reasoning of the Subordinate Judge, who has discussed the question after hearing full arguments upon it. It is quite clear that the Collector's books have all along shown these lands not as part of the allowance attached to the *mutalikship*, but as an allowance attached to the office of Deshpande. This is, for instance, shown by the statement in the judgment of 1842, Ex. 77, that these lands were Chavrat lands of Deshpande. Again in the sale certificate of 1869 the lands are described as standing in the *khata* of the Deshpandes Rangrao and Shamrao. In the judgment in the suit of 1870, Ex. 80, it is stated that the land in suit is one of the Deshpandes' *inam* lands and has been entered in the account in their names. The Alienation Register under the Bombay Land Revenue Code similarly shows it as part of the Deshpande land, while the *sanad* given to the plaintiffs is only in respect of a cash allowance and shows no service lands as attached to the office of *mutalik* Deshpande. On the other hand, the lands do appear in the *sanad* which has been issued to the Deshpande. Accordingly, it seems to me, that s. 20 only covers the case of an alienation of these lands by an incumbent *of the hereditary office of Deshpande*, and not an alienation by any grantee of that incumbent. Being a section which is opposed to the ordinary right of the subject to transfer lands without restriction, it must be construed strictly, and I think the Subordinate Judge is right in holding that it does not cover the alienation of 1869. Nor do I think that assistance is given to the plaintiffs by the provisions of Bombay Act III of 1874. First of all; those provisions, as pointed out by the Subordinate Judge, cannot have retrospective operation so as to affect an alienation made prior to the Act coming into force, unless there is some clear provision in the Act to the contrary. There is nothing in that Act, which operates to bring the case under the terms of s. 5 (1) (*a*) of the Act, and no authority for holding that s. 5 (1) (*a*) applies has been cited to us. The Act clearly differentiates between alienations prior to the date of the Act coming into force and alienations subsequent to that date. Thus s. 10 does not render it obligatory on the Collector to declare an alienation made prior to the Act's commencement *null and void* whereas under s. 11 he is required in the case of an alienation made after the Act has come into force to declare such alienation *null and void*. Action has been taken accordingly in this case by the Revenue Authorities who have, on the ground that the alienation was prior to the Act coming into force, refused to interfere. There certainly seems no proper ground for the Civil Courts to take a different view, having regard to the provisions of s. 20 of the Regulation, to which I have already referred.

I would, therefore, dismiss the appeal with costs.

Madgavkar, J.—I agree. The appellants are *watandars* but *mutalik watandars* under the Deshpande *watandars*. The land in suit is *watan* land appertaining not to the *mutalik watan* but to the Deshpande *watan*. The incumbent within the meaning of s. 20 of the Regulation XVI of 1827 is the Deshpande and not the *mutalik*, as is clear from the *sanad* of 1864. From the *sanad* of 1864 to the *mutalik* Deshpande and the view of the Collector and Commissioner from 1883 onwards, it follows that whether it is or is not open to a Deshpande to question the alienation by his predecessor, a Despande *watandar* in respect of this land it is not so open to the appellants, because they are *watandars* of a *watan* other than the one to which these lands appertain, and because they obtained the grant of these lands from the Deshpande.

The appeal, in my opinion, fails and must be dismissed with costs.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2014 OF 1925.
January 15, 1926.
Present:—Mr. Justice Harrison.
RIKHI KESH—PLAINTIFF—APPELLANT
versus
MELA RAM—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7, cl. iv (f)—Suit for accounts—Plaintiff's valuation.

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(2) 24 B. 556; 2 Bom. L. R. 548; 4 C. W. N. 517; 27 I. A. 86; 7 Sar. P. C. J 710; 12 Ind. Dec. (N. S.) 901 (P. C.).

In a suit for rendition of accounts, the option or discretion of the plaintiff in fixing his valuation is not confined to those cases where the value of the relief cannot be ascertained at the time the plaint is presented.

Barru v. *Lachhman*, 22 Ind. Cas. 503; 111 P. R. 1913; 228 P. W. R. 1913; 23 P. L. R. 1914 and *Manna Lal* v. *Samandu*, 46 P. R. 1906; 94 P. L. R. 1906; 62 P. W. R. 1906, referred to.

Second appeal from an order of the Senior Subordinate Judge, Amritsar, dated the 1st July 1925, varying that of the Subordinate Judge, Fourth Class, Amritsar, dated the 27th January 1925.

Mr. *Dev Raj Sawhney*, for the Appellant.

Lala *Moti Sagar*, R. B., and Lala *Har Prashad*, for the Respondent.

JUDGMENT.—Pandit Rikhi Kesh of Amritsar brought a suit against Mela Ram, his brother, for rendition of accounts, and valued his relief at Rs. 100. The defendant Mela Ram objected that the suit did not lie in this form and the Trial Court held that this was so, and passed an order to the effect that the plaint be returned for amendment. On appeal the Senior Subordinate Judge held that the suit for rendition of accounts did lie, and to this extent he accepted the appeal. He further held, however, that the valuation should have been Rs. 3,800 on the strength of an application made in a partition suit pending at the time between the same parties, and he directed the stamp to be made up to this figure.

From this order an appeal has been presented and Counsel relies on *Barru* v. *Lachhman* (1) and *Manna Lal* v. *Samandu* (2). The wording of the section is perfectly clear and I do not think there is any force in the contention on the other side that the option or discretion of the plaintiff in fixing his valuation is confined to those cases where the value of the relief cannot be ascertained at the time the plaint is presented, though possibly combined with other circumstances the fact that such relief can be ascertained might be a reason for holding that the suit for accounts does not lie. The decision here, against which no appeal has been presented, is that the suit does lie in this form, and, therefore, the plaintiff is entitled to exercise the privilege of valuing his relief at any figure he chooses, and the stamp will have to be made up subsequently if relief of greater value be granted to him.

I accept the appeal and direct that this suit proceed on the original stamp. The costs of the appellant will be paid by the respondent.

N. H. *Appeal accepted.*
S. S.

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(1) 22 Ind. Cas. 503; 111 P. R. 1913; 228 P. W. R. 1913; 23 P. L. R. 1914.

(2) 46 P. R. 1906; 94 P. L. R. 1906; 62 P. W. R. 1906.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 177 OF 1923.
September 1, 1925.
Present :—Mr. Justice Fawcett and
Mr. Justice Madgavkar.
GANPATRAO BHAVANRAO—
PLAINTIFF—APPELLANT
versus
GANESH VISHNU HASABNIS
AND OTHERS—DEFENDANTS—RESPONDENTS.

Bombay Hereditary Offices Act (III of 1874), ss. 4, 5—Mortgagee or lessee from watandar, *whether* watandar—*Alienation of* watan *land—Period of operation.*

Legal possession within the lifetime of the mortgagor or lessor *watandar* is clearly not equivalent to the legal acquisition of title to the land which is contemplated in the definition of *watandar*. Therefore, a mortgagee or lessee from a *watandar* is not himself a *watandar*. [p. 652, col. 1.]

An alienation of a *watan* land remains in force only during the natural life of the alienor. [p. 652, col. 2.]

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Satara, in Appeal No. 18 of 1921, reversing a decree of the Subordinate Judge, Islampur, in Civil Suit No. 687 of 1918.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *Velinker*, (with him Mr. *K. N. Koyajee*), for the Respondent.

JUDGMENT.

Madgavkar, J.—The question in this case is whether the plaintiff-appellant Ganpatrao is entitled to obtain possession of Survey No. 140, which is admittedly *watan* land, from the defendants-respondents. That survey number was mortgaged by his grandfather Vithalrav to the predecessor-in-title of the respondents. In the redemption suit of 1883, the Civil Court ordered Vithalrav to redeem within a certain period. Vithalrav failed to do so, and he forfeited his right to redeem. He then applied to the Deputy Collector for restoration of the lands and succeeded. In appeal by the mortgagee-decree-holder the order was set aside by the Collector and the mortgagee re-instated. On the death of Vithalrav, the appellant's father Bhavanrao passed a permanent lease in favour of the respondents, for three survey numbers. The respondents' father obtained possession of one survey number only—No. 140. The appellant accordingly sues for possession of No 140 and a declaration in respect of the other two Survey Nos. 220 and 225.

The two main issues when the parties went to trial were: firstly, whether the lease was operative after the life of Bhavanrao, and secondly, whether the suit was barred by limitation. The appellants succeeded on both the issues in the Trial Court and the respondents in first appeal.

The first issue depends on whether the respondents are *watandars* of the same *watan* within the meaning of s. 5 of the Hereditary Offices Act III of 1874. It is argued for the appellant that they are not. It is contended for the respondents that they are holding *watan* property, legally acquired as laid down in the definition of *watandar* in s. 4 of the Act by reason of the order of the Civil Court and of the Collector, which, it is said, binds the heirs of the mortgagor.

With that contention we cannot agree. The decree of the Civil Court could not, by reason of s. 5 of the Act, operate beyond the lifetime of Vithalrav. The same may be said of the order of the Collector, and of the fact that on the death of Vithalrav, his son Bhavanrav chose not to challenge the respondents' possession under s. 5 but created a permanent grant. The lease to the respondents cannot affect the rights of the present appellant to set aside his father's lease after his father's death. Legal possession within the lifetime of the mortgagor or lessor *watandar* is clearly not equivalent to the legal acquisition of title to the land, which is contemplated in the definition of "*watandar*" in s. 4. We, therefore, agree with the conclusion of the Trial Court, though not with its reasoning, that the respondents are not persons holding *watan* property legally acquired. They are not, therefore, *watandars* of the *watan* within the meaning of s. 5. No question of *taksim* or share arises and it is, therefore, unnecessary to consider the law in that respect. It follows that the appellant is entitled to the possession of Survey No. 140. The Trial Court has held that he has failed to prove any cause of action as regards Survey Nos. 220 and 225 and refused the injunction.

On the question of adverse possession and limitation, the respondents seek to challenge the correctness of the date of the death of the appellant's father. They do not, however, set up any alternative date. The lower Courts held on the meagre evidence before them that the appellant's date was correct. The respondents' possession under the lease by Bhavanrao in the lifetime of Bhavanrao cannot be said to be adverse to the appellant nor their possession in the lifetime of appellant's grandfather Vithalrav adverse to the mortgagor prior to the date of redemption or to the order of the Collector.

For these reasons I am of opinion that the appeal should succeed, the order of the lower Appellate Court be set aside, and the order of the Trial Court restored, with costs throughout against the respondents.

Fawcett, J.—I agree. As to the point of limitation, the lower Appellate Court is clearly wrong in holding that there had been adverse possession, which would bar the plaintiff's suit. As authority, reference may be made to the recent Privy Council case of *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Desphande* (1). On the main question the first thing to notice is that cl. (*a*) of sub-s. (1) of s. 5 clearly applies to the present case. Under sub-s. (2) of that section this cl. (*a*) applies to a *watan* in respect of which a service commutation settlement has been effected, unless the right of alienating the *watan* without the sanction of Government has been conferred upon the *watandars* by the terms of such settlement. The Gordon Settlement did not confer any such right of alienation, as has been held in *Appaji* v. *Kashav* (2) and other cases including *Balku Sidu Kumbhar* v. *Vyankatesh Vaman Deshpande* (3). Therefore, we think, there is a direct prohibition against the alienation, which is relied upon by the defendants as constituting them *watandars* of the same *watan*. The prohibition is as to any transfer of interest beyond the natural life of the alienor. The Civil Court's decree is, in the circumstances, one which is liable to be set aside, so far as it might otherwise effect an alienation beyond Vithalrav's lifetime. It is hardly necessary to cite authorities on this point, but I may refer to *Shivram Narsingrao* v. *Mahadev Narayan* (4), where *watan* land was sold in execution of a decree and bought by the defendant, and it was held that he took merely the right, title and interest, of his judgment-debtor, and on the death of the latter his right under the Court sale ceased. So here, any rights of the defendants, which they had under the decree, must be deemed to have ceased upon Vithalrav's death. As to the Collector's order, that order merely decided that the alienation was not null and void *ab initio*, as had been held by the Deputy Collector. It cannot properly be extended to a declaration that the alienation would be valid after Vithalrav's death; and even if the order had meant this it would be directly against the enactment contained in s. 5 (1) (*a*). Consequently, I think, it is clear that the defendants are not persons, who can be held to have "legally acquired" this *watan* property, within the meaning of definition of *watandar*. It is not necessary to say what class of cases might be covered by this part of the definition of "*watandars*"; but I may instance of the case of a person to whom an alienation is made with the sanction of Government.

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(1) 74 Ind. Cas. 362; 47 B. 798; 25 Bom. L. R. 1005; (1923) M. W. N. 689; A. I. R. 1923 P. C. 205; 33 M. L. T. 389; 28 C. W. N. 857; 20 L. W. 248; 50 I. A. 255; 47 M. L. J. 248 (P. C.).

(2) 15 B 13; 8 Ind. Dec. (N. S.) 9.

(3) 62 Ind. Cas. 942; 23 Bom. L. R. 799; 46 B. 52; A. I. R. 1922 Bom. 192.

Accordingly, I think that, although the reasoning of the Subordinate Judge who tried the case on the ramanded issue cannot be supported, his conclusion is right, and I concur in the order proposed by my learned brother.

R. L. *Appeal allowed.*

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(4) 17 Ind. Cas. 170; 37 B. 81; 14 Bom. L. R. 797.

OUDH CHIEF COURT.

Second Civil Appeal No. 327 of 1925.
February 3, 1926.
Present:—Mr. Justice Hasan.
SAHAI SINGH and others—Plaintiffs—Appellants
versus
SURAJPAL SINGH—Defendant—Respondent.

Custom—Succession—Wajib-ul-arz, *construction of—Widow succeeding as* malik kamil—*Absolute estate—Use of future tense in recording of custom—Interpretation.*

The words "*malik kamil*" convey the idea of absolute ownership.

Where the widow of a childless proprietor succeeds to him as *malik kamil* as recorded in the *wajib-ul-arz* she inherits an absolute estate, particularly where no line of devolution of the estate after the death of the widow is indicated in the entry.

Sartaj Koer v. *Mahadeo Bux*, 92 Ind. Cas. 657, followed.

Prima facie an entry in a *wajib-ul-arz* is intended to be a record of custom and not a record of the expression of wishes of the proprietors of the village, and use of the future tense does not in any sense negative the existence of the custom but it only denotes that the pre-existing custom shall be applicable to cases which arise thereafter.

Second appeal against the decree and judgment of the District Judge, Rae Bareli, dated the 7th April 1925, upholding that of the Subordinate Judge, Partabgarh, dated the 31st May 1924.

Mr. *Ram Bharose Lal* for Mr. *H. D. Chandra*, for the Appellant.

Mr. *Radha Krishna Srivastava*, for the Respondent.

JUDGMENT.—This is the plaintiffs' appeal in a suit for possession of certain shares in four villages, in a house and for the recovery of Rs. 250 as the price of certain ornaments. The suit has failed in both the lower Courts except as to Rs. 40 as the price of some ornaments.

Sahai Singh plaintiff No. 1 claimed title to a half share in the villages and in the house as the nearest reversioner with the defendant, Surajpal Singh, to the estate of one Bakhtawar Singh, the succession to which opened on the death of *Musammat* Gulab Kuar in November 1922. *Musammat* Gulab Kuar was the widow of Bakhtawar Singh. There were originally two other plaintiffs to the suit, Nageshar Singh and Chhatar Pal Singh. They were the purchasers of a portion of the interests of Sahai Singh plaintiff No. 1. Nageshar Singh died after the decree of the lower Appellate Court. His five sons and Sahai Singh and Chhatarpal Singh are the appellants in this Court.

In proof of the relationship of Sahai Singh plaintiff and Surajpal Singh defendant with Bakhtawar Singh a pedigree was produced. This was admitted. The chief defence to the suit, however, was that under a family custom *Musammat* Gulab Kuar held her husband's estate as an absolute proprietor and that in the exercise of her powers as such she had made a gift of the *zemindari* shares and of the house in favour of the defendant, Surajpal Singh, so far back as the year 1884 and the defendant had been in possession thereof since. Both the Courts below have upheld the plea of custom and dismissed the plaintiffs' suit on that ground in respect of the immoveable property.

Apart from other evidence the defendant relied upon four *wajib-ul-araez* of the four villages in suit in proof of the plea of custom. The entry as to custom in each of these *wajib-ul-araez* is to my mind perfectly clear. It invests the widow of a deceased childless proprietor with complete ownership of the estate of her deceased husband. The words used are "*malik kamil*" and no line of devolution of the estate after the death of the widow is indicated in the entry. The interpretation which the Courts below have placed on the entry and with which I agree is wholly covered by a recent decision of this Court in the case of *Sartaj Koer* v. *Mahadeo Bux* (1) to which I was a party, and I have heard nothing at the hearing of this appeal which would induce me to interpret the present *wajib-ul-araez* in any different sense.

Three of the *wajib-ul-araez* used future tense in respect of the devolution and distribution of the estate of a deceased proprietor. On this ground the learned Pleader for the appellants argues that the entry connotes the wishes of the proprietors to be observed in future and is not a record of a pre existing custom. I am unable to accept this argument as a sound argument. The entry was *prima facie* intended to be a record of custom and not a record of the expression of wishes of the proprietors of the village. The use of the future tense does not in any sense negative the existence of the custom but it only denotes that the pre-existing custom shall be applicable to cases which arise thereafter. The appeal is dismissed with costs.

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(1) 92 Ind. Cas. 657.

S. S. *Appeal dismissed.*
N. H.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 49 OF 1925.

July 29, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Madgavkar.

SEVADASJI CHANDRADASJI—APPELLANT

versus

THE MUNICIPAL CORPORATION FOR THE CITY OF BOMBAY—RESPONDENT.

Bombay High Court Original Side Rules, r. 736—Appeal—Security for costs, additional, when may be demanded.

Additional security for the costs of the respondent may be required from an appellant in an exceptional case where it appears that the appellant has failed to pay the costs incurred by the respondent at the trial, that he is not possessed of sufficient funds out of which the costs can be recovered and that he has not been able to make the necessary deposit with his attorneys for advances for costs.

FACTS.—The plaintiff was the *mohant* of a certain temple in Bombay. The defendant had a tank lying close to the temple filled up in 1906, and began to enclose a wall round the site in 1923. The plaintiff brought a suit claiming the land for the temple and sought for an injunction and damages against defendant. The suit was dismissed by the Trial Court. The plaintiff appealed from the decree, but he being unable to make necessary deposit for advances for costs, his attorneys got themselves discharged. The defendant took out a notice calling upon the plaintiff to show cause why he should not be ordered to give security for costs of the original suit and appeal alleging that the plaintiff was a *sadhu* and a celebate who usually live by begging and have not funds and that they would be unable to realise costs from the defendant. The plaintiff admitted that he was a *sadhu* and a celebate but denied that he had no funds, that he was the manager of a temple which had good income from the offerings of its followers.

Mr. *Kania*, for the Appellant.

Mr. *Coltman*, for the Respondent.

JUDGMENT.—We think that this is an exceptional case such as is contemplated in the judgment in *Ahmad* v. *Shaik Essa* (1).

There will be an order on the motion that the appellant should deposit within one month security to the extent of Rs. 5,000, in addition to the security already deposited for the respondent's costs. Costs will be costs in the appeal.

Z. K. *Order accordingly.*

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(1) 13 B. 458; 13 Ind. Jur. 467; 7 Ind. Dec. (N. S.) 305.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 141 OF 1923.
August 26, 1924.
Present:—Mr. Kinkhede, A. J. C.
MOHAN—PLAINTIFF—APPELLANT
versus
BODHAN—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens—Applicability to surrenders of tenancy holdings—Specific performance—Agreement to surrender—C. P. Tenancy Act (I of 1920), s. 12—Occupancy holding—Transfer to distant heirs—Legality.

A surrender of tenancy holding during the pendency of suit for possession by a purchaser is void against him. An agreement to surrender tenancy land at some future time cannot be specifically enforced. [p. 655, col. 2.]

Under s. 12 of the C. P. Tenancy Act an occupancy tenant is entitled to transfer his holding to any distant heir even during the lifetime of other nearer heirs, provided the transferee is a person to whom the right is likely to go by inheritance to the transferring tenant in the absence of any nearer heirs entitled to succeed under the Tenancy Act. [p. 656, col. 1.]

Appeal against a decision of the Additional District Judge, Raipur, in Civil Appeal No. 205 of 1922, dated the 2nd February 1923.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *S. C. Dutt Choudhary*, for the Respondent.

JUDGMENT.—The plaintiff-appellant purchased an occupancy holding of his cousins Ramdayal and Jadu by a registered sale-deed dated 10th April 1922 (Ex. P-4). Subsequent to this sale the vendor executed a registered surrender-deed dated 10th July 1922 (Ex. D-2) in respect of the field in favour of the defendant-respondent Bodhan *malguzar*, as a prior surrender deed dated 28th February 1921 (Ex. D-1) was unregistered and could not operate as against the land.

Mohan instituted the present suit on 26th February 1922 against the *malguzar* for possession, and obtained a decree in the first Court, on the ground that the unregistered surrender Ex. D-1 was inoperative, and the subsequent surrender though evidenced by a registered-deed Ex. D-2 was made at a time when the surrendering tenants no longer had any title to the land, and that the plaintiff's title on the basis of the registered sale-deed Ex. P-4 held good and was enforceable. The defendant appealed to the District Judge, Raipur, who held that the sale to plaintiff was in contravention of the provisions of s. 12 of the C. P. Tenancy Act of 1920 and that his sale-deed Ex. P-4 was not validly registered and he had no cause of action against the defendant who held possession under a valid surrender dated 10th July 1922 although he had originally taken possession of the land under the unregistered surrender deed dated the 28th February 1921, which being unregistered was invalid in view of the imperative provisions of s. 89 (2) of the new Tenancy Act of 1920. In this view of the case the plaintiff's claim was dismissed with costs. The plaintiff, therefore, appeals contending that his transfer was valid under the new Tenancy Act.

This suit was instituted on 26th February 1922, whereas the *malguzar's* registered surrender-deed is dated 10th July 1922, *i.e.*, it was executed during the pendency of the suit. Such a surrender is void on the principle underlying the doctrine of *lis pendens.* It was of no effect as against the plaintiff for the simple reason that the defendant could not defeat the suit by the acquisition of a new right during its pendency, when his rights were non-existent at the date of the suit. It was contended by the respondent that if his title under Ex. D-2 failed, he could resist the plaintiff's claim and maintain his own possession apart from the title derived under his registered surrender-deed Ex. D-2, on the basis of the unregistered surrender-deed Ex. D-1 as he could treat it as an agreement to surrender and defeat the suit for ejectment. But in view of the rulings in *Seth Umedsingh* v. *Tarachand* (1) and *Balideo* v. *Sania* (2) an agreement to surrender tenancy land at some future time could not be specifically enforced, and this position would be untenable and the surrender-deed Ex. D-1 could not serve as an answer to the suit. The defence based on the surrender-deeds dated 28th February 1921 and 10th July 1922 (Exs. D-1 and D-2), therefore, fails.

The lower Appellate Court was wrong in holding that the plaintiff's sale-deed Ex. P-4 contravened the provisions of s. 12 of the new Tenancy Act of 1920, and that consequently its registration was void under s. 12, cl. (4) thereof. The sole question now left to be considered is whether s. 12 permits a transfer in favour of the next heir only as the lower Appellate Court seems to think, or even a distant heir can become a transferee under sub-cl. (*ii*) of sub-s. (1) of the said section. The words of s. 12 (1) (*ii*) so far as they are relevant to this case are as follows:—

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(1) 9 C. P. L. R. 83.
(2) 15 C. P. L. R. 131 at p. 133.

"An occupancy tenant may transfer... any right in his holding to any......person who, if he survived the tenant without nearer heirs, would inherit his right."

What I have to see is, is plaintiff a person who if he survived the transferring tenants without nearer heirs would inherit their right, and is the transfer in his favour valid and the registration of his sale-deed also valid? If he is not, it follows that the transfer cannot but be in contravention of s. 12 of the Act, and the document would also necessarily contravene the said section.

I may mention here that in s. 6 (1) (*a*) also of the said Act which deals with the absolute occupancy tenant's right to transfer his holding to his possible heirs similar words are to be found. There was a debate in the Legislative Counsel over an amendment moved by the Hon'ble Mr. M. K. Golwalkar to the above clause in s. 6, the amendment was to the following effect:—

"He may transfer to any person who will be entitled to inherit the right in the holding if he then died."

Mr. Golwalkar meant by this amendment to give to the absolute occupancy tenant a right to transfer his holding only to the next heir and not to a distant heir. The Hon'ble R. B. N. K. Kelkar and the Hon'ble Mr. H. A. Crump pointed out that the intention was not to curtail but to enlarge the right of transfer so as to make it possible for the tenant to transfer his holding or any right therein to any person who might be entitled to inherit as an heir under the new Tenancy Act and not to the nearest heirs only. The amendment of Mr. Golwalkar was put to vote and lost. It follows from this that the intention of the Legislature was to clothe an occupancy tenant with a power to transfer his right in the holding to any distant heir even during the lifetime of other nearer heirs provided the transferee is a person to whom the right is likely to go by inheritance to the transferring tenant, in the absence of nearer heirs entitled to succeed under the new Tenancy Act.

These very words used in s. 47 (1) of the old Tenancy Act of 1898 had been interpreted by the Revenue Authorities as upholding the right of a distant heir to apply to be placed in possession of the holding under that section, even when nearer heirs were in existence. In the revenue-case of *Basahu* v. *Nilkanth* (3) a distant heir was placed in possession of the holding as the nearer heirs had not expressed their desire to take up the holding. Even under the new Tenancy Act of 1920, a case has gone up to the Court of the Revenue Member, Central Provinces and Berar, in which these very words as used in s. 12 (1) (*ii*) of the new Tenancy Act had been interpreted as supporting a transfer in favour of a distant heir; the Revenue Member held that it was sufficiently clear from the perusal of the two Acts (Tenancy Acts of 1898 and of 1920), that in using the words 'without nearer heirs' in the said section it was intended to give to an occupancy tenant a wider right of transfer, and that this intention was made absolutely clear by the remarks of the Hon'ble Mr. Crump when the bill was passing through the Council: *Gajanan* v. *Jaideo & Harba* (4). For all these reasons I hold that the view taken by the District Judge that a sale by an occupancy tenant to a distant heir is in contravention of s. 12 (1) (*ii*), C. P. Tenancy Act, is incorrect and that the registration of such a sale-deed does not contravene the provisions of that section merely because the transfer is not in favour of the next heir.

I, therefore, set aside the decree of the lower Appellate Court and restore that of the first Court and direct that the plaintiff's costs be paid by the defendant who will bear his own throughout.

R. L. *Decree set aside.*
G. R. D.

(3) (1916) C. P. Rev. Rulings 32.
(4) (1921) C. P. Rev. Rulings 15.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 403 of 1925.
January 4, 1926.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

TIMMANNA PARMESHWAR BHAT AND OTHERS—APPELLANTS
versus
GOVIND GANPATI BHAT AND OTHERS—RESPONDENTS.

Execution of decree—Decree sent to Collector for

…nd decree—Court's power

…r, to whom a decree has been … a partition of the property, dis… …erms of the decree and divides the pro… …contravention of its terms, the Court is …its rights to refer the case back to Collector to …ition the property in accordance with the terms … the decree.

Bhimangauda Konapgauda Patil v. *Hanmant Rangappa Patil*, 46 Ind. Cas. 10; 20 Bom. L. R. 411; 42 B. 689, distinguished.

A Collector when asked to partition lands in accordance with a decree must follow the terms of the decree and is not at liberty to read the decree together with the judgment so as to effect partition in a manner not contemplated by the decree.

Second appeal from a decision of the District Judge, Kanara, in Appeal No. 44 of 1924.

Mr. *S. V. Palekar*, for the Appellants.

Mr. *S. R. Parulekar*, for the Respondents.

JUDGMENT.

Macleod, C. J.—A partition decree was passed in Suit No. 306 of 1911 on April 8, 1914. By that decree it was declared that plaintiff along with defendants Nos. 4 and 5 was entitled to one-sixth share in the whole of the property at Gokaran, other than the house—site situate in Survey No. 27, to, one sixth share in Survey Nos. 1 and 43 in addition to Survey Nos. 51 and 54, to one acre in Survey No. 52 and two acres and two *gunthas* in Survey No. 36 all situate in the village of Kadoked. The lands were to be got partitioned through the Collector, and the house was to be got partitioned through the Commissioner.

The Collector endeavoured to carry out the terms of the decree, but he seems to have found some difficulty in doing so, with the result that he has not followed the direction in the decree. For instance, he allowed the plaintiffs four acres and twelve *gunthas* in Survey No. 1 in Kadekod, although the whole area was five acres and one *guntha* and plaintiffs were held to be entitled to one-sixth only.

We can only gather that the Collector was reading the decree together with the judgment, and thought that the judgment was right and that the decree was wrong.

The present appellants, defendants Nos. 28 to 30 in the Trial Court raised objections, and asked the Subordinate Judge to re-open the partition. An objection was taken that once the Collector had effected a partition the Court could not send the case back to him for re-partition. But it seems to me that the case referred to, *Bhimangauda Konapgauda Patil* v. *Hanmant Rangappa Patil* (1) merely decided that if the Collector carries out the terms of the decree and divides the property, a party who is not satisfied with the division cannot ask the Court to interfere with the partition effected by the Collector. But if the Collector disregards the terms of the decree and divides the property in contravention of its terms, clearly the Court is entitled to interfere. We think then that the Subordinate Judge was right in referring the case back to the Collector to partition the property in accordance with the terms of the decree. It may be that the decree does not conform to the judgment. If that is the case, it is very strange that although the decree was passed in 1914, and although an appeal was filed against that decree, it should not have been discovered until the present time that corrections were required in the decree. At present we have no application before us to amend the decree, and we can only lay it down as a correct principle that the Collector, when asked to partition lands in accordance with a decree, must follow the terms of the decree, and he is not at liberty to read the decree together with judgment so that he partitions the lands in a manner which is not contemplated by the decree We allow the appeal and restore the decision of the Subordinate Judge with costs throughout.

Coyajee, J.—I agree.

R. L. *Appeal allowed.*

(1) 46 Ind. Cas. 10; 20 Bom. L. R. 411; 42 B. 689.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 2625 OF 1923.

July 20, 1925.

Present:—Mr. Justice Page.

RAMKUMAR SEWCHAND ROY—

PLAINTIFF

versus

NANURAM PODDAR—DEFENDANT.

Limitation Act (IX of 1908), s. 20—Part-payment—Payment sent through messenger by agent of debtor—Person making payment, who is.

Where an agent of the debtor sends a sum of money through a messenger to the creditor with a slip signed by himself asking that the sum be credited to the debtor, the payment made is by the agent within the meaning of s. 20, Limitation Act. [p. 658, col. 2.]

Messrs. *S.N. Banerjee* and *R.N. Banerjee*, for the Plaintiff.

Mr. *B. Basu*, for the Defendant.

JUDGMENT.—This is a suit brought to recover money lent. The *munim gomastha* of the plaintiff firm gave evidence in support of the claim, but no evidence was adduced by the defendant in rebuttal. I am satisfied that the sums claimed as having been lent by the plaintiffs to the defendant were lent as alleged. The claim, however, is barred by limitation unless a payment of Rs. 1,000 alleged to have been made on behalf of the defendant on the 3rd October 1921 amounts to a part-payment within s. 20 of the Limitation Act, 1908, of the moneys due by the defendant to the plaintiffs in respect of the sums which had been lent. The *munim gomastha* of the plaintiffs stated that one Naitram Jajodia, who was a friend and purported to act as the agent of the defendant, sent this sum of Rs. 1,000 by a messenger who handed the money to the plaintiffs, and at the same time delivered to the plaintiffs a slip in the following form:—

"To Ramkumar Sewchand Roy,

"Please accept compliments of Naitramjee. I send one piece note for Rs. 1,000 through my man. Please credit same to Nanuramjee Poddar, Miti Aswin Sudi, 2nd, *Sambat* 1978."

The *munim gomastha* further stated that this slip was in the handwriting of Naitram and that after the money had been paid he had several interviews with the defendant who enquired on each occasion if the Rs. 1,000 which he had sent had been paid and asked for a statement showing the state of the account for money lent to him by the plaintiffs. Having regard to the evidence I come to the conclusion that this sum of Rs. 1,000 was paid by Naitram on behalf of Nanuram to be placed to the credit of the debt for moneys lent to, and owing by, the defendant, and that Naitram was duly authorised by the defendant to make this payment. In these circumstances if the slip on which the fact of payment is stated in the handwriting of Naitram can be said to be in the handwriting of "the person making the payment", then, in my opinion, the plaintiffs' suit is not barred. I am clearly of opinion that Naitram was the person who made the payment within s. 20 of the Limitation Act. The intention of the Legislature in enacting s. 20 of the Limitation Act appears to have been that a debtor should not be bound by the payment of part of the debt unless in substance, though perhaps made the payment has stated in that such payment had been made. Now, who "makes the payment" within s. 20? Is it the man who physically hands over the money, which apparently was the view held by the Bombay High Court in *Joshi Bhaishankar* v. *Bai Parvati* (1)? In my opinion that need not necessarily be the case. For instance, where a duly authorised agent sends a cheque or notes by post the person actually making the payment and physically handing over the notes or the cheque is the postman, or again, the money may have been sent by a duly authorised agent through peon, and in that case it is the peon who physically hands over the money. But, in my opinion, neither the peon nor the postman "makes the payment" within s. 20 of the Limitation Act, for the postman or the peon is merely a conduit pipe through which the money passes to the creditor, the duly authorised agent who sent the notes or cheque being regarded as the person who made the payment. That appears to me to be the clear meaning of s. 20 of the Limitation Act; *Sarajubala Debi* v. *Saradanath Bhattacharjee* (2).

In my opinion, therefore, the suit is not barred by limitation, and there will be a decree for the plaintiffs for Rs. 3,172-3-0. Interest on judgment at 6 per cent. Costs on scale No. 2.

R. L. *Suit decreed.*

(1) 26 B. 246; 3 Bom. L. R. 834.
(2) 50 Ind. Cas. 862; 23 C. W. N. 336.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 627 OF 1924.

September 18, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

BHAGU GOVINDA PATEL—DEFENDANT—APPELLANT

versus

NARAYAN TUKARAM SURVASHI—PLAINTIFF—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 63A—Sale by agriculturist through agent—Requirements of law.

An alienation by an agriculturist must comply with the provisions of s. 63-A, Dekkhan Agriculturists' Relief Act, whether the alienation is effected by him personally or through a person holding his power-of-attorney. [p. 659, col. 2.]

Second appeal from a decision of the Assistant Judge, A. P., at Satara, in Appeal No. 439 of 1923, reversing that of the Subordinate Judge at Islampur, in Civil Suit No. 255 of 1922.

Mr. *A. G. Desai*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to recover possession of the plaint property alleging that it belonged to one Dadu Govinda who took Rs. 500 from the plaintiff and sold it to him on June 12, 1920. Plaintiff alleged that he got possession according to the terms of the deed but defendant thereafter wrongfully deprived him of possession. With regard to possession both Courts have found that the plaintiff could not get possession, although he got a sale-deed in his favour. Being out of possession then he must rely upon the title which he sets up under his sale-deed.

Now Dadu Govinda did not execute the sale-deed himself. At that time he had been found guilty of the offence of murder and had been sentenced to death. In order to raise money to enable him to appeal against the sentence of death to the High Court, he, while in Satara Jail, gave a power-of attorney to his mother to sell his property. That power-of-attorney was cancelled and he gave a fresh power-of-attorney to one Tukaram while he was in Yervada Jail. This power authorised Tukaram to sell the plaint land, if required. Accordingly, Tukaram sold the land to plaintiff for Rs. 500. Eventually the sentence of death was commuted by the High Court to transportation for life.

The defendant, the mother of the convict, challenges the sale-deed as being invalid under ss. 57 and 63-A of the Dekkhan Agriculturists' Relief Act. It does not appear that s. 57 has any application, but under s. 63A :—

"When an agriculturist intends to execute any instrument required by s. 17 of the Indian Registration Act, 1877, (it should now be 1908) to be registered under that Act, he shall appear before the Sub-Registrar within whose sub-district the whole or some portion of the property to which the instrument is to relate is situate, and the Sub-Registrar shall write the instrument, or cause it to be written, and require it to be executed, and attest it and, if the executant is unable to read the instrument, cause it to be further attested, and otherwise act in accordance with the procedure prescribed for a Village-Registrar by ss. 57 and 59 of this Act, and shall then register the instrument in accordance with the provisions of the Indian Registration Act, 1877."

By sub-cl. (2) :—

"An instrument to which sub-s. (1) applies shall not be effectual for any purpose referred to in s. 49 of the Act last-mentioned unless it has been written, executed and attested in the manner provided in that sub-section."

The Trial Court held that by virtue of s. 63A an agriculturist, who wants to execute a document which requires registration, has himself to appear before the Sub-Registrar. He is not allowed to execute a document through an agent. Accordingly he dismissed the plaintiff's suit.

In appeal the learned District Judge set aside that order and decreed the plaintiff's claim. It is difficult to follow the somewhat involved argument of the Judge, but it seems to me that s. 63A was enacted in order to provide protection to agriculturists intending to execute an instrument required by s. 17 of the Indian Registration Act to be registered. If it had been intended that this section should not apply in the case of documents executed by an agriculturist through an attorney, then it would have been so stated in the section. It must be remembered that when a party executes a power-of-attorney enabling the attorney to deal with his property and execute conveyances on his behalf, he is still the executing party. Section 63A clearly applies to agriculturists who intend to sell or mortgage their properties, and the fact that an agriculturist gives a power-of-attorney to another person to execute a conveyance or mortgage on his behalf cannot prevent the application of the section.

A very simple test will show that this reading of the section is correct. An agriculturist owning property and intending to sell or mortgage it might give a power-of-attorney to a non-agriculturist to execute a sale-deed or a mortgage on his behalf. Then, if the argument of the respondent were to prevail, the agriculturist's attorney would be able to execute the document on his behalf without complying with the provisions of s. 63A, although the agriculturist is in law the executing party.

I think, therefore, that the plaintiff cannot rely on his sale-deed as entitling him to possession of the property, but if the defendant resists the plaintiff's claim to possession on this ground, she is bound in equity to return the money which was paid by the plaintiff when he obtained the sale-deed.

There will be a decree, therefore, in favour of the plaintiff for Rs. 500 with interest at six per cent. from June 12, 1920, to date. There will be no order as to costs. Plaintiff to be given a charge on the property to secure what is payable to him under the decree.

Coyajee, J.—I agree.

R. L. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2373 OF 1925.

February 20, 1926.

Present:—Mr. Justice Addison.

CHIRANJI LAL AND OTHERS—OBJECTORS—APPELLANTS

versus

MUNSHI AND ANOTHER—INSOLVENTS AND OTHERS—CREDITOR AND VENDEE—RESPONDENTS.

Insolvency—Property sold by Receiver as belonging to insolvent—Claim to such property by third person dismissed—Appeal—Receiver necessary party.

In an appeal by a claimant whose claim with regard to a property sold by the Receiver as belonging to an insolvent has been dismissed, the Receiver is a necessary party.

Miscellaneous first appeal from an order of the District Judge, Karnal, dated the 4th July 1925.

Mr. *Sundar Das*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—This appeal is closely connected with Appeal No. 2374 of 1925. In this case a house and shop were sold by the Receiver in insolvency as belonging to the insolvents, Munshi and *Musammat* Sardhi. Certain collaterals, Chiranji Lal, etc., came before the District Judge and claimed that the property was theirs, having been purchased by them from one Tirkha *Jat*. They relied upon an entry in a *bahi* which was not produced. The District Judge disbelieved the evidence and dismissed the application. Against this decision Chiranji Lal, etc., have appealed and have joined as respondents the two insolvents, Rughnath, a creditor and the auction purchaser, and Girdhari one of the other creditors. The Official Receiver and the other creditors have not been made parties. For reasons given in my judgment in the connected suit the appeal must be dismissed with costs as incompetent as the Official Receiver who represents the insolvents' estate has not been made a party to it. Without him there can be no final adjudication of the matter as the insolvents' estate is vested in him and the money is with him.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.

CIVIL REVISIONAL APPLICATION No. 309 OF 1925.

December 8, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

GANGADHAR BAPURAO GADRE—APPLICANT

versus

HUBLI MUNICIPALITY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Bombay District Municipal Act (III of 1901), s. 22—Election petition—District Judge acting under Municipal Act, whether Court—Revision.

A District Judge acting under s. 22, Bombay District Municipal Act, is not a Court within the meaning of the word in s. 115, C. P. C. Therefore, an order by the District Judge refusing to entertain an objection petition in election on the ground of improper presentation is not open to revision by the High Court. [p. 661, col. 1.]

Revision application against an order of the Assistant Judge, Dharwar.

Messrs. *Nilkanth Atmaram* and *R. A. Jahagirdar*, for the Applicant.

JUDGMENT.—The petitioner filed a petition in the District Court at Dharwar praying for a declaration that the election of opponents Nos. 1 to 4 as Councillors of the Hubli Municipality, was illegal and void on account of the corrupt practices described in the petition and further that he and opponent No. 5 should be declared as validly elected members of the Hubli Municipality. Opponents Nos. 1, 2 and 4, resisted the application on the grounds set out in their written statement. They denied the corrupt practices attributed to them, and contended that the petition, not having been legally and properly presented to the District Judge, was barred by time.

The first issue was whether the petition was or was not legally and properly presented to the District Judge within the prescribed time. The petition was as a matter of fact presented to the Clerk of the Court of the District Judge within ten days of the declaration of the results of the elections for the Hubli Municipality. The question then was, whether such a presentation amounted in the eye of the law to its presentation to the District Judge, as required by cl. (1) of s. 22 of the Bombay District Municipal Act III of 1901.

The Assistant Judge held that the representation of the application to the clerk of the Court of the District Judge was not a presentation of the application to the District Judge, and accordingly the application was rejected.

The petitioner now applies to this Court, under s. 115 of the C. P. C., to set aside the order of the Assistant Judge, and he is met with the objection that the District Judge acting under s. 22 of the Bombay District Municipal Act III of 1901, as further amended, was not a Court within the meaning of the word in s. 115. A similar point arose in *Balaji Sakharam* v. *Merwanji Nowroji* (1) under the Bombay District Municipal Act II of 1884, s. 23, and it was held by this Court that the District Judge was not a Court within the meaning of s. 622 of the Code of 1882 so that this Court had no jurisdiction to revise the order refusing to set aside an election.

But it has been urged before us, as a ground for admitting this application, that in this case as the District Judge, or the Assistant Judge acting for the District Judge, has refused to entertain the application on the ground stated in the judgment, that enables this Court to interfere. But the District Judge remains a *persona designata* whether he hears the petition and makes an order thereon, or whether he refuses to entertain the application, because it has not been presented to him in time.

If it seems desirable that the High Court should have powers of superintendence over the Distrtict Judge acting under s. 22 of the Bombay District Municipal Act III of 1901, then that is a matter for the Legislature to consider. As the law stands at present we cannot entertain this application.

R. L. *Appeal dismissed.*

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(1) 21 B. 279; 11 Ind. Dec. (N. S.) 189.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2267 OF 1923.

December 3, 1925.

Present :—Mr. Justice Cuming and Mr Justice B. B. Ghose.

HARI MONDAL AND OTHERS—DEFENDANTS —APPELLANTS

versus

DURJODHON MANDAL AND OTHERS— *Pro forma* DEFENDANTS—RESPONDENTS.

Estoppel—Kabuliyat acted upon by lessors—Denial of lease by persons claiming under lessors.

Where a *kabuliyat* has been accepted and acted upon by the lessors, third parties claiming under the lessors are, equally with the lessors, estopped from denying the validity of the lease. [p. 662, col. 1.]

Appeal against a decree of the Subordinate Judge, Jessore, dated the 21st of May 1923, reversing that of the Munsif, First Court of that place, dated the 29th of September 1921.

Babu *Makunda Behari Mullick*, for the Appellants.

Babu *Bhudhar Halder*, for the Respondents.

JUDGMENT.—In the suit out of which this appeal has arisen the plaintiffs sued for recovery of *khas* possession of some 4 *bighas* of land from the possession of the defendants Nos. 1 to 4. Their case was that they executed a *kabuliyat* in favour of defendants Nos. 6 to 9 in July 1919 and this *kabuliyat* was accepted by the landlords defendants Nos. 6 to 9 and they were put in possession and that after being in possession for one year they were evicted by defendants Nos. 1 to 9. Defendants Nos. 1 to 4 contested the suit contending that this land formed part of their ancestral *jama* held under defendants Nos. 6 to 9. The first Court held that the lease to the plaintiffs contravened the provisions of s. 85 of the Bengal Tenancy Act, as he held that defendants Nos. 6 to 9 were occupancy *raiyats*. He, therefore, held the lease void and dismissed the suit. The plaintiffs appealed to the District Court and the learned Subordinate Judge held that the defendants Nos. 1 to 4 claiming as they did under the defendants Nos. 6 to 9 were estopped from pleading that the lease granted by defendants Nos. 6 to 9 contravened the provisions of s. 85 of the Bengal Tenancy Act. He also held that defendants Nos. 1 to 4 had obtained no title to this land by the *kabuliyat* of 1305. He also found that so far as the share of defendant No. 5

was concerned, namely, 2 annas and 8 pies this share had not been leased out to the plaintiffs. He, therefore, granted the plaintiffs a decree to the extent of 13 annas and 4 pies share of the land.

Defendants Nos. 1 to 4 have appealed to this Court and their contention is that the *kabuliyat* executed by the plaintiffs is not to be used in their favour and, therefore, this *kabuliyat* does not estop the lessors of the plaintiffs from denying their title. Their argument being that the *kabuliyat* was executed by the plaintiffs and not by their lessors and that, therefore, the statement contained in it does not bind the lessors. The learned Subordinate Judge has found that the lessors accepted and acted upon the *kabuliyat* and hence they would be clearly bound by the statement contained in it. If, therefore, the lessors of the plaintiffs could not be heard to say that the lease granted to the plaintiffs contravenes the provisions of s. 85 of the Bengal Tenancy Act it would not be open to defendants Nos. 1 to 4 who claim under the defendants Nos. 6 to 9 to question the validity of the lease granted by defendants Nos. 6 to 9. They would be equally estopped with defendants Nos. 6 to 9 the lessors of the plaintiffs claiming as they do under these defendants from denying the validity of the lease.

The result is the appeal must fail and is dismissed with costs.

R. L. *Appeal dismissed*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 271 OF 1924.
September 18, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

KONDI RAMJI BHOSLE—PLAINTIFF—APPELLANT
versus
VITHALRAO LAXMANRAO—DEFENDANT—RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), ss. 3 (16), 68, 83, 217—Alienated village, introduction of Survey Settlement in—Tenant's rights, variation in—Liability to enhanced rent.

Introduction of Survey Settlement into an alienated village does not confer on an ordinary tenant the rights which belong to an "occupant" in an unalienated village. Such a tenant, therefore, is not immune from enhancement of rent.

Second appeal from a decision of the District Judge, Satara, in Appeal No. 32 of 1923, confirming a decree of the Subordinate Judge at Wai, in Civil Suit No. 446 of 1922.

Mr. *D. C. Virkar*, for the Appellant.

Mr. *K. N. Koyajee*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff as an *inamdar* brought a suit No. 36 of 1918 in the Court of the Second Class Subordinate Judge at Wai for possession against the defendant on the ground that he was a yearly tenant and was liable to be evicted on being given a proper notice. The final decision of the High Court in that case was to the effect that defendant was a permanent tenant under s. 83 of the Bombay Land Revenue Code, and the point as to enhancement of rent was then left untouched as it was not originally claimed in the plaint.

The plaintiff has now brought this suit for enhancement of the rent at the rate of Rs. 125 a year together with Rs. 22 as unpaid rent for two years before suit. It was urged that the notice by the plaintiff to the defendant to enhance the rent was not according to law, but the Judge held that the notice was legal and proper. He also found that having regard to the usage and custom prevailing in the locality the plaintiff was entitled to ask for the enhancement of rent. And on a consideration of the evidence he directed the defendant to pay enhanced rent at the rate of Rs. 25 a year as well as the rent due for the previous two years before suit. It appears to have been urged before the Judge that the defendant was entitled to the rights of an occupant in an alienated village by virtue of s. 217 of the Bombay Land Revenue Code. It is not easy to follow the argument which is constantly being put forward in the Court.

The same point was urged in appeal before the District Judge who, after referring to the amendment in 1913 of s. 217 of the Land Revenue Code, said:—

"Since the amendment one cannot rely on these decisions [*Nanabhai Bajibhai* v. *Collector of Kaira* (1) and *Dadoo Bhaoo* v. *Dinkar Vishnu Aphte* (2)] because the words 'holders of land' have been substituted for 'occupants' The result of the amendment is that holders in general have the same rights in alienated villages after a settlement as they have in unalienated villages. A holder may be a mere tenant. If so, he has merely a tenant's rights. It is admitted that the present appellant is a tenant, the origin of whose tenancy owing to antiquity cannot be determined. He is not the *khatedar.* He has rightly been held not to be an 'occupant'."

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(1) 7 Ind. Cas. 949; 34 B. 686; 12 Bom. L. R. 707.
(2) 47 Ind. Cas. 745; 43 B. 77; 20 Bom. L. R. 887.

We think that this reasoning is correct. The defendant was a holder of land, for under s. 3 (11) to be a "holder" of land means to be lawfully in possession of land, whether such possession is actual or not. Consequently, when the Survey Settlement was introduced into the suit village, the defendant had the same rights and was affected by the same responsibilities in respect of the lands in his occupation as holders of land in unalienated villages. If the village had been unalienated he would still have been a tenant and not an occupant. Under s. 3 (16) of the Act an occupant means a holder in actual possession of unalienated land, other than a tenant. It cannot be suggested that the defendant was an occupant. He was a tenant with neither fixity of tenure nor fixity of rent, until the Court decided in the suit I have referred to that he was entitled to the presumption arising under s. 83 of the Bombay Land Revenue Code. The decree in that suit was his title, but the title so granted was subject to the right of the landlord if he had the same either by virtue of agreement, usage or otherwise; to enhance the rent payable or services renderable by the tenant. So that the defendant cannot rely upon the provisions of s. 217 as protecting him from any attempt the landlord may make to prove that he is entitled to enhance the rent.

We, therefore, dismiss the appeal with costs.

Cross-objections also dismissed with costs.

Coyajee, J.—In this case the Survey Settlement was first introduced into this village with the consent of the *inamdar* in the year 1901. And it is found by both the Courts that the land in suit has ever since then stood in the *khata* not of the defendant but of the *inamdar,* and also that during all these years the defendant has not been paying assessment, but rent slightly in excess of the assessment fixed at the survey.

The defendant relies on the provisions of s. 217 of the Bombay Land Revenue Code, and contends that by reason of the introduction of the Survey Settlement into this village, he has acquired, in respect of the lands in his occupation, all the rights which belong to holders of land in unalienated villages. It may be conceded that the defendant is a holder of lands in an alienated village to which the Survey Settlement extends; for, "to be a holder of land means to be lawfully in possession of land, whether such possession is actual or not" (s. 3, cl. 11, Land Revenue Code). In order to ascertain what rights belong to holders of land in unalienated villages, it is necessary to refer to s. 68, read with s. 3, cl. 16, of the Land Revenue Code. The material portion of s. 68 runs thus: "An occupant is entitled to the use and occupation of his land for the period, if any, to which his tenure is limited, or if the period is unlimited, or a Survey Settlement has been extended to the land, in perpetuity, conditionally on the payment of the amounts due on account of the land revenue for the same, according to the provisions of this Act or of any rules made under this Act." The defendant claims that by reason of the introduction of the Survey Settlement into this village he has become entitled to hold the lands which are in his possession in perpetuity on the payment of the assessment fixed at the Survey Settlement. But these rights belong to an "occupant." Section 3, cl. 16, defines an "occupant" as meaning "a holder in actual possession of unalienated land, other than a tenant; provided that where the holder in actual possession is a tenant, the landlord or superior landlord, as the case may be, shall be deemed to be the occupant." According to the findings of the lower Courts the defendant is in possession of the suit land as a tenant of the plaintiff. He is, therefore, not an occupant within the meaning of that word in s. 68. The learned Pleader on behalf of the appellant has invited our attention to the decision of this Court in *Nanabhai Bajibhai* v. *Collector of Kaira* (1). But, as pointed out by the learned District Judge, after the date of that decision s. 217 was amended, and the words "holders of land" were substituted for the original word "occupants" by Bombay Act IV of 1913. That being so, it is clear that the introduction of the Survey Settlement into this village does not confer on the appellant the rights which belong to an "occupant" in an unalienated village.

For these reasons I agree in affirming the decree of the lower Court.

R. L. *Decree confirmed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 44 OF 1923.
January 27, 1925.
Present:—Mr. Kennedy, J. C., and
Mr. Rupchand Bilaram, A. J. C.
SHAKARKHAN AND ANOTHER—
APPELLANTS
versus
LAKHIMAL—RESPONDENT.

Hindu Law—Joint family—Debts—Money lent by manager—Discharge, who may give, after manager's death—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2—Date for determination of status as agriculturist.

If money is lent by a manager of joint Hindu family in his capacity as a manager, a valid discharge for payment after his death can be given only by a person representing him as manager of such family. But if the money was lent by the manager in his personal capacity the discharge can be given by a person holding the heirship cetrificate.

Under s. 2, Dekkhan Agriculturists' Relief Act, the term 'agriculturist' applies to a person who is an agriculturist at the time of the transaction and not at the time of suit.

Second appeal against a decree of the Joint Judge, Sukkur.

JUDGMENT.—This is an appeal by one Shakarkhan and his brother against the finding of the learned Joint Judge of Sukkur dismissing an appeal against the order of the learned Joint Sub-Judge, Shikarpur. The suit was a mortgage suit.

In the second appeal only two points are raised: First, that the Court should have held that the appellants were agriculturists and applied the ordinary procedure under the Dekkhan Agriculturists' Relief Act in respect of the mortgage; and secondly, that credit should be given to the appellants in respect of a certain sum of money alleged by them to have been paid to the children of the original mortgagee.

As regards the first point there seems to be perhaps a certain amount of confusion in the mind of the lower Appellate Court. But it is to be observed that the appellants themselves never raised the point that they were at the time of transaction agriculturists. It is to be noted that under s. 2 of the Dekkhan Agriculturists' Relief Act the term "agriculturists" included a person who was an agriculturist at the time of the transaction and it is obvious that this must be so. But, whatever the status of the defendants might have been at the time of action, it seems clear that they were never really agriculturists. They are Pathans by caste and were employed on salaried labour and it is on that that all along their principal maintenance has depended. We are not sure that we should be competent to go into the question of their status because it does not appear that the point was really absent from the mind of the Joint Judge. It is true that his judgment chiefly devotes itself to the consideration of the status of the appellants at the time of suit and thereafter but he had accepted and ratified the finding of the Joint Sub-Judge as to the status at the time of liability. We do not think, therefore, that these people are entitled to be treated as agriculturists.

The second point also is one which cannot avail the appellants. They had borrowed this money from Kodumal and they must pay it back either to Kodumal or some person who has stepped into Kodumal's shoes. Kodumal being dead, they could only pay to the person entitled to recover moneys from the estate of Kodumal or for the family which Kodumal represented. If the money loaned was private property of Kodumal they should have paid the person possessing an heirship certificate in respect of the estate of Kodumal. If the property was joint family property as it undoubtedly was, they should have paid not to the sons of Kodumal but the person who was then representing Kodumal in his capacity as manager of such joint family. If the joint family were so torn by faction that it had no manager they should have not paid at all. In neither case has the alleged payment to the two sons discharged them from their liability to pay the mortgage amount to the person who is really entitled to payment, that is the joint family by its manager.

The appeal is dismissed with costs.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 5 OF 1924.

September 30, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Kincaid.

BHIKUBAI YESHWANTRAO MEHER— PLAINTIFF—APPELLANT

versus

HARIBA SAWALARAM MEHER— DEFENDANTS—RESPONDENTS.

Hindu Law — Widow — Maintenance—Unchastity, effect of—Reversion to moral life, effect of—Bare maintenance.

The right of a Hindu widow to maintenance is dependent upon her continuing to be chaste. In case her incontinence is proved she forfeits that right. [p. 667, col. 1.]

Where a Hindu widow, who has been unchaste, is proved to have given up the life of unchastity she is entitled to bare maintenance which should ordinarily be fixed by a rough and ready reference to the general condition of the family as disclosed in the evidence. The amount of maintenance should be the bare minimum which is necessary in order to enable the widow to live. [p. 670, cols. 1 & 2.]

[Case-law and texts discussed.]

FACTS.—On the death of her husband, a man owning a considerable amount of property, *Musammat* Bhikubai, the plaintiff, entered into an agreement with her husband's collaterals whereby the latter undertook to pay her Rs. 100 per mensem and provide her free quarters on the condition that she led a chaste life, and would neither live separately nor adopt anyone.

The widow, however, began to live an impure life with one Shankar, and although as alleged by her, she afterwards reverted back to a purer life since the time her paramour married another woman, she adopted one Tuka Ram. A few months after the adoption, the defendants stopped payments of the monthly maintenance allowance.

She filed a suit to recover maintenance at an enhanced rate and for arrears at the same rate.

Mr. *G. N. Thakor*, (with him Messrs. *Munshi* and *S. G. Joshi*), for the Appellant.

Mr. *M. C. Setalvad*, (with him Messrs. *Kanga* and *B. J. Desai*), for the Respondents.

JUDGMENT.

Shah, A. C. J.—[His Lordship, holding that the illicit connection between the plaintiff and Shankar did not amount to a marriage, as contended by the defendants, went on:—]

The next question of fact to be determined is whether the finding that she has reverted to a moral life is correct. Its correctness has been challenged by Mr. Setalvad. It appears from the evidence that Shankar married one Jijibai at Dehu in December 1918. The case for the plaintiff is that ever since that marriage there is nothing to show that Shankar has been living on terms of improper intimacy with Bhikubai. It appears from the various receipts of money-orders sent by the defendant to Bhuikubai at Dehu and Junnar that Shankar signed for Bhikubai, and that his association with her has not ceased. There are other letters in the case, which it is not necessary to refer to, that the apparent association of Shankar with Bhikubai, who has been living apparently since 1918 at Junnar and Dehu, has continued. When once we find that the relations between Shankar and Bhikubai had reached the stage of improper familiarity, and when we find that the apparent association of Shankar with Bhikubai has not ceased, it is not easy to draw the inference that after his marriage with Jijibai, the improper connection with Bhikubai has ceased. At the same time we have the evidence of Jijibai which goes to show that such improper relations did not exist—at any rate not to her knowledge. While I am prepared to give due weight to the evidence of Jijibai, speaking for myself I do not find it easy to hold it proved that the improper relations between Bhikubai and Shankar have ceased. The learned Trial Judge was prepared to draw that inference in favour of Bhikubai, and my learned brother is also prepared to draw that inference in her favour on the evidence of Jijibai.

As I consider that that inference is a reasonably possible inference under the circumstances, in spite of the difficulty which I feel in accepting it, I am not prepared to differ from the conclusion that for some time prior to the date of the suit Bhikubai had given up her life of incontinence.

On these facts, the question arises whether Bhikubai has forfeited her claim to maintenance altogether, or whether she is entitled to bare maintenance, as the learned Trial Judge has held. It is argued on her behalf that in view of the observations of Chandavarkar, J., in *Parami Ramayya* v. *Mahadevi* (1) she is entitled to full maintenance as a widow living a chaste life would get, as she has given up the life of incontinence.

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(1) 5 Ind. Cas. 960; 34 B. 278; 12 Bom. L. R. 196.

I shall, therefore, first deal with the question as to whether she has lost her right to maintenance generally speaking, and shall deal with the question of her right to bare maintenance separately.

It has been argued on behalf of the respondents that in view of the terms of the agreement, Ex. A, she has lost all right to maintenance. The material clause in the agreement is as follows:

" By the aforesaid deed or agreement I Bhikubai widow of Yeshwantrao Sawlaram pass in writing as follows. I will always live with my mother-in-law Jenabai wife of Sawlaram Dhondiba Meher and will always lead a moral life and behave according to the duties of female (*i. e.*) lead a virtuous life. If I fail to lead a moral life and to behave according to the duties of female I shall not claim the right of food and clothing (*i. e.* maintenance) referred to above; similarly I will not live independently. (1) (*i. e.* by myself alone)."

It is urged that as her incontinence is proved, under this clause she has lost all right to maintenance. It is true that she has lost the right to maintenance referred to in the agreement. But I do not think that this clause can be read as meaning that if she has any right under the law in spite of incontinence, that right is affected. The question of her right to maintenance must be determined according to Hindu Law on the facts found, and it cannot be held to be affected in any way by this clause in the agreement, as contended on behalf of the respondents.

As regards the consequences of unchastity on the right of a Hindu widow to maintenance, there can be no doubt. The text of Narada, which is referred to in Ch. 2, s. 1, pl. 7, of the Mitakshara, makes the position clear. I shall refer to the translation of this text, as given in Gharpure's Translation of the Mitakshara, Vyavahara Adhyaya, page 230:—

"Among brothers, if any one die without issue, or enter a religious order, let the rest of the brothers divide his property excepting the *stridhana* (of his wife). They should make provision for the maintenance of his wives till their death, provided they preserve unsullied the bed of their Lord. They may, however, cut it off in the case of those who behave otherwise."

The original word for "cut off" or "resume" used in other translations is * * (Achchindyuh). This word clearly indicates that they may cut off or forfeit if the widow does not lead a chaste life, or, to use the words in the translation, "if the widow does not preserve unsullied the bed of her lord." Yajnavalkya's Verse No. 142 and Vijnanesvara's commentary thereon as translated in *plactia* 14 and 15 in Ch. 2, s. 10, of Colebrooke's Translation of the Mitakshara, which need not be quoted here would show that the sonless wives of disqualified heirs were to be maintained so long as they conducted themselves aright, but were liable to be expelled if they were unchaste. This is consistent with Narada's view as to the obligation on the part of a widow to lead a chaste life in order to be entitled to maintenance.

In the Vyavahara Mayukha also this text of Narada is quoted with approval (see page 78, Mandlik's Hindu Law).

The decisions of this Court are consistent on this point. In *Valu* v. *Ganga* (2) the question has been considered and the conclusion reached is that she forfeits her right to maintenance.

In the earlier decision in *Honamma* v. *Timmannabhat* (3) which was dissented from in the above case, it was observed that "the observations [in *Rajah Pirthee Singh* v. *Ranee Raj Kower* (4)] as to loss of maintenance in consequence of unchastity,...referred to maintenance as a *dives*, not to a starving maintenance, as a bare maintenance has been sometime denominated." (page 561*). In *Yashvantrav* v. *Kashibai* (5) Nanabhai Haridas, J., who delivered the judgment of the Court, sitting with Sargent, C. J., referred to this rule in these words: " The wives and widows of disqualified coparceners are entitled to maintenance, but only on condition of their continuing chaste," 1 Strange 175; 2 Cole. Dig, 438 (page 28†).

The point for decision in that case was different, but I refer to this statement as showing that Nanabhai Haridas, J., who was a party to the decision in *Honamma* v. *Timmannabhat* (3) described the right of maintenance of widows as being subject to the condition of their continuing to be chaste.

(2) 7 B. 84; 7 Ind. Jur. 261; 4 Ind. Dec. (N. s.) 56.

(3) 1 B. 559; 1 Ind. Dec. (N. s.) 370.

(4) 20 W. R. 21; 12 B. L. R. 238; I. A. Sup. 203; 3 Sar. P. C. J. 259.

(5) 12 B. 26; 6 Ind. Dec. (N. s.) 502.

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*Page of 1 B.—[*Ed.*]

†Page of 12 B.—[*Ed.*]

Therefore, it is clear that if the incontinence of Bhikubai is proved, under this rule she would forfeit her right to be maintained by the co-parceners of her deceased husband. Mr. Thakor, however, has relied upon the observations of Chandavarkar, J., in *Parami Ramayya* v. *Mahadevi* (1). I do not think that Chandavarkar, J., meant to question in any sense the well-settled rule that the right of the widow to maintenance was dependent upon her continuing to be chaste, and that in case her incontinence was proved, she forfeited that right. The opinion of Apararka, referred to by Chandavarkar, J., cannot be read as modifying this view: and even if it means what Mr. Thakor contends it does mean, it cannot be accepted as against the opinions of Vijnanesvara and Nilakantha on this point and the uniform current of decisions. The opinion of Madhavacharya, referred to by Chandavarkar, J., does not in any sense support the contention that even an incontinent widow may retain her right to full maintenance if she has reverted to the path of morality. I am quite clear that the observations of Chandavarkar, J., are directed to the point of bare maintenance, as to which there was an apparent conflict between *Honamma* v, *Timmannabhat* (3) and *Valu* v. *Ganga* (2). The lower Court was, therefore, right in disallowing the plaintiff's claim for maintenance generally. She claimed in this suit increased maintenance in spite of the agreement which was entered into between her and her husband's relations. But, on account of her proved incontinence, that right is forfeited, and the defendants are entitled to refuse to maintain her.

The next question is whether she is entitled even to bare maintenance in view of her having given up the path of unchastity. On this point apparently there is a conflict between the two decisions of this Court to which I have referred. With reference to this apparent conflict Chandavarkar, J., has examined the texts of Hindu Law, and has expressed the opinion that those texts would seem to support the decision of this Court in *Honamma* v. *Timmannabhat* (3). It is quite true that those observations were not essential for the decision of the case. As the point was argued in that case he examined the texts and expressed his opinion. The question that we have to consider is whether there is really any conflict between the two decisions, and if there is no necessary conflict, as to whether the widow can be allowed bare maintenance under the circumstances of this case.

It appears from the judgment of the learned Chief Justice in *Valu* v. *Ganga* (2) that the authorities which were referred to in *Honamma* v. *Timmannabhat* (3) were considered, and after quoting a passage from Strange's Hindu Law, at page 90 it is pointed out that:—

"In the absence of any text distinctly imposing this obligation or of any expression qualifying the right which is reserved by so many texts to those who take the husband's property, of withdrawing maintenance from an unchaste widow, it cannot (except perhaps in the case of a son) be regarded as a legal liability to be enforced in a Civil Court."

It does not appear from the judgment that the passages in the Achara and Prayaschitta Adhyayas in the Mitakshara, to which I shall presently refer, were before the Court. If any text which would support the view taken in *Honamma's case* (3) had been brought to the notice of the learned Judges, it is permissible to think that they might not have expressed their dissent in an unqualified form. It does not appear from the facts of the case in *Valu* v. *Ganga* (2) that the question whether the widow would be entitled to bare maintenance if she had given up the life of incontinence arose for decision in that case.

The decision in *Vishnu Shambhog* v. *Manjamma* (6) does not carry the apparent conflict between the two views any further. In that case the necessary facts which would raise the question of allowing bare maintenance to the widow were not alleged, and the decision proceeds upon the general ground as to whether on account of unchastity the right of the widow to maintenance is lost, even though it may have been decreed before.

I have considered the authorities which have been mentioned by Chandavarkar, J., in *Parami Ramayya* v. *Mahadevi* (1) and I do not consider it necessary to refer to them all in this judgment. It is sufficient to refer to the passages in the Mitakshara. Verse 70 in the Achara Adhyaya in the Chapter relating to "Marriage," with Vijnanesvara's commentary thereon, is translated as follows by Srisa Chandra Vidyarnava in his translation of the Achara Adhyaya at page 136:—

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(6) 9 B. 108; 9 Ind. Jur. 271; 5 Ind. Dec. (N. S.) 72.

"The author now describes how unchaste women are to be treated.

Yajnavalkya.

LXX.—The unchaste wife should be deprived of authority, should be unadorned, allowed food barely sufficient to sustain her body, rebuked, and let sleep on low bed, and thus allowed to dwell.—70.

Mitakshara.

She who commits adultery, 'should be deprived of authority' *i. e.*, the control over servants and the management of the household, etc., should be taken away. She should be kept 'unadorned, *i. e.*, without collyrium, ointments, white cloth or ornaments; 'with food enough to maintain her body' and sustain her life merely, and 'rebuked' with censure etc., and 'sleeping on low bed,' on the ground, and 'allowed to dwell,' only in his own house. This should be done in order to produce repentance, and not for purification."

In the commentary on Verse No. 72. the meaning of the word 'abandonment' is explained by Vijnanesvara in these terms at page 139 of the same translation:—

"The abandonment should be by not having any carnal connection with her, and by not allowing her to join in any religious ceremonies and does not mean that she should be driven out of the house, because of the rule she should be kept confined to one apartment" (Manu XI, 176 or 177).

It must be remembered, however, that these passages in terms relate to a wife and not to a widow.

In the Prayaschitta Adhyaya of the Mitakshara in Verses 297 and 298, in dealing with the question of penance, Yajnavalkya lays down the following rule as translated in the Sacred Laws of the Aryas (Mitakshara, Vol. II. Prayaschitta Adhyaya) translated by S. M. Naraharayya and published from the Panini Office, Allahabad, at page 437:—

"It is declared that this very process (should hold good) with regard to women who have suffered degradation (from caste).

CCXCVII. (But) accommodation should be *given (to them) close to the house*; (and also) food and clothing along with protection."

And then in the commentary on that verse the following explanation is given of these women (page 438):—

'To those women who, though have suffered degradation (from caste) and for whom the rite of presenting (disconnecting) water libations, etc., have been performed, accommodation, (that is) a small cottage built of straws and leaves should be given in the proximity of the main (building of the) house. Similarly food that is just sufficient for the maintenance of life and also raiment of a low description along with (the protection) of preventing her from being enjoyed again by another man should be given."

In the commentary on the next verse it is explained at page 439 of the same book that women under certain circumstances may be abandoned. The following translation of Vijnanesvara's commentary on this text is material:—

"(Here) it has been said that the abandoning is with regard to these four (sorts of) women only, and, nevertheless, the idea is that among such women who (have suffered degradation from caste and) will not perform the penance, only four, (namely), one who yields herself to (her husband's) pupil etc., should be abandoned without the (allowance of the) necessaries of life, (namely,) clothing, food, accommodation, etc., and it is not so with respect to other (offending women). And hence, it is inferred that (in the case) of other women who have suffered degradation (from caste), all that is said as, 'accommodation should be given (to them) close to the house etc.,' (III, 297) should be done though they do not perform the penance."

These passages may go to show that in the case of woman who did not fall from the path of chastity in any of the grave manners specified in this last verse, she may be allowed to live as described in the preceding verse. It is not easy to determine whether these passages in the Achara Adhyaya and the Prayaschitta Adyaya are applicable to the case of a widow who claims maintenance from the co parceners of her deceased husband. I may refer to the following passage in the Vyavahra Mayukha at page 79 of Mandlik's Hindu Law:—

"As for the text:—'This same course should be followed in the case of degraded females; food and raiment are to be given to them and they should reside near the house'; it is, in the opinion of some others, in reference to the husband while living."

This suggests that in the opinion of Nilakantha it might not be so limited, In the Vira Mitrodaya, Mitra Misra expresses an opinion, as given at page 153 of Golap Chandra Sarkar's translation of the Vira Mitrodaya, in the following passage.

"As for the allowance of food and raiment even to the unchaste wives, as is declared in the following text, namely,—'Also let one act in the same manner towards even the fallen wives; food and raiment, however, should be allowed to them, if they reside in the vicinity of the dwelling house':—that, however, is to be explained as referring to the husband, consistently with what is ordained by Yogisvara after having premised the husband, as in the text—'Deprived of her position in the family, clad in dirty clothes, living upon morsels barely sufficient for life, and humiliated, an unchaste wife shall be made to lie down upon the bare earth.'"

At the same time it is a reasonably possible reading of the passages in the Mitakshara, particularly the passages in the Prayashchitta Adhyaya that they refer to women generally and are not confined to wives.

In this state of the opinions with regard to the application of these passages to the case of a widow who has been unchaste but who has reverted to the path of propriety it is not unreasonable to say that they may apply to such widows.

It is important to remember that, so far back as 1876, Sir Michael Westropp, C. J., and Nanabhai Haridas, J., accepted the view that where the widow had resumed proper ways, she might be and ought to be given bare maintenance. No doubt, in coming to that conclusion, they referred to a text of Harita which is quoted in *placita* 37 and 38 of Mitakshara, Ch. 2 s. 1, which has no bearing upon the question. This text of Harita has been referred to and considered by Sir Charles Sargent in *Valu* v. *Ganga* (2) (page 84*) and the view taken of Harita's text there by the learned Chief Justice is correct, if I may say so with respect. But the fact remains that in *Honamma's case* (3) the learned Judges acted upon the view that a bare maintenance could be allowed to an incontinent widow without referring to the passages in the Achara and Prayaschitta Adhyayas of the Mitakshara. I read that judgment as really applicable to the case of a widow who is proved to have given up the life of unchastity. In that case it is pointed out that the allegation that the widow was living in a state of unchastity was not proved, and it appears that the widow had gone to reside with her mother-in-law. Under those circumstances the learned Judges considered whether her incontinence had disentitled her to bare maintenance which was allotted to the widow in that case under a previous decree. The decision is really applicable and limited to the case of a widow who is proved to have ceased to lead an unchaste life. If it is read as going beyond that, it has not the support of any text or of any recognised commentator; nor has it the support of any decision of this Court or of any other High Court. I cannot believe that the learned Judges could have meant to go beyond the strict necessity of the case and to hold that even an incontinent widow was entitled to bare maintenance.

In *Rama Nath* v. *Rajonimoni Dasi* (7) the learned Judges declined to apply the rule of *Honamma* v. *Timmannabhat* (3) to the case of a widow who was living a life of unchastity at the date of the suit. But they expressed the following opinion in the judgment at page 679*.

"We do not decide in this case what her rights would be if she were to give up her present way of living and begin to lead a moral life; we do not say that she would not, even in that case, be entitled to claim a starving maintenance. All that we say now is, that under the existing state of things, she is not entitled to maintenance of any sort."

This point has been recently considered in *Sathyabhama* v. *Kesavacharya* (8). The view taken by Seshagiri Ayyar, J., is that these passages in the Mitakshara go to show that the widow will get starving maintenance, though on account of unchastity, she would lose the right to the ordinary rate of maintenance. Undoubtedly this case supports the view that a widow who has been unchaste, but who has ceased to lead a life of incontinence, may be given bare maintenance, and that such right is not excluded by the text of Narada which seems to give the co-parceners the right of cutting off her maintenance.

This is the state of the authorities and the opinions with reference to this point. The question is whether there is any real conflict of decisions such as would necessitate a reference to a Full Bench. As I have already stated, the decision in *Honamma* v. *Timmannabhat* (3) must be treated as limited to the case of a widow who has ceased to be unchaste, and connot be read as applicable to a widow who continues to be unchaste. If the judgments in *Valu* v. *Ganga* (2) and *Vishu Shambhog* v. *Manjamma* (6) are read with reference to the facts of those cases that question did not arise for decision. If *Honamma's case* (3) is read as laying down that bare maintenance should be allowed to a widow who is in fact leading a life of unchastity, there is undoubtedly a difference of opinion. But, as I have already said, the weight of opinion would be preponderatingly against the view that a widow continuing to be unchaste can get bare maintenance: and no reference to a Full Bench would be called for. Further, on the facts of this case, that question would not arise. But if the decision in *Honamma's case* (3) is, as I think it should be, restricted to the case of a widow who has really given up a life of unchastity, there is really no conflict of decisions. In view of the concurrence of judicial opinion in the three High Courts, that a widow who has been unchaste, but who is proved to have given up the life of unchastity, should be given bare maintenance, I think that that view may be given effect to without any reference to a Full Bench. I may respectfully say that, in spite of the difficulty of applying these passages in the Mitakshara to the case of a widow who is proved to have lapsed from the path of chastity but who has improved her ways, I am of opinion that they are fairly capable of being applied to the case of such a widow, provided she has not been guilty of any such grave misconduct as has been stated in the said passages. At the same time these passages cannot be literally applied to modern conditions under which the Hindu Law is administered. While, therefore, the Court allows such a widow to live separately, it must insist upon her continuing to lead a chaste life, if she wishes to have the benefit of bare maintenance.

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*Page of 7 B.—[*Ed.*]

(7) 17 C. 674; 8 Ind. Dec. (N. S.) 990.

(8) 29 Ind. Cas. 397; 39 M. 658; 18 M. L. T. 28; 29 M. L. J. 87.

*Page of 17 C.—[*Ed.*]

I am, therefore, of opinion that the conclusion of the Trial Court on this point, that Bhikubai is entitled to bare maintenance, can be accepted.

The learned Trial Judge has referred the question of determining the amount of bare maintenance to the Commissioner. I do not think, however, that any reference to the Commissioner is necessary. Bare maintenance can and should ordinarily be fixed by a rough and ready reference to the general condition of the family as disclosed in the evidence. It must be bare maintenance as indicated in the passages cited in this judgment. Though these passages are not capable of literal application to the case of a widow who does not live in the family house, under the law as administered now it is simply a question of determining the bare minimum which should be allowed to her under the circumstances in order to enable her to live. We asked the learned Counsel for the respondents as to what amount he would suggest under the circumstances. He suggested Rs. 20 as maintenance and Rs. 5 as house rent, in all Rs. 25. The appellant's Counsel has not accepted this as being a reasonable amount for bare maintenance. But his suggestion for allowing Rs. 75 or Rs. 100 per month as bare maintenance is clearly unreasonable. I am of opinion that Rs. 25 would be reasonable as bare maintenance under the circumstances.

We modify the decree appealed from by cancelling the order of reference to the Commissioner and the other provisions in the decree incidental to the reference, and by ordering that the defendants Nos. 1 to 4 do pay Rs. 25 per mensem including house rent to the plaintiff from the date of the suit; the liability to pay in the case of defendants Nos. 2 to 4 to be limited to the estate in the hands of the Administrator General. The amount now lying with the plaintiff's Solicitors in respect of payments made under the order of the Court during the pendency of the suit to be refunded to defendants, so far as it is in excess of Rs. 25 per mensem. The excess amount paid during the pendency of the appeal to be set off against payments already due or which may fall due hereafter. In the Trial Court each party to bear his or her own costs.

The appellant to pay the respondents' costs in appeal and to get the costs of cross objections from respondents Nos. 1 to 4.

Kincaid, J.—[His Lordship concurring with the conclusions on facts arrived at by the Acting Chief Justice, dealt with the question whether Bhikubai had reverted to a moral life]. The next question is whether the improper intimacy between Bhikubai still exists. In 1918 Shankar, after quarrelling with Kashibai, married yet another wife Jijibai. Jijibai has sworn that no intimacy now exists between Shankar and Bhikubai. The learned Counsel for the defendants has argued that Shankar and Bhikubai have not ceased to meet and, therefore, their intimacy most probably continues. But if we accept Kashibai's statement as regards impropriety of their conduct, we should, I think, also accept Jijibai's statement as to its present propriety. I, therefore, agree with the learned Trial Judge in holding that their immoral intimacy has ceased and that Bhikubai has returned to a chaste life.

The last question is whether even on that finding Bhikubai is entitled to a bare maintenance. The case-law on the subject is not inconsiderable. The first authority brought to our notice is that of *Honamma* v. *Timmannabhat* (3) where Westropp, C. J., held that where a widow had obtained an award of maintenance, she did not ferfeit a bare maintenance by her incontinence. It should, however, be observed that the question whether she was incontinent at the time of the suit was left in doubt. The Judge of the first Appellate Court did not positively find "that allegation (*i. e.*, of continued incontinence) to be true and he did state that she resided with her mother-in-law."

The correctness of the above decision was questioned in the case of *Valu* v. *Ganga* (2) Sir Charles Sargent observed (page 90*) :—

"In the absence of any text distinctly imposing this obligation (to give an unchaste widow maintenance) or of any expression qualifying the right which is reserved by so many texts to those who take the husband's property, of withdrawing maintenance from an unchaste widow, it cannot (except perhaps in the case of a son) be regarded as a legal liability to be enforced in a Civil Court."

In this case, too, the question whether the widow had returned to a moral life did not arise.

This authority was followed in *Vishu Shambhog* v. *Manjamma* (6). But a passage which occurs to the close of Sargent, C. J.'s, judgment is worthy of note (page 110†) :—

"Such being the nature of the widow's right to maintenance, a decree, declaring her right, must, from its nature, be liable to be set aside *or suspended in its operation* on proof of such unchastity."

Here, again, the question of the widow's return to a moral life was not before the learned Judges but the words "suspended in its operation" seem to imply that a widow was to be deprived of her maintenance only so long as her unchastity lasted.

The matter was again discussed in the case of *Parami Ramayya* v. *Mahadevi* (1) by Chandavarkar, J. Although he decided the case on other grounds he quoted with approval a text of Parashara which supports the contention that a repentant widow must be maintained. The passage runs as follows (page 285*) :—

"This text of Parashara, which includes the case of a widow, is explained by Madhavacharya (†) as relating only to a woman who is leading a life of unchastity is unrepentant, and has not performed expiatory rites. As to a woman, whether she is wife or widow, who returns to a life of chastity after she has been unchaste Madhavacharya explains that she, after expiation, cannot be cast out of the house, but that she must be maintained."

Other High Courts, besides the Bombay High Court, have considered the same question.

In the case of *Roma Nath* v. *Rajonimoni Dasi* (7) their Lordships held that an unchaste widow was not entitled to a "starving maintenance," but they deliberately left open the question of her rights should she return to a moral life. They observed (page 679††) :—

"We do not decide in this case what her rights would be if she were to give up her present way of living and begin to lead a moral life; we do not say that she would not, even in that case, be entitled to claim a starving maintenance. All that we say now is, that under the existing state of things she is not entitled to maintenance of any sort."

In the Madras High Court there were two similar cases. The first, however, *Kandasami Pillai* v. *Murugammal* (9), deals with a wife, and is, therefore, hardly pertinent. Still the following passage may be quoted from the judgment (page 8‖) :—

"I have little doubt that before a decree

(9) 19 M. 6 at p. 7; 6 Ind. Dec. (N. S.) 708.

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*Page of 7 B.-[*Ed.*]

†Page of 9 B.-[*Ed.*]

*Page of 34 B.—[*Ed.*]

†Parashara, Dharma Samphita, Bombay Sanskrit Series, Volume II, Part I, page 352

††Page of 17 C.—[*Ed.*]

‖Page of 19 M.—[*Ed.*]

for maintenance is given to a wife who has once been guilty of infidelity, she must show, not only that at the time of the plaint and the trial she was leading a chaste life, but also that she had done so for a sufficient period previously so as clearly to lead to the conclusion that she has completely renounced her immoral course, and that, in fact, she is a reformed woman."

A case exactly analogous to the present one was that of *Sathyabhama* v. *Kesavacharya* (8). There the learned Judges, after reviewing the authorities cited by me, came to the conclusion that an unchaste widow who had definitely repented was entitled to a bare maintenance. I quote the following passage (page 660):—

"But in none of these (Hindu) texts is there any provision for a woman who had repented and was subsequently leading an honest life. It is not to be presumed from the omission to provide for such a contingency, that the resumption once made is to be irrevocable and that the fallen woman who had reformed is to be denied even a starving allowance."

We thus have a series of decisions that at first sight seem to conflict, but if closely scrutinized, appear not really opposed to each other. In the case of *Honamma* v. *Timmannabhat*(3) we do not know whether the widow had reformed or not, but as she was living with her mother-in-law, their Lordships seem to have believed that she had. In *Valu* v. *Ganga* (2) and *Vishu Shambhog* v. *Manjamma* the (6) the widow had certainly not reformed and in the latter case their Lordships seem at any rate to have felt a doubt whether, if she had returned to a chaste life, she would not have been entitled to a starving maintenance. In *Parami Ramayya* v. *Mahadevi* (1) Chandavarkar, J., certainly inclined to the opinion that a repentant widow must be maintained. In *Roma Nath* v. *Rajonimoni Dasi* (7), their Lordships deliberately refused to hold that a repentant widow had no claims. Finally in *Sathyabhama* v. *Kesavacharya* (8) the Madras High Court affirmatively held that a reformed widow must be given a starving maintenance. In these circumstances the decision of the Trial Judge seems to be the right one and I would confirm it with costs save in one particular. I should not send the case for further consideration of the Commissioner but would award by way of starving maintenance Rs. 25 inclusive of rent and all other charges.

I would modify the Trial Court's decree, therefore, as indicated by the Chief Justice.

Z. K. *Appeal dismissed:*
Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 162 OF 1925.
September 2, 1925.
Present:—Mr. Simpson, A. J. C.
DWARKA DAS—PLAINTIFF—APPLICANT
versus
THE AGENT OF EAST INDIAN RAILWAY COMPANY, CALCUTTA—
DEFENDANT—OPPOSITE PARTY.

Railway Company—Goods accepted under Risk Note B—Waggon sealed with paper only—Liability for loss of goods.

The fact that a waggon is sealed with paper and bolted but not locked, does not amount to wilful neglect on the part of the Railway Company accepting goods on the terms of Risk-Note B.

Firm Bhagai Ram-Bahadur Ram v. *B. N. Railway*, 87 Ind. Cas. 215; 1 O. W. N. 766; A. I. R. 1925 Oudh 631, *Jagannath Prasad* v. *Agent, G. I. P. Ry. Co.*, 94 Ind. Cas. 644 and *Rohilkhand and Kumaon Ry. Co.* v. *Bij Raj*, 72 Ind. Cas. 428; 10 O. L. J. 58; 9 O. & A. L. R. 421; A. I. R. 1923 Oudh 212, referred to.

Application against a decree of the Subordinate Judge, Kheri, exercising the Small Cause Court's powers, dated the 3rd March 1924.

Mr. *Ali Mohammad*, for the Applicant.

Mr. *G. N. Mukerji*, for the Opposite Party.

ORDER.—This is an application under s. 25 of the Small Cause Courts Act. The plaintiff purchased 126 bags of sugar from a Calcutta firm. They were consigned to plaintiff at Lakhimpur. The Railway accepted the goods on the terms of Risk Note Ex. B, under which they are free from liability unless the Railway is guilty of wilful neglect. The bags came by goods train in the ordinary way in a waggon sealed merely with paper, and bolted, in such a way that the bolt could easily be opened. The Guard had deposed that the seal was intact at Utrauli Station, but that it was broken and six bags of sugar were missing when the train reached Lucknow. The Court of Trial has held that the way in which the waggon was fastened amounted to wilful neglect on the part of the Railway, and this is not an unreasonable view to take. There is evidence in this very case that on the R. K. Railway, the waggons are bolted in such a way that an unauthorised person could not open them without using a hatchet. But in *Firm Bhagai Bam-Bahadur Ram* v. *B. N. W. Railway* (1) it was said:

"The plea as to wilful neglect cannot succeed. The Company in the way usual with all Railways sealed the waggon on one side. The seal was broken and it is not known how the plaintiff's property disappeared. The putting of a seal and not of a lock does not amount to wilful neglect on the part of the Railway Company."

Similarly in *Jagannath Prasad* v. *Agent, G. I. P. Ry., Co.* (2). The case of *Rohilkhand & Kumaon Ry., Co.* v. *Bij Raj* (3) differs because in that case the waggon was not even sealed. See *Agent, Rohilkhand & Kumaon Ry.* v. *Gauri Lal* (4). I follow these decisions, and hold that there was no wilful neglect on the part of the Railway Company.

The learned Small Cause Court Judge, although he decided that the fastening of the waggons by bolt and seal amounted to wilful neglect, nevertheless dismissed plaintiff's suit on a finding that the bags had disappeared through running train robbery. This would raise the vexed question whether the word "robbery" in the Risk Note form B is to be construed to mean robbery or theft. If this question had come up for decision, I should have referred it to a Bench, because I am unable to agree with the Allahabad and Madras decisions. But since there was no wilful neglect the second question of running train robbery is not reached (see *B. B. & C. I. Ry., Co.* v. *Ranchhodlal Chhotalal & Co.* (5).

In the result, although I do not agree with his reasons I maintain the judgment and decree of the learned Small Cause Court Judge. This application is dismissed with costs.

S. D. *Application dismissed.*

(1) 87 Ind. Cas. 215; 1 O. W. N. 766; A. I. R. 1925 Oudh 631.

(2) 94 Ind. Cas. 644.

(3) 72 Ind. Cas. 428; 10 O. L. J. 58; 9 O. & A. L. R. 421; A. I. R. 1923 Oudh 212.

(4) 90 Ind. Cas. 46; 2 O. W. N. 749; A. I. R. 1926 Oudh 68.

(5) 52 Ind. Cas. 516; 43 B. 769; 21 Bom L. R. 779.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 4375 OF 1921.

November 24, 1925.

Present:—Mr. Justice Taraporewala.

THE OFFICIAL TRUSTEE OF BOMBAY
—PLAINTIFF
versus
SALEBHAI SARAFALLY BHAGAT
—DEFENDANTS.

Easements Act (V of 1882), ss. 4, 13—Right of going upon property of another person to white-wash, one's wall—Easement, whether of necessity—Easement of necessity, what is—New kind of easement, creation of.

The right claimed by a person of going upon the premises of another person with a view to erect a scaffolding for purposes of white-washing and plastering his own wall is an easement though not one of necessity. [p. 674, col. 2.]

An easement of necessity is not created merely when the easement is necessary but when it is absolutely necessary for the beneficial enjoyment of the dominant property. [p. 676, col. 2.]

Chhotalal v. *Devshankar*, 3 Bom. L. R. 601, *Esubai* v. *Damodar Ishvardas*, 16 B. 552 at p. 559; 8 Ind. Dec. (N. S.) 847 and *Municipality of the City of Poona* v. *Vaman Rajaram Gholap*, 19 B. 797; 10 Ind. Dec. (N. S.) 534, referred to.

But there cannot be an easement of necessity for enabling the dominant owner to enjoy another easement. [p. 674, col. 2.]

If a right comes within the four corners of the statutory definition of an easement, whether it be a new one or novel one, the Court is bound to give effect to it. [p. 675, col. 2.]

Simpson v. *Mayor of Godmanchester*, (1896) 1 Ch. 214 and *Moody* v. *Steggles*, (1879) 12 Ch. D. 261; 48 L. J. Ch. 639; 41 L. T. 25, referred to.

Sir *Chimanlal Setalvad* (with him Mr. *Mulla*), for the Plaintiff.

Mr. *Bahadurji* (with him Mr. *Kanga*, Advocate-General), for the Defendant.

JUDGMENT.—This suit was originally filed by one Vanmalidas Bhicabhai, as a trustee of certain premises situate at Sham Sett Street outside the Fort of Bombay, against the 1st defendant, who is the owner of certain premises situate to the north of the said trust premises, claiming *inter alia* that the 1st defendant, his servants, agents and workmen might be restrained by an order and injunction of this Court from encroaching or trespassing on the trust premises as they had done on October 8, 9 and 10, 1924, in the manner following, that is to say, that the defendant and his servants, agents and workmen had entered upon the ground floor of the trust premises and upon a *chowk* in the trust premises adjoining the southern wall of the defendant's premises for the purpose of plastering the said southern wall. The original 2nd defendant was one of the trustees of the said premises with the plaintiff, and as he refused to join in the filing of the suit, he was made a party defendant. The plaintiff resigned as the trustee and the Official Trustee was thereafter brought on the record in his place. The original 1st defendant died and his legal representatives were brought on the record as defendants Nos. 1, 1 (*a*) 1 (*b*) and 1 (*c*). I shall thereafter refer to them as defendants.

The original first defendant put in a written statement whereby he alleged that the two properties in suit formerly belonged to common owners, *viz.*, Tyeballi Ahmedji, Abdul Ally Ahmedji and Abdul Hoosein Ahmedji, who by a conveyance, dated July 2, 1923, conveyed the trust property to the plaintiff's predecessor-in-title subject to a covenant by the purchaser, his heirs, executors, administrators and assigns that he and they would not raise the building on the land conveyed to a greater height than it was on February 11, 1903, and would keep the *chowk* in the premises conveyed in the same condition as it was in on the said date. The defendant contended that the said covenant was inserted in order to preserve to the transferors access of light and air to the windows in the property retained by the transferors and ultimately conveyed to the 1st defendant on June 12, 1917. He further contended that by reason of the fact that the plaintiff's building was lower than the defendant's building and by reason of the existence of the said open *chowk* it was necessary to plaster the portion of the defendant's southern wall which abutted on the said open *chowk* in order to protect it from wind and rain, and stated that in order to plaster such wall he had placed planks in his building so that they projected through the windows thereof and had erected on the projecting portions of such planks scaffolding to enable his workmen to carry out the said work. He further contended that the plastering of the said wall was incidental to and necessary for the full and proper enjoyment of the said easement of light and air, and that by reason of the facts stated in para. 2 of the written statement he was entitled to erect a scaffolding over the said open *chowk* in order to enable his workmen to carry out such plastering work.

At the hearing of the suit two issues were raised :—

(1) Whether the defendants are entitled to raise the scaffolding in the open *chowk* of the plaintiff for the purpose of plastering or white-washing the south wall of defendants' premises?

(2) Whether for that purpose the defendants were entitled to enter the plaintiff's *chowk* through the plaintiff's property?

It was admitted by Mr. Bahadurji for the defendants that their workmen did enter the plaintiff's *chowk* through the plaintiff's property for the purpose of plastering and white-washing the wall of the defendants abutting on the said *chowk*.

The defendants, as the successors of the former owners who owned the two properties, are entitled to the benefit of the covenant in the conveyance to the plaintiff dated July 2, 1903. That covenant, however, does not either expressly or impliedly create an obligation on the plaintiff to allow the defendant or his men to enter the *chowk* through plaintiff's property for the purpose of plastering or repairing the southern wall of defendants' premises. But the defendants have claimed that right in para. 4 of the written statement on the ground that it was necessary for the full enjoyment of the said easement of light and air. Now there cannot be an easement of necessity for enabling the dominant owner to enjoy another easement. At the hearing, however, Mr. Bahadurji for defendants put forward the defendants' claim on the ground that the right to enter the plaintiff's *chowk* and to erect a scaffolding thereupon for the purpose of plastering and white-washing the defendants' wall, was absolutely necessary for the beneficial enjoyment of the defendants' property and that the defendants were entitled to the said right as an easement of necessity under s. 13 (*c*) of the Indian Easements Act. I allowed the defendants to put forward that contention and the parties to lead evidence on the point.

The first question then to consider is whether the right claimed by the defendants is in the nature of an easement. Mr. Mulla argued that it was not, and that it did not fall under the definition of "easement" as given in s. 4 of the Indian Easements Act. "Easement" is defined as a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. The act which the defendants claim a right to do here is to erect a scaffolding on the plaintiff's land and for the purpose of so erecting it to enter into the *chowk* which is the plaintiff's property through the adjoining building of the plaintiff. The right to erect a scaffolding is claimed as being for the beneficial enjoyment of the defendants' property on the ground that the wall of their building abutting on the *chowk* must be plastered and white-washed from time to time in order that the defendants may keep it in proper condition so as to enable them to live in and enjoy their said property, and that unless they are allowed to go on the plaintiff's land and erect a scaffolding thereupon, they cannot plaster or white-wash the said wall.

Mr. Mulla argued that an easement of the nature claimed here had not been heard of before. I think there was some misapprehension as to the nature of the right claimed in the argument of Mr. Mulla. He seemed to think that the easement claimed was the right to plaster the wall. But on a proper consideration of the facts it appears to me that there is a clear fallacy in the argument, because the easement claimed here is not the right to do something to the defendants' own property but the right to do something on the plaintiff's property for the beneficial enjoyment of the defendants' property. The plastering is for the beneficial enjoyment of the defendants' property, and the act which they claim the right to do to enjoy that benefit is an act which is to be done on the plaintiff's property. In my opinion, if such a right exists, it would clearly be in the nature of an easement. If the two properties had belonged, as they do now, for a long time to different owners, the owner of the property belonging to the defendants could have acquired the right claimed as an easement by prescription or by grant under the Indian Easements Act. For example, if the defendants had gone on the property of the plaintiff without the leave or license of the plaintiff, and as a matter of right for the purpose of erecting a scaffolding on the *chowk*, and had from that scaffolding plastered and white-washed their own wall, and if that right had been exercised for the period required by the Indian Easements Act, it would have ripened into the right of easement which the plaintiff could not have denied.

Mr. Mulla argued that the English Courts had declined to create easements of a new kind. There is really no easement of a new kind which is claimed in this suit. However, if the right comes *within* the four corners of the statutory definition of an easement whether it be a new one or novel one, the Court is bound to give effect to it.

In *Simpson* v. *Mayor of Godmanchester* (1) the question was considered by the Appeal Court. The right claimed in that case was a right to open in the times of flood certain river locks belonging to the plaintiff. By a deed of 1639 a predecessor of the plaintiff had granted to the Corporation the right that the miller, or other appointee of the Corporation, should open the locks in question in times of flood. Lord Herschell in his judgment at page 218* observes as follows:—

"It appears to me to be an easement within the definition of the term at the commencement of Mr. Gale's work on Easements, and I think that that is a perfectly correct definition. Easements may be of various characters, and it is a fallacy to suppose that every easement must be brought within some particular class which has been recognised, such as the class relating to water-courses, or light or air or otherwise. If a right is granted by the owner of land to another person to enter and to do something on the grantor's land for the benefit of the land of that other person that *prima facie* is an easement. And I do not see any reason why there should not be a perfectly valid easement in this right to go upon the land of the owner of locks or sluices, and in times of flood raise those locks or sluices to let the water down for the benefit of the land of the person who exercises the right."

The definition of "easement" in Gale on Easements is similar to the definition given in the Indian Easements Act. He defines it as a privilege without profit which the owner of one neighbouring tenement has of another, existing in respect of their several tenements by which the servient owner is obliged "to suffer or not to do" something on his own land for the advantage of the dominant owner.

Gale gives at page 27 of his book instances of affirmative easements as held by the English Courts; they include a right to place an advertisement hoarding on the servient land, or to place a sign-post on a common, or to place over neighbouring land clothes on lines or telephone wires.

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(1) (1896) 1 Ch. 214.

*Page of (1896) 1 Ch.—[*Ed.*]

In *Moody* v. *Steggles* (2) the question was whether the plaintiffs, the owners of a public-house, had the right to affix a sign-board to the wall of the defendants' house as the sign-board had been so affixed for upwards of 40 years. It was held that the easement claimed was a legal one, and that a grant of it by the defendants' predecessors-in-title to the plaintiffs' predecessors-in-title must be presumed. There the benefit was the advertisement of the public-house which was in a lane, and the sign-board, which was fixed on the wall of the defendants' house, gave that advertisement.

In my opinion, therefore, an easement could have been created in this case of the nature alleged by the defendants at the hearing.

The next question then is whether it is an easement of necessity coming under s. 13 (c) of the Indian Easements Act. The claim is based by the defendants on the fact that in 1902-1903 for a period of less than a year, the two properties were owned by a common owner. Before the common ownership, it appears that there was litigation between the then respective owners of the properties and that litigation was put an end to by the then owners of the defendants' property buying the other property. Within a year of such acquisition the common owners of these two properties conveyed the property of the plaintiffs to their predecessors-in-title with the covenant as mentiond by me hereinbefore. Nothing is mentioned in that covenant as to the transferors, the predecessors in-title of the defendants, having any right to enter upon the plaintiff's property or to erect a scaffolding upon the plaintiff's property, for the purpose of plastering or white-washing the wall abutting on the *chouk* of the defendants' property. But Mr. Bahadurji, in my opinion, rightly pointed out that if there was a right by way of an easement of necessity, no covenant was required to support it. Mr. Bahadurji gave me a reference in Indian Cases of a judgment of the Madras High Court where a right of the nature claimed in this suit was held to exist as an easement of necessity. I have not been able to get this judgment; so I do not know the reasoning on which the Court came to the conclusion; but after giving a careful consideration to the point, I have come to the definite conclusion that the right claimed here cannot be treated as an easement of necessity.

Now an easement of necessity is created under s. 13, sub-cls. (*a*), (*c*) and (*d*). An easement of necessity is not created merely when the easement is necessary, but when it is absolutely necessary for the beneficial enjoyment of the dominant property. As pointed out in *Chhotalal* v. *Devshankar* (3) by Jenkins, C. J., the necessity contemplated in cls. (*a*), (*c*) and (*d*) of s. 13 of the Indian Easements Act is an absolute necessity; while in cl. (*b*) of the section, it is a qualified necessity. There the easement was claimed under s. 13, cl. (*b*), which is not classed as an easement of necessity under s. 13. The learned Chief Justice observes as follows (page 602*):—

"It is true that the lower Appellate Court has found that there was no necessity, but it is clear that the Judge in so deciding had in mind an absolute necessity such as is indicated in s. 13 (*a*), (*c*) and (*d*) and not a qualified necessity such as is contemplated in s. 13 (*b*). The distinction is obvious: thus a right of way may not be absolutely necessary, and yet necessary for the purpose of enjoying the property as it was enjoyed when a transfer of it took place."

This point is also dealt with in *Esubai* v. *Damodar Ishvardas* (4) and in *Municipality of the City of Poona* v. *Vaman Rajaram Gholap* (5). In the last case the person who claimed the right of way had another right of way to the property through his own land. It was contended that if the property had been sold to a third party, he would have been entitled to have a right of way through the defendant's land, that, therefore, although the plaintiff had a right of way through his own land, still the right of way through the defendant's land was a way of necessity. The learned Judge held that it was not so. The easement of necessity could only be created when it is absolutely necessary for the enjoyment of the dominant tenement. He says (page 800†):—

"If a stranger had bought, he would have got what is called a landlocked tenement, to which he could only obtain access over the land of his vendor or by trespassing on other people's property. But the defendant having bought could approach his new acquisition through his own premises, and it cannot, therefore, be said that in order to enjoy it, it was necessary for him to pass over his vendor's land."

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(2) (1879) 12 Ch. D. 261; 48 L. J. Ch. 639; 41 L. T. 25.

(3) 3 Bom. L R. 601.

(4) 16 B. 552 at p. 559; 8 Ind. Dec. (N. S.) 847.

(5) 19 B. 797; 10 Ind. Dec. (N. S.) 534.

*Page of 3 Bom. L. R.—[*Ed.*]

†Page of 19 B.—[*Ed.*]

The English cases and the observations in Gale on the point are to the same effect.

The question here is one of fact as to whether the right which is claimed is an easement of necessity for the beneficial enjoyment of the property of the defendants. In my opinion, it is not. It may be necessary for the purpose of such enjoyment that the wall should be plastered and white-washed, but it is not absolutely necessary. Admittedly, the common ownership of the two houses lasted for less than a year. The original wall of the defendants' house which abutted on the *chowk* was built by the owner of that house long prior to the time when the two houses came under common ownership, that is to say, the owner built the wall with knowledge that he ran the risk of not being allowed to go on the neigbouring property for the purpose of plastering or white-washing the wall. This state of affairs continued for a long number of years during which period the then owner of defendants' property could not have claimed as a matter of right to go on the plaintiff's *chowk* for the purpose of white-washing or repairing his said wall. Then, was the position changed in any way because for a period of less than a year the properties were owned by a common owner? Can it be said that during this period of less than a year the white-washing and plastering became so absolutely necessary that on the severance of the two tenements, the right to do so by going over plaintiff's property was created in favour of the owner of the defendants' property? There is no evidence at all of any such enjoyment of the right by the common owners during that particular period. The defendants cannot, therefore, say that by the mere fact of the properties having come under a common owner for a period of a year or so, a right, which otherwise could not have been considered absolutely necessary for the enjoyment of the property, became an easement of necessity. In my opinion, there is really no easement of necessity in this case, and, if my view is correct, there is an end to the defendants' case.

As to the evidence laid before me, I may point out here shortly that the evidence of the witnesses on behalf of the defendants has not impressed me at all as evidence of truthful witnesses. It may be that occasionally the wall was white washed and plastered by the men of the owner of the defendants' property going over the neighbouring *chowk*, but it must have been with the leave and license of the owner of the neighbouring property. As to the erection of the scaffolding by the defendants' men in the plaintiff's *chowk*, which led to the filing of this suit, I have no hesitation in accepting the evidence of Mr. Chinoy, the architect of the plaintiff, and rejecting the evidence of the witnesses on behalf of the defendants on the point. They have told a falsehood when they said that the scaffolding was there for nearly two years. The affidavit made by the original defendant in the suit on January 9, 1922 (Ex. B), puts the matter beyond any doubt. The scaffolding was in fact erected a few days before the filing of the suit. In my opinion, the oral evidence in the case does not affect the decision of the question in issue.

There will be a decree in favour of the plaintiff in terms of prayer B of the plaint, and costs of the suit, including costs reserved, if any.

R. L. *Suit decreed.*

MADRAS HIGH COURT. FULL BENCH.

SECOND CIVIL APPEAL No. 1076 OF 1922.
November 10, 1925.
Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.
SHEIKH HUSSAIN SAHIB—PLAINTIFF—APPELLANT
versus
PACHIPULUSU SUBBAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), s. 7—Lands, upper and lower, owners of—Right of upper owner to let surface water on to lower land.

Where two contiguous plots of land belong to different proprietors, one of which stands upon higher level than the other, the owner of the plot of land on a lower level, into which water flows in the ordinary course of nature from the adjacent land on a higher level, is not entitled in law so to deal with his land as to obstruct the escape of water from the higher land. [p. 680, col. 1.]

Gibbons v. *Lenfestey*, (1915) 113 L. T 55; 84 L. J. P. C. 158, *Young* v. *Bankier Distillery Co.*, (1893) A. C. 691; 69 L. T. 838; 58 J. P. 100, *Blair* v. *Bunter Finlay & Co.*, 9 Court Sess. Cases, 3rd Series Macpherson at p. 207, *Smith* v. *Kernick*, (1849) 7 C. B. 515; 18 L. J. C. P. 172; 13 Jur. 362; 137 E. R. 205; 78 R. R. 745, *Rylands* v. *Fletcher*, (1868) 3 H. L. 330; 37 L J. Ex. 161; 19 L. T. 220; 143 R. R. 629 and *Ramaswamy* v. *Rasi* (*Sankarappa Naicker* v. *Pari Naicker*), 21 Ind. Cas. 62; 38 M. 149; (1913) M. W. N. 640; 25 M. L. J. 276, relied on.

Mahamahopadyaya Rungachariar v. *Municipal Council of Kumbakonam*, 29 M. 539; 16 M. L. J. 582; 1 M. L. T. 333 and *Sangana Reddiar* v. *Perumal Reddiar*, 5 Ind. Cas. 921; (1910) M. W. N. 545; 7 M. L. T. 164, dissented from.

Second appeal against a decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 380 of 1921, preferred against that of the Court of the District Munsif, Kovvur, in O. S. No. 911 of 1919.

ORDER OF REFERENCE TO A FULL BENCH.

Phillips and Ramesam, JJ.—The plaintiff (appellant) is the owner of a piece of land which lies on a higher level than the land of the defendant and he seeks to prevent the defendant from erecting a *bund* on his land, which has the effect of preventing the flow of surface water over the plaintiff's land on to the defendant's land which is its natural outlet. The lower Appellate Court following the ruling in [*Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) has held that the defendant is entitled to prevent water flowing over his land by erecting a *bund*. It is now argued for the appellant that this decision in *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) is only applicable to cases where the lands are situated within a town and he relies on subsequent cases of this Court, *Ramaswamy* v. *Rasi* (*Sankarappa Naicker* v. *Pari Naicker*) (2) and *Gopala Kristna Yachendrulu Varu* v. *Secretary af State for India* (3). In *Ramaswamy* v. *Rasi* (*Sankarappa Naicker* v. *Pari Naicker*) (2) the prior decision in *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) was distinguished on the ground that it referred to land in a town and was, therefore, not applicable to agricultural land outside a town. The decision in *Gopala Kristna Yachendrulu Varu* v. *Secretary of State for India* (3) was with reference to the right to *bund* a natural stream and Seshagiri Iyer, J., prefers to base his decision on *Illustration* (*h*) of s. 7 of the Easements Act (V of 1882) rather than *Illustration* (*i*) which deals with surface water, *Illustration* (*h*) dealing with natural streams. He, however, adds that if the learned Judge in *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) intended to lay down that the principle regarding the conflict of rights should be extended to agricultural areas in rural parts, he dissents from the proposition and Wallis, Offg. C. J., takes the same view. Subramania Iyer, J., in *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) laid down the proposition that the natural right mentioned in *Illustration* (*i*), namely, "the right of every owner of upper land that water naturally rising in, or falling on, such land and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto," was not an absolute right but was the right to pass such water without incurring any liability for damages caused thereby and held that when that right came in conflict with the right mentioned in *Illustration* (*a*), namely, "the exclusive right of every owner of land in a town to build on such land, subject to any Municipal Law for the time being in force," the latter must prevail. If this proposition is correct, it would be illogical to hold that the natural right to pass water over a lower land cannot prevail in a town, whereas it must prevail in the country.

In s. 7 we have the definition of what an easement is, namely, "restriction of one or other of the following rights" which are mentioned. Because *Illustration* (*a*) mentions the right of an owner of land "in a town" to build on such land, it does not necessarily exclude the right of an owner of land in the country to build on such land. In fact s. 7 itself deals with the exclusive right of every owner of immoveable property, subject to any law for the time being in force, to enjoy and dispose of the same and also the right of every owner of immoveable property, subject to any law for the time being in force to enjoy without disturbance by another the natural advantage arising from its situation. *Prima facie* the owner of immoveable property is entitled to do what he pleases with his land and can only be restrained by law or by the superior right of some other person. There can be no distinction between such a right in a town and the same right in the country, unless it is subject to any law for the time being

(1) 29 M. 539; 16 M. L. J. 582; 1 M. L. T. 333.

(2) 21 Ind. Cas. 62; 38 M. 149; (1913) M. W. N. 640; 25 M. I . J. 270.

(3) 26 Ind. Cas. 800; 28 M. L. J. 98; 16 M .L. T. 597; 2 L. W. 45.

in force. We find it difficult to realise the distinction drawn between such rights in *Ramaswamy* v. *Rasi* (*Sankarappa Naicker* v. *Pari Naicker*) (2) and *Gopala Kristna Yachendrulu Varu* v. *Secretary of State for India* (3) unless there is some law or custom having the force of law which restricts the right in rural areas, but not in urban areas. The difficulties of cultivating land are referred to and it is suggested that owing to these difficulties the natural right of an owner of land to do on it what he pleases is subject to restrictions but this can only be if the restrictions are imposed by law or custom having the force of law. If the right of an owner to pass his surface water on to the lower land is an absolute right which the owner of the lower tenement cannot resist, it is undoubtedly an easement right enjoyed by him over the lower tenement but we find in the Act that the right is given as an illustration of a right against which an easement may be acquired, and is not described as being in itself an easement right. It is doubtful whether the Legislature would have given a right which is in itself an easement right as an illustration of a natural right in restriction of which an easement right can be acquired. We may mention that the observations in *Gopala Kristna Yachendrulu Varu* v. *Secretary of State for India* (3) with reference to *Illustration* (*i*) of s. 7 are *abiter* inasmuch as it was found in that case that the water which was interfered with was the water of natural stream. The decision, however, in *Ramaswamy* v. *Rasi* (*Sankarappa Naicker* v. *Pari Naicker*) (2) distinctly limits the proposition put forward in *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) to urban areas although in the earlier judgment there is no language to lead one to suppose that the learned Judges meant to confine the decision to urban areas. They no doubt refer to *Illustration* (*a*) which deals with land in a town, but the right mentioned is only an illustration of the right referred to in s. 7 and does not exclude other rights *ex jure naturæ* appertaining to an owner of land. An owner of agricultural land is undoubtedly entitled to raise the level of his land if he so wishes, provided there exists no legal restriction to such act. It might thus happen that a lower land when raised would become higher in level than the adjacent land which had formerly been on a higher level. The right to pass water would thereby be reversed and the owner of the originally lower land would be entiled to pass water on to what was originally the higher land. If the owner of the lower land has such a right to raise his land over the whole of it, it is strange that he cannot raise the level over only a part, such raising having the effect of stopping the flow of water through the adjacent land but whether he has such right must depend on the extent of the right of the owner of the land which was originally higher. Three other authorities have been cited before us from other parts of India, the first being *Ambica Saran Singh* v. *Debi Saran Singh* (4) in which it was decided that the owner of higher land had the right to pass his surface water over lower land so long as it continued to be on a lower level, apparently dissenting from the decision in *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) although in terms it does not purport to do so. In the other two cases of Calcutta and Patna respectively, the Easements Act does not apply *Ramadhin Singh* v. *Jadunandan Singh* (5) and *Sarban* v. *Phudo Sahu* (6). The former case is of no assistance here, for it merely deals with the right of a party to abstain from passing water falling on his land to the lower land and to callect it on his own land. The Patna case does not refer to any authorities and the Court came to the conclusion differing from that taken in *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1).

Inasmuch as the authority of *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) which was followed in *Sangana Reddiar* v. *Perumal Reddiar* (7) has been questioned in *Ramaswamy* v. *Rasi* (*Sankarappa Naicker* v. *Pari Naicker*) (2) and *Gopala Kristna Yachendrulu Varu* v. *Secretary of State for India* (3) we think that it is advisable that the whole question should be considered by a Full Bench of this Court, and accordingly we refer the case to a Full Bench for decision.

This second appeal came on for hearing yesterday in pursuance of the said Order of Reference to a Full Bench. Upon

(4) 24 Ind. Cas. 91; 12 A. L. J. 685.

(5) 27 Ind. Cas. 268; 19 C. W. N. 54.

(6) 69 Ind. Cas. 947; (1922) Pat. 305; 4 U. P. L. R. (Pat.) 105; 4 P. L. T. 81; A. I. R. 1923 Pat. 65; 2 Pat. 110.

(7) 5 Ind. Cas. 921; (1910) M. W. N. 545; 7 M. L. T. 164.

perusing the grounds of appeal, and the judgments and decrees of the lower Appellate Court, and the Court of first instance, and the material papers in the suit and the said Order of Reference to the Full Bench, and upon hearing the arguments of Mr. *Y. Suryanarayana*, for the Appellant and Mr. *B. Satyanarayana*, for the Respondents, and having stood over for consideration till this day, the Court expressed the following

OPINION.

Coutts Trotter, C. J.—This appeal raises certain questions of fact with which we are not concerned. The question of law to which our attention has been directed is whether the owner of a plot of land on a lower level on to which water flows in the ordinary course of nature from adjacent land on a higher level is entitled in law so to deal with his land as to obstruct the escape of water from the higher land. It is said that any right which the owner of the higher land has is not in the nature of an easement and that terms such as dominant and servient tenements are inapplicable. That may be true in the abstract but it seems to me that the Privy Council and the House of Lords have clearly recognised a very close analogy between the two classes of cases and that if the owner of the land at the lower level raises an obstruction to the natural flow of the water, he will be restrained if it causes or tends to cause damage to the owner of that on the higher. *Gibbons* v. *Lenfestey* (8) is a direct authority of the Privy Council binding upon us. In the judgment of the Committee which was delivered by Lord Dunedin we have at page 57*.

"The right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property; it is a question of nomenclature whether it is or is not called a servitude."

Later on we have "Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property." In *Young* v. *Bankier Distillery Co.*, (9) Lord Watson says at page 696: "The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation unless it has been unduly and unreasonably, increased by operations which are in *æmulationem vicini*. But he is under no legal obligation to receive foreign water, brought to the surface of his neighbour's property by artifical means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream."

And then His Lordship quotes Lord Giffard in *Blair* v. *Bunter Finlay & Co.* (10) "although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible."

The same principle clearly underlies the decision in *Smith* v. *Kernick* (11) and in that case Mr. Justice Crosswell in delivering the judgment of the Court said (page 565*).

"There are many cases in which the principle has been recognised, that one land-owner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus, he cannot by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house; nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time, the adjoining land has become subject to a right analogous to what in the Roman Law was called a servitude. So, also, in *Acton* v. *Blundell* (12),—where the subject was very much discussed,—the Court held that one land-owner, having dug a well on his own land, could not maintain an action against a party who afterwards sunk a coal-pit in the neighbourhood, which had the effect of drawing the water away from his well; the act not being done by the defendant negligently or maliciously, but in a proper manner, for the purpose of winning his own coal. We think that the same principle is applicable to the present case. The water is a sort of common enemy,—as was said by Lord Tenterden in *Rex* v. *Commissioners of Sewers for Pagham* (13),—against which each man must defend himself. And this is in accordance with the Civil Law, by which it was considered that the land on a lower level. owed a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it."

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(8) (1915) 113 L. T. 55; 84 L. J. P. C. 158.

*Page of (1925) 113 L. T.—[*Ed.*]

(9) (1893) A. C. 691; at p. 696; 69 L. T. 838; 58 J. P. 100.

(10) 9 Court Sess. Cases, 3rd Series Macpherson at p. 207.

(11) (1849) 7 C. B. 515; 18 L. J. C. P. 172; 13 Jur. 362; 137 E. R. 205; 78 R. R. 745.

*Page of (1849) 7 C. B.—[*Ed.*]

This last case also touched on the distinction between natural and artificial accumulations of water which was later in 1898 made the basis of the celebrated decision in *Rylands* v. *Fletcher* (14). The reference seems to have been made on account of the conflict of views expressed in *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) and *Sangana Reddiar* v. *Perumal Reddiar* (7) on the one hand and *Ramaswamy* v. *Rasi* (*Sankarappa Naicker* v. *Pari Naicker*) (2) on the other. The referring Bench in accepting the distinction drawn in *Ramaswamy* v. *Rasi* (*Sankarappa Naicker* v. *Pari Naicker*) (2) held that the decision in *Mahamahopadyaya Rungachiariar* v. *Municipal Council of Kumbakonam* (1) only referred to urban areas and we agree that no such distinction arises. It doubtless came from the accident. that *Illustration* (*a*) to s. 7 of the Easements Act instances a case of land in an urban area because it wishes to safeguard the statutory rights of urban authorities to restrict unapproved methods of dealing with land and buildings. In our opinion *Mahamahopadyaya Rungachariar* v. *Municipal Council of Kumbakonam* (1) was wrongly decided and the reasoning on which it is based is clearly at variance with the decisions of the Privy Council and the House of Lords to which we have referred; and the same observations apply to *Sangana Reddiar* v. *Perumal Reddiar* (7). It cannot be that the law recognises two inconsistent rights in adjacent owners, the exercise of one of which would necessarily destroy the other.

It was contended by the respondent that, if the argument of the appellant should be correct, the owner of the adjoining lands at a lower level would be prevented from improving their lands, but this is clearly not so, as the adjoining owner can improve his lands to any extent he pleases even to the extent of raising the level of his lands provided that he makes suitable arrangements for carrying off the water from his neighbour's land. We are confirmed in our view by the fact that the decision in *Ramaswamy* v. *Rasi* (*Sankarappa Naicker* v. *Pari Naicker*) (2) was referred to by the Privy Council in *Mauug Bya* v. *Maung Kyi Nyo* (15) with approval as being consistent with the authorities.

We refer the case back to the Division Bench for final disposal with this expression of opinion.

V. N. V. *Reference answered.*

(12) (1843) 12 M. & W. 324; 13 L. J. Ex. 289; 152 E. R. 1223; 67 R. R. 361.

(13) (1828) 8 B. & C. 355; 2 Man. & Ry. 468; 6 L. J. K. B. (o. s.) 338; 108 E. R. 1075; 32 R. R. 406.

14) (1868) 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220; 143 R. R 629.

(15) 90 Ind. Cas. 198; 52 I. A. 385; 42 C. L. J. 156; 49 M. L. J. 282; A. I. R. 1925 P. C. 236; 27 Bom. L. R. 1427; 3 R. 494; (1925) M. W. N. 894; L. R. 6 A. (P. C.) 209; 30 C. W. N. 218 (P. C.).

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 602 OF 1925.

November 24, 1925.

Present:—Mr. Justice Taraporewala.

THE PIONEER ALKALI WORKS LIMITED—PLAINTIFFS

versus

AMIRUDDIN SHALEBHOY TYEBJI—DEFENDANT.

Company—Shares, calls for—Resolution by Board of Directors—Time, place, amount and person, specification of.

Where the Articles of Association authorise the Directors of a Company to make calls upon the shareholders in respect of moneys unpaid, to the persons and at the time and place appointed by the Board, the Directors must, when they make a call, fix and appoint by resolution the amount to be paid, the time and place of payment and the person to whom the same should be paid. Any failure to comply with the above requirements can be remedied by any subsequent issue of notice. [p. 684, col. 1.]

In the absence of any such provisions in the Articles of Association, the fact that the amount of the call is fixed by the terms of the issue of the shares cannot be treated as creating an obligation on the share-holders to pay such amount as and by way of a call. [*ibid.*]

Mr. *Munshi*, for the Plaintiffs.

Mr. *B. J. Wadia*, for the Defendant.

JUDGMENT.—In the first suit the plaintiff Company claim to recover from the defendant a sum of Rs. 3,058-7-7 with interest thereon alleging that the said amount is due by the defendant as the share-holder in the plaintiff Company in respect of the third call alleged to have been made by the plaintiff Company. The only issue in the suit is whether the call was legally made and is binding on the defendant under the Articles of Association the Company.

There was one resolution passed by the Directors making the second and the third calls. That resolution is as follows:—

"Resolved that the second (or the first as the case may be) call be made on June 30, 1922, and the third (or the second as the case may be) call be also made payable two months after that date."

Article 38 of the Articles of Association provides for the making of calls in the following terms:—

"The Board may, from time to time, make such calls upon the share-holders in respect of all moneys for the time being unpaid on their shares as the Board think fit, and every share-holder shall be liable to pay the amount of every call to the persons, and at the time and place appointed by the Board; provided that no amount shall be called up in respect of any share to an extent in excess of the amount called up in respect of the rest of the issued or allotted shares for the time being."

Then Art. 40 provides for the notice of the call being given, and Art. 41 provides that a call shall be deemed to have been made at the time when the resolution of the Board authorizing the call was passed.

The plaintiffs originally claimed interest on the amount of the calls, but they have abandoned that claim.

Now Art. 38 is in the same terms as the usual Article which now appears in the Articles of Association of Companies. The question as to what is a proper resolution for making a call under an Article framed as here is considered in *In re Cawley & Co.* (1). In that case no time or place of payment was appointed in the original resolution of December 18. The time and place of payment were appointed by a resolution of January 17 following. It was held by the Appeal Court that there was no proper call made until the second resolution fixing the time and place for payment. The head-note at pages 209 and 210* is not accurate as will appear from the following observations of Lord Esher, M. R., at page 228*, in which the other two Lords of Appeal concurred:—

"In order to make a call within the Articles of Association, we must see what is necessary to be done to make a call. In the first place, there must be a resolution of the Directors. They cannot do such a thing as make a call without a resolution. Then, what is to be done in passing a resolution to make a call? Article 38 says the time and place for payment must be stated...Therefore, there could be no valid call in this Company until the time and place for its payment had been appointed by the Board; that is to say, until it had been resolved by the Directors that the call should be payable in certain instalments and in a certain manner and at a certain time appointed by the Board. The Article says, 'as shall be appointed from time to time.' I take those words to mean this; that the Directors are not bound to make a call of the whole of the unpaid capital, but that they may make a call of part only, and that at another time they may deal with the rest, so that there may be successive calls until the whole of the capital has been paid up...but, if there is a resolution passed that a call shall be made, and afterwards, on a subsequent day, a further resolution is passed naming a time and place for payment, the utmost that can be said is, that the two resolutions taken together make a valid call, but that there is no call until the latter day."

The question was also discussed in *Johnson* v. *Lyttle's Iron Agency* (2). There in the judgment of the first Court, Jessel, M. R., held that there was no objection to the call which could be sustained on the ground which was taken, *viz.*, that the time

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(1) (1889) 42 Ch. D. 209; 58 L. J. Ch. 633; 61 L. T. 601; 37 W. R. 692; I Meg. 251.

(2) (1877) 5 Ch. D. 687; 46 L. J. Ch 786; 36 L. T. 528; 25 W. R. 548.

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*Pages of (1889) 42 Ch. D.—[*Ed.*]

for payment was not mentioned in the original resolution and the same was inserted therein afterwards by the Secretary. It was assumed by Jessel, M. R. that that must have been done with the authority of the Directors. The Appeal Court came to the contrary conclusion. Lord Justice James observes at page 694* as follows:—

"It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. Here the notice is inaccurate. It is, therefore, bad, and the forfeiture is invalid. I may add that, as at present advised, I think that the time for the payment of the call could not properly be fixed by a mere verbal direction to the Secretary; it ought to be fixed by a formal resolution of the Directors."

Mr. Munshi for the plaintiffs relied on the judgment in *Sheffield and Manchester Railway Co.* v. *Woodcock* (3). In that case none of the resolutions making the calls specified the place where or the person to whom payment was to be made; but shortly after the passing of each of the resolutions, notices were inserted in the local newspapers pursuant to the directions of the Act of Parliament, signed "by order of the Directors" by the clerk and Secretary, stating that "the Directors having resolved to make a call" for an instalment of...per share, the proprietors were required to pay the said call on or before etc., to some one of the under-mentioned bankers. It was contended that the time and place of payment of the calls ought to have been specified in the resolutions in order to entitle the Company to recover them. Parke B., in delivering the judgment of the Court, observes as follows (page 587†):—

"There appears to us to be nothing in the 115th section, nor in any other part of the Act, which requires the Directors to fix the person to whom and the place where the payment is to be made, at the same time that they resolve that a call shall be made, and as part of the same resolution. It seems to us to be open to them to fix such person, as well as the time and place of payment, at a different period, and by a distinct act. A question indeed may arise in some cases, where there has been a change of proprietorship by transfer, what is the time of making a call, which fixes the liability of the then proprietor of a share under the 118th section and which prevents the free transfer of a share under the 127th section; whether it is to date from the original resolution, from the time of fixing the mode of payment, of giving notice in the newspapers, or even from the period when the calls become due. ...All that we have to determine now is, that the Directors may fix the time, place, and manner of payment, after the original resolution has been made, and by a distinct act."

The judgment proceeds entirely upon the construction of the section of the Act in that case, and on the proved fact that the Directors had, subsequent to the passing of the resolution, appointed the place where and the person to whom the payment was to be made.

The time of payment is mentioned in the resolution before me but the defect which the defendant points out is in respect of the amount, the place of payment, and the person to whom the same was to be paid, which are not mentioned in the resolution. Mr. Munshi has argued that the amount of the calls was fixed when the new issue of capital, to which the defendant subscribed, was resolved upon by the Company. The Company then gave authority to the Directors to fix the manner in which the new capital should be paid by the subscribers. The Directors accordingly resolved that the new capital should be paid by calls of Rs. 5 which were not to be made before a certain interval had elapsed. Mr. Munshi says that that resolution ought to be read with the resolution in making the second and third calls, that the amount of the call having been fixed in the first resolution, it cannot be said that the amount was not fixed by a resolution of the Directors, and that taking the two resolutions together, there was a valid and binding call made on the subscribers so far as the amount of the call was concerned.

Now, there is no doubt that the shareholders are bound by the Articles of Association, and the Memorandum of Association and nothing else in the absence of any special agreement. Even if in the prospectus the amount of the calls was stated to be fixed at a certain figure, the same would not create a liability in the nature of a call. Palmer in his Company Precedents, 12th Edition, Part I, at page 628 says as follows:—

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(3) (1841) 7 M. & W. 574; 11 L. J. Ex. 26; 151 E. R. 894; 56 R. R. 788.

*Page of (1877) 5 Ch. D.—[*Ed.*]

†Page of (1841) M. & W.—[*Ed.*]

"In the absence of a special provision in the Memorandum or Articles, or any special agreement as to payment, a subscriber to the Memorandum of Association, like an ordinary share-holder, is not liable to pay anything in respect of the shares subscribed for by him until calls are duly made on him."

Then, in the form of the Articles given by Palmer, he specifically provides for a case like the present in Art. 21 (*a*) at page 630 in the following terms:—

"If by the terms of issue of any share or otherwise any amount is made payable at any fixed time or by instalments at fixed times, whether on account of the amount of the share or by way of premium, every such amount or instalment shall be payable as if it were a call duly made by the Directors and of which due notice had been given, and all the provisions herein contained in respect of calls shall relate to such amount or instalment accordingly."

In the absence of any such provision in the Articles of Association, the fact that the amount of a call is fixed by the terms of the issue of the shares, cannot be treated as creating an obligation on the shareholder to pay such amount as and by way of call. It is something quite distinct from the process of making a call whereby alone the liability to pay the amount is created. Under Art. 38, the Directors must, when they make a call, fix and appoint by resolution the amount to be paid, the time and place of payment and the person to whom the same should be paid. The fact that in this case there is a resolution of the Directors fixing the amount of the calls, when they fixed the manner in which the capital of the new issue should be paid, does not differentiate this case from a case where the amount of the calls is fixed by the prospectus. It has been held that, notwithstanding any such provision, a Company can make even a call in excess of the amount so fixed at the time of the issue, and certainly can make a call for a lesser amount. The share-holder, therefore, on whom the call is made is entitled to know from the resolution making the call, the amount which the Directors have resolved to ask for in respect of that particular call. It is to be noted that in the resolution for the first call passed by the Directors in respect of the new issue, the amount of the call *viz.*, Rs. 5, is mentioned.

In my opinion, there cannot be any distinction between the other requirements of the Article regarding the call. I do not see on what principle it can be argued that although the place is not mentioned in the resolution, it is sufficient if it is subsequently mentioned in the notice, but that if the time is not mentioned in the resolution, it would invalidate the call. As observed by Lord Justice James, in *Johnson* v. *Lyttle's Iron Agency* (2) every requirement is of the same importance whether it is a small or a big one, and, therefore, if the place is not mentioned in the resolution it cannot be contended that because it is mentioned in the notice it is sufficient. There is no evidence before me to show that, so far as the second and third calls are concerned, the Directors ever resolved that the amount of the calls should be Rs. 5 each or that they should be paid at a particular place or to a particular person. Even if Mr. Munshi's argument as to the amount of the call having been fixed by the resolution at the time of issue of new capital be correct, neither the place of payment nor the person to whom the payment was to be made was appointed by a resolution of the Directors. Mr. Potdar, who gave evidence on behalf of the plaintiffs, did not make any allegation to that effect.

Under these circumstances, I must hold that the second and third calls were not validly made, and the plaintiffs' suit must be dismissed with costs.

R. L. *Suit dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2171 OF 1922.

May 26, 1925.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Cuming.

CHANDI CHARAN MITRA—DEFENDANT—APPELLANT

versus

ASHUTOSH LAHIRI—PLAINTIFF—RESPONDENT.

Lease—Second lease for convenient use of land under first lease—Presumption as to incidents of second lease—Indefinite tenancy, duration of—Yearly rent—Presumption as to nature of tenancy.

Where a land is taken on lease for the convenient use and occupation of other premises already taken under a lease, there is no presumption that incidents of the first lease also attach to the second.

The question whether a lease for an indefinite term enures for the life of the grantee and cannot be put an end to by a notice to quit, depends upon the terms of the lease.

In the absence of anything to show the contrary an agreement to pay annual rent indicates that the tenancy is yearly.

Appeal against a decree of the Subordinate Judge, Rungpur, dated the 6th May 1922, affirming that of the Munsif, Rungpur, dated the 19th May 1921.

Mr. *Rishindra Nath Sarkar* (with him Babu *Sudhangsusekhar Mukherjee*), for the Appellant.

Mr. *Girijaprasanna Sanyal* (with him Babu *Phanindra Lal Maitra*), for the Respondent.

JUDGMENT.

Chatterjea, J.—This appeal arises out of a suit for ejectment of the defendant after notice to quit. The Court of first instance gave a decree to the plaintiff and that decree has been affirmed on appeal by the lower Appellate Court.

The defendant has appealed to this Court and four contentions have been raised before us.

The first is that the land in suit was taken settlement of for the purpose of enlarging the compound of the house in which his predecessor-in-title was residing, that he had a permanent tenancy in the house; and that the incidents of that tenancy would apply to the disputed land also as it was taken for the purpose of enlarging the compound of the house. We do not, however, think that that would follow. A man may have a permanent right to a piece of land, but he would not necessarily have the same right to another piece of land adjoining it.

The next point taken is, that the two holdings were amalgamated because one rent-receipt was granted in respect of both. But they have been mentioned as two distinct *jamas* and we do not think there was any amalgamation of these two tenancies.

The third point is that the lease was for an indefinite term and that, therefore, it enures for the life of the grantee and it cannot be put an end to by a notice to quit. Whether it is so or not, depends upon the terms of the document and in this particular case there is nothing to show that it comes within that principle. An annual rent was payable and in the absence of anything to show the contrary it indicates that it was a yearly tenancy. Section 106 of the Transfer of Property Act lays down that "in the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy". There is nothing in this case to show that it does not come within s. 106 of the Transfer of Property Act.

The last contention is that the notice to quit is bad as it did not expire with the end of the year of the tenancy. The lease was granted on the 28th *Pous*, 1306 corresponding to 11th January 1900. The notice to quit was served on the 9th July, 1919, to vacate the land within the 11th January. The suit was instituted on the 9th October 1920. The Court below found that the tenancy commenced on the 11th January and the year of the tenancy extended to the 10th January of the next year.

The learned Advocate for the appellant has relied upon some rent receipts showing that rent was paid according to the *Bengali* year and has contended that that being so the year of the tenancy did not extend to the 10th January but to the last day of the *Bengali* year. It is not clear that this question was raised in the Court below, because there is no reference to it in the judgment of the lower Court; and, if we were to direct a remand to the Court below for a determination of this question it would lead to further litigation; and if the notice is found to be bad the defendant will have ultimately to quit after proper service of notice to quit. In these circumstances the learned Advocate for the respondent has agreed to give up costs and also to give the appellant time to vacate the land in question within six months from this date.

We accordingly dismiss the appeal and direct that each party do bear his own costs in all the Courts. There will be a direction in the decree that the defendant must vacate the land in suit within six months from this date.

Cuming, J.—I agree.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 3112 OF 1917.
March 12, 1926.
Present:—Mr. Justice Martineau.
MUIN-UD-DIN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
ABUL KHAIR AND OTHERS—DEFENDANTS RESPONDENTS.

Procedure—Decree against minor in second appeal—Decree set aside—Second appeal, re-hearing of.

Where a decree in second appeal passed by the High Court is set aside on the ground that a minor respondent was not duly represented by a guardian *ad litem*, the second appeal would be re-heard.

Bhagwan Dayal v. *Param Sukh Dass*, 36 Ind. Cas. 366; 39 A. 8; 14 A. L. J. 818, referred to.

Second appeal from a decree of the District Judge, Hissar, dated the 11th August 1917, modifying that of the Munsif, Second Class, Hissar, dated the 17th July 1916.

Mr. *Shamair Chand*, for the Appellants.

JUDGMENT.—The plaintiffs brought a suit in which they asked for several injunctions against the 1st defendant Nur Mustafa. The Trial Court gave them a decree in full but on appeal the District Judge set aside one of the injuctions, namely, in regard to the demolition of a wall and a room built by the defendant, and held that although these were new erections and they narrowed the way to which the parties were entitled the relief to be given to the plaintiffs should take the form of compensation. The plaintiffs filed a second appeal in the Court. It was heard *ex parte* and Mr. Justice LeRossignol accepted it and restored the decree of the first Court.

During the pendency of the appeal in the Court Nur Mustafa had died, and his sons, one of whom, Niaz Mohammad, was a minor, were impleaded in his place. They brought a suit to have the decree of this Court set aside on the ground that Niaz Mohammad had not been properly represented by a guardian. They succeeded in the suit and the decree of this Court was declared to be null and void as against them. The second appeal which the plaintiff had filed in this Court has consequently to be re heard [*Bhagwan Dayal* v. *Param Sukh Dass* (1).] A guardian has been duly appointed for the minor Niaz Mohammad, but no appearance has been made for the respondents. I have heard Counsel for the appellants and have come to the same conclusion at which Mr. Justice LeRossignol arrived, namely, that the plaintiffs claim should have been decreed in full, and for the reasons given in Mr. Justice LeRossignol's judgment I accept the appeal and restore the decree of the Trial Court with costs throughout.

R. L. *Appeal accepted.*

BOMBAY HIGH COURT.

CROSS-APPEALS NOS. 337 OF 1922 AND 67 OF 1923.
July 29 and August 25, 1921.
Present:—Mr. Justice Marten and Mr. Justice Fawcett.
KESARLAL GIRDHARILAL DESAI AND OTHERS—DEFENDANTS—APPELLANTS, IN APPEAL NO. 337 OF 1922.
versus
JAGUBHAI HIRALAL AND OTHERS—PLAINTIFFS—RESPONDENTS IN APPEAL NO. 67 OF 1923.

Civil Procedure Code (Act V of 1908), O. XX, r. 18—Partition suit—Interest, whether can be allowed—Hindu Law, interpretation of—Mayukha—Succession—Sons of deceased brother, whether entitled to succeed along with brothers.

In a suit for partition the Court has power, after a preliminary decree has been passed, to award interest, although the preliminary decree does not make any mention of interest. [p. 687, col. 2; p. 689, col. 1.]

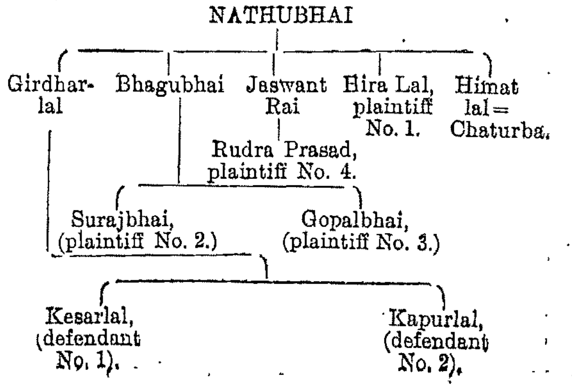
In the administration of the Hindu Law it is not the literal meaning of the original text that is to be looked to. Though commentators may have been wrong in their interpretation of an original text their opinion should be enforced as having the sanction of usage. [p. 692, col. 1.]

In the *Mayukha* the sons of pre-deceased brothers succeed along with surviving brothers to the estate o a deceased Hindu. [*ibid.*]

[Case-law referred to.]

Cross-appeals from an order of the First Class Subordinate Judge at Nadiad, in *Darkhast* No. 238 of 1920.

FACTS.—The following pedigree-table illustrates the relations of the parties to the suit.


NATHUBHAI
Girdharlal
Bhagubhai
Jaswant Rai
Hira Lal, plaintiff No. 1.
Himat lal = Chaturba.
Rudra Prasad, plaintiff No. 4.
Surajbhai, (plaintiff No. 2.)
Gopalbhai, (plaintiff No. 3.)
Kesarlal, (defendant No. 1).
Kapurlal, (defendant No. 2).

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(1) 36 Ind. Cas. 366; 39 A. 8; 14 A. L. J. 818.

These cross-appeals arise out of a suit for partition for family property filed as long ago as 1893, in which a preliminary decree was passed (as modified in appeal) for taking accounts since 1870. Accounts were taken and a report submitted in 1907. The defendants then made over certain lands to the plaintiffs. The report coming up before the Trial Court, and on appeal before the High Court, the latter directed the accounts to be submitted down to 1907. The Commissioner after compliance with the above order submitted his report in 1919 and after reference to the Court made his final report in 1921. In the meantime Himat Lal died in 1902, after bequeathing his share to his wife who was brought on to the record as the representative of her husband. In 1905 she sold his share to defendants Nos. 1 and 2, she died in 1917, and in 1918 plaintiffs Nos. 2, 3 and 4 applied to the Court stating that they and the defendants were entitled to the property of Himat Lal as his reversioners. The Trial Court confirmed the Commissioner's report, upheld the sale-deed in favour of defendants Nos. 1 and 2, and referred the parties to apply for a Succession Certificate with respect to the right to succeed to the profits accruing from the estate of Himat Lal, prior to the sale-deed in favour of defendants Nos. 1 and 2.

Messrs. *G. S. Rao* and *H. V. Divatia*, for the Appellants.

Messrs. *M. H. Mehta*, *G. N. Thakor* and *N. K. Mehta*, for the Respondents.

JUDGMENT.

Marten, J. (*July 29, 1924*).—[His Lordship after dealing with facts of the case discussed the question of interest thus:—] Next it was argued that as a matter of law we were unable to direct interest to be paid. Mr. Rao cited to us several decisions of the Privy Council based on the law or the practice which was in force prior to the present practice and to the practice which regulated to the decisions of the Court at the time when these proceedings were originally heard. I may note in passing that in one judgment their Lordships followed a particular rule, not because they themselves were in favour of it but because it represented practically the unanimous decisions of all the High Courts in India, and, therefore, in face of that unanimous opinion they were not prepared to set it aside, and declare that those decisions were all wrong. But in fact by alteration in the rules those decisions have been rendered obsolete.

Now we have not here a suit for possession of immoveable property and for rent or mesne profits as in O. XX, r. 12. In that class of suits it is quite easy for a plaintiff to ask at the trial for interest when he gets his decree for possession. If he does not then ask for mesne profits, one can quite understand that he may be debarred thereafter from getting them. But the suit before us is governed partly by O. XX, r. 18, which provides for making preliminary decrees for the partition of property, and for giving such further directions as may be required. We are now on what I may call further consideration, and I think we may give such further directions as are necessary to work out the accounts and adjust the rights of the parties between themselves. What then about interest?

Now in the present case if it is open to us to award interest on this money, I should unhesitatingly do so having regard to the conduct of defendants Nos. 1 and 2 which the Commissioner has so adversely commented on and with which comments I entirely agree. I may also say that under the rule of Damdupat, which admittedly applies here, the Hindu Law has foreseen the possibilities of what I have called the longevity of Indian litigation. The rule works very usefully here, because if one takes interest at the normal Court rate of 6 per cent. then after approximately 16⅔ years' delay you reach your 100 per cent. and no more interest can be obtained by a plaintiff. So approximately if you take the date of October 1907 when the possession in this case was given and when this sum in question was due from the defendants, we have just about 16⅔ years' interest up to the present date. Consequently as a matter of arithmetic it is sufficient to debit the defendants with interest on the sums found due from them as at October 1907 and to disregard complications as to the interest prior to that date. Even taking that date, they have got off some fourteen years' interest from the date of the suit, to say nothing about interest due prior to that date.

Therefore it seems to me—and I wish to make this distinction perfectly clear—that we should not debit the defendants with interest on the profits received by them year by year up to 1907, but should debit them with the final sum found due from them by the Commissioner at the proper date, *viz*, 1907, and with interest thereon to the present date. In my opinion we have jurisdiction to do that in this case. In this connection I again want to point out the difference which exists between a case where a Court can only grant a preliminary decree, and a case in which the main rights can be ascertained at the trial. In Daniell's Chancery Practice, 7th Edition, Volume I, page 950, I find it stated:—

"A party may be charged with interest at the hearing upon further consideration, although the question has not been reserved by the original judgment; and not only may the computation of simple interest be so directed, but, where the Court finds large sums of money in the hands of an agent, Receiver, trustee or personal representative, it may direct balances from time to time in the hands of the accounting party to be ascertained, and interest to be computed on them. The Court has even gone the length of charging an accounting party with interest on the balance in his hands on further consideration, not only where there was no reservation of the question of interest by the original decree but even where there was not originally any claim that he might be so charged, and where the circumstances were such that a claim for interest existed, and was known to exist, at the time of the institution of the suit."

Then *Burland* v. *Earle & Sons* (1) was a Canadian appeal where the appellant had been ordered to re-pay money in excess of his salary as Manager of the Company. There Lord Davey in delivering the judgment of their Lordships said:—

"Their Lordships do not doubt the power of the Court on further directions to order payment of interest on a sum found due from a defendant, although the decree declaring the liability contains no direction for payment of interest or the statement of claim does not ask for it. In a case like the present one the plaintiffs are not entitled as of right to interest, and the liability for payment of interest is a matter for the discretion of the Court, and depends largely on the view which the Court may take as to the conduct of the defendant to be charged and the circumstances under which the liability for payment of the principal sum was incurred."

Then on going into the facts of that case their Lordships were of opinion that as the Order in Council intentionally omitted to make an order as to interest, therefore, the Court below had no discretion in that particular case to allow interest and consequently the claim for interest was over-ruled.

I may also refer to *In re Salvin, Worsley* v. *Marshall* (2) where Mr. Justice Eve went into the practice of allowing interest upon the arrears of an annuity, and after pointing out that there was a difference between an administration suit and a mortgage suit in that respect, he directed on further consideration that the arrears of an annuity should carry interest.

There is another line of authority which is exemplified in *Turner* v. *Burkinshaw* (3) where Lord Chelmsford pointed out that usually, unless fraud is proved, an agent is not charged with interest on the moneys in his hands, except from the date of the certificate. It will, however, be remembered that in the present case the original report or certificate was in 1907, and that it is mainly by reason of the subsequent appellate judgment directing the accounts to be carried back still further, that defendants Nos. 1 and 2 have been enabled to delay the proceedings in this way.

Then there is a recent case of *Ramaswami Aiyar* v. *Subramania Aiyar* (4). This was a partition suit, which in the length of its proceedings was somewhat similar to the present one because it was instituted in 1895, and the learned Judges in the Madras High Court were deciding the question of interest in 1922. There the claim for interest was disallowed, and their Lordships referred to some of the English authorities. But there was this material difference of fact, which is pointed out by Mr. Justice Venkatasubba Rao. He says (page 54*):—

"As my learned brother has pointed out, it cannot be said in this case that the 2nd defendant was bound to invest the profits. The plaintiff had the conduct of the suit and it was quite open to him at any moment to ask for possession of the properties, for an account of the profits and for payment to him of the sum ascertained to be due. The delay is not attributable solely to the 2nd defendant, and the plaintiff has failed to show any grounds for making the 2nd defendant liable for interest."

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(1) (1905) A. C. 590; 93 L. T. 313.

(2) (1912) 1 Ch. 332; 81 L. J. Ch. 248; 106 L. T. 35 56 S. J. 241; 28 T. L. R. 190.

(3) (1867) 2 Ch. 488; 15 W. R. 753.

(4) 74 Ind. Cas. 804; 46 M. 47; 16 L. W. 297; 43 M L. J. 406; A. I. R. 1923 Mad. 147.

*Page of 46 M.—[*Ed.*]

Here the plaintiffs got actual possession in 1907, but long before that, *viz.*, in 1893 had asked for accounts and for payment of the sum due to them and also for interest. Therefore the Madras case seems to me quite a different one from the one which we have before us.

Accordingly, after giving my best consideration to the arguments which have been advanced, I hold, first, that in the circumstances of this particular case we have power to award interest; secondly, that it is a case in which if we have the power, undoubtedly interest ought to be allowed; and thirdly, that it ought to be awarded on the basis of interest due on the sums found due from defendants Nos. 1 and 2 as at October 1907, the date down to which the account has been ordered to be taken by the Appellate Court.

The result, therefore, is that in effect, owing to the rule of Damdupat, we arrive at precisely the same sum as was awarded by the learned Judge, and I do not propose that the figures that he has given should in any way be altered. We think that the sum he has awarded is the correct sum, and that if there should be any slight variation in rupees or pies it should be adjusted so as to make the aggregate sum for interest amount to 100 per cent. Accordingly our finding is that the sum he has allowed is correct, although we allow it for different reasons.

Fawcett, J.—I agree generally with the conclusions of my learned brother, and the reasons that he has given for them.

I will only add a few remarks on one or two points. As to the question about interest awarded against the defendants, this is clearly not a case where a decree can be said to have been passed for the payment of money, that is to say, a definite sum of money, falling under s. 34 of the C. P. C. so as to make sub-s. (2) of the section applicable to the present case. I quite agree with my learned brother that there is no ground for holding that the decree passed originally by the Subordinate Judge in 1894, and the subsequent judgment of this Court in regard to that decree, are intentionally silent on this point of interest, so that such interest must be taken to have been refused. It seems to me to be a case clearly on all fours with the authorities cited by my learned brother, especially the Privy Council case of *Burland* v. *Earle and Sons* (1), where their Lordships held that the Court has the requisite authority to pass orders making interest payable by the defendant, although the decree declaring the liability contained no direction for payment of interest.

This case is one that arose under the old Code. The plaintiffs are seeking to execute the original decree which, amongst other things directed an account to be taken of the income divisible between the plaintiffs and the defendants. And so far as regards the *Darkhast* of 1902 they asked for execution of that decree by having accounts taken. The case is one falling under s. 51 of the present C. P. C. under which the Court may grant execution in such other manner as the nature of the relief granted may require. But the position really is analogous to what the present Code recognises, namely, that a preliminary decree be first passed for the taking of an account, and then a final decree be passed when that account has been taken. The case would be entirely governed by O. XX, r. 18, of the present Code, under which the Court may give such further directions as may be required.

Now the case of taking an account under the particular rule is similar to the case of taking an account in a decree in an administration suit and that is governed by O. XXI, r. 30. We have for our guidance Forms Nos. 17 and 18 of the Appendix D to the C. P. C. of decrees in the case of a preliminary decree in an administration suit, and a final decree in an administration suit by a legatee. If those forms are looked at, it will be seen that the Legislature does recognise that although the preliminary decree does not contain any direction as to interest on the amount a defendant may be found accountable for, yet in the final decree interest may be awarded against him. In Form No. 17, item No 7, there is a direction that the defendant should pay into Court all sums of money which may be found to have come to his hands, etc. There is nothing in the different heads of this Form which mentions the word" interest," and finally the Commissioner is directed to report the result of the enquiries and the accounts and all other acts ordered and have his certificate ready for inspection of the parties on a certain date.

Then when we come to Form No. 18, head No. 1, we find the Form contemplating the Court making an order against a defendant not only as regards the amount certified by the Commissioner but also for the sum of Rs...for interest from a certain date to a certain date. I think that is a clear indication that the Legislature intended to allow a subsequent order for the payment of interest of the kind referred to in the Privy Council case that I have already mentioned." The omission to mention interest in Form No. 17 does not appear to be due to oversight, because we find the word "interest" mentioned in the form of preliminary decree in an administration suit given in Form No. 19: see item No. 3. The forms with regard to preliminary decree and final decree in suits for dissolution of partnership do not throw any light on this question, because the ordinary rule is that in taking partnership accounts interest is not allowed from one partner to another.

The case is very much like one where the Court refers the matter to the Commissioner for taking an account, and the ordinary form on the Original Side says: "Further directions and further costs reserved." It does not make any specific direction about interest, but the further directions would cover any subsequent direction on that point.

Messrs. *R. W. Desai* and *M. H. Mehta*, for the Appellant.

Mr. *G. N. Thakor* (with him Mr. *B. D. Mehta*), Messrs. *G. S. Rao* and *H. V. Divatia*, for the Defendants.

The appeal was decided in the terms of the judgments given above. The judgment on cross-appeal was delivered as under:—

JUDGMENT.

Marten, J. (*August 25, 1924.*)—We have already disposed, on July 29, of Appeal No. 337 of 1922 apart from the question of costs, and have also dealt with some of the points raised in Appeal No. 67 of 1923. We have since heard full arguments on the remaining points in Appeal No. 67 of 1923 and also Civil Application No. 523 of 1924.

Under the rulings of the Court already given, a one-fifth share in the income, the subject-matter of the accounts directed by the preliminary decree of 1894 as subsequently varied by the orders of the Appellate Court, devolves on the original defendant No. 3, Himatlal, or his assigns or personal representatives. If one looks at the pedigree, it will be observed that Himatlal was one of five brothers; three of whom, *viz.*, Girdharlal, Bhagubhai and Jaswantrai predeceased him, and one, namely, Hiralal, the original plaintiff No. 1, survived him. It will also be seen that Himatlal died in 1902 leaving a widow Chaturba who died in September, 1917. It is alleged that Himatlal left a Will in favour of Chaturba under which she was his universal legatee and devisee, and that Chaturba in her turn passed a sale-deed in respect of this one-fifth share to defendants Nos. 1 and 2 dated March 8, 1905. It is common ground that this sale-deed only affected the income after March 8, 1905. Accordingly as the accounts directed by the Court extended from 1870 up to 1907 when possession of the land was given up by defendants Nos. 1 and 2, it follows that the sums found due in respect of this one-fifth share may have to be apportioned so that the amount up to March 8, 1905, passes to the representatives of Himatlal or Chaturba, and the amount accruing after March 8, 1905, passes to the purchasers under the sale-deed of 1905.

All these points are contested. The present plaintiffs Nos. 1—4 all contest the validity of the Will and also the validity of the sale-deed as regards the moneys after 1905. But as regards the moneys prior to 1905 the present plaintiffs Nos. 2 to 4 join with defendants Nos. 1 and 2 in contending that on Chaturba's death these moneys passed to the surviving brother and the sons of the deceased brothers of Chaturba's husband Himatlal The present plaintiff No. 1, however, contends that Hiralal as the sole surviving brother alone takes these moneys and that his nephews are not entitled to share with him.

[After dealing with an objection as to jurisdiction the learned Judge proceeded :—]

In the result, therefore, I think we have jurisdiction to determine who are now entitled to this one-fifth share, and to say in what shares and proportions we should pass a final decree for payment of that share amongst the parties so entitled.

That being so, the first question arises about the Will of Himatlal which is Ex. 357 and is dated October 12, 1902.

[Here his Lordship discussed the evidence on the point and concluded :—]

In my judgment, therefore, the Will, Ex. 357, was rightly held by the learned Judge to be the last Will and testament of Himatlal. That being so, this one-fifth share passed under that Will to Himatlal's widow Chaturba.

That brings us next to the sale-deed, Ex. 358, which was passed by Chaturba in favour of defendants Nos. 1 and 2.

...In my opinion there is really no ground here for contesting the validity of this deed. Accordingly we hold that so much of Himatlal's one-fifth share of income as accrued after the date of this sale-deed passed thereunder to the purchasers defendants Nos. 1 and 2.

There yet remains the question whether Himatlal's nephews are entitled to share along with their uncle Hiralal, or whether Hiralal alone takes so much of Himatlal's one-fifth share as did not pass under the sale-deed, Ex. 358. I have had the advantage of reading the judgment which my brother Fawcett has prepared on that point, and I need only say that I concur in it. Our final conclusions on these appeals will be stated after that judgment has been delivered.

Fawcett, J.—I agree with my learned brother in upholding the findings of the lower Court as to the Will of Himatlal (Ex. 357) and the sale-deed (Ex. 358)....

The dispute resolves itself into one whether under the Law of Succession contained in the Mayukha, which is the leading authority in the Province of Gujarat, whence the parties come, the sole heir of Himatlal was Hiralal, his only surviving brother, or whether the nephews of Himatlal, plaintiffs Nos. 2, 3 and 4 and defendants Nos. 1 and 2, who are the sons of predeceased brothers, are entitled to share along with Hiralal, as if their fathers had survived Himatlal. The son of the deceased plaintiff No. 1, namely Jagubhai, puts forward the former contention, while plaintiffs Nos. 2, 3 and 4 and defendants Nos. 1 and 2 contend that they are entitled, as nephews, to share in the succession.

It is common ground that, although it is now a question of the legal representation of Bai Chaturba (who as already mentioned), was brought on the record as the legal representative of Himatlal, the original defendant No. 3, this only entails a question of heirship to her husband Himatlal, for the marriage between Himatlal and Chaturba being presumably in an approved form, and Chaturba having died leaving no issue, her *stridhan* inherited from her husband goes to his and not her, heirs. There is no dispute on this point. The sole question, therefore, before us is whether Hiralal was entitled to succeed to Chaturba's *stridhan* alone, or whether the nephews, being sons of predeceased brothers, are entitled to share along with plaintiff No. 1.

This question turns upon the meaning of para. 17 of s. 8 of Ch. IV of the Vyavahara Mayukha, and there is a dispute as to the correct translation of this paragraph. According to the translations of Messrs. Borrodaile and Stopes, the sons of brothers share the inheritance, without any restriction as to their father being alive at the death of their uncle, and the rule has accordingly been taken to be a general one that the sons of a deceased brother succeed along with the surviving brother or brothers. The translation, however, of the same passage made by Messrs. Mandlik, Jamietram and Gharpure, limits the right to the case where the father of any nephew was alive at the death of the paternal uncle, and allows such a nephew to take the share of his father on a division with the other paternal uncles.

Before us no expert evidence has been adduced as to which of these two translations is correct, nor has there been any detailed discussion on this point. In any case it would obviously be difficult for us, without a knowledge of Sanskrit, to decide which translation is to be preferred. I understand on good authority that the difference between the two translations turns upon whether an unexpressed negative should be read into one or two words, which are in this passage, and that Sanskrit allows a negative to be read in or the reverse, according to the context. There is, therefore, obviously room for legitimate difference of opinion as to the correct translation. In view of this it seems to me that in considering this question as it arises before us, we should be mainly governed by the principle laid down by the Privy Council in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (5) where their Lordships, after stating that the different commentaries had given rise to the different schools of law, say (page 436*):—

"The duty, therefore, of an European Judge who is under the obligation to administer Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, (Smritis), as to ascertain whether it has been received by the particular school which

(5) 12 M. I. A. 397; 1 B. L. R. P. C. 1; 10 W. R. P. C. 17; 2 Suth. P. C. J. 135; 2 Sar P. C. J. 361; 20 E. R. 389; Ind. Jur. 298; 1 Ind. Dec. (N. S.) 1 (P. C.).

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*Page of 12 M. I. A.—[*Ed.*]

governs the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

Similarly in *Muthukaruppa Pillai* v. *Sellathammal* (6) it is observed: It is not the literal meaning of the original text that has to be looked to in the administration of Hindu Law. Though commentators may have been wrong in their interpretation of an original text, their opinion should be enforced as having the sanction of usage.

No doubt this principle has reference primarily to ancient commentaries: but in a case like the present I think it can almost equally be applied to usage based on an interpretation accepted by modern commentators. In the present case, we have the fact that undoubtedly for a long time it has been accepted as a rule laid down by the Mayukha that the sons of full brothers succeed with full brothers and in *Chandika Bakhsh* v. *Muna Kuar* (7) this was accepted as being a definite rule in cases governed by the Mayukha. It is true that the translation there referred to was Stokes', and that there was no discussion, and, therefore, no decision, on the point now before us. On the other hand, the fact remains that this was taken as a definite rule, and the case affords a strong instance of usage. Practically all the modern commentators accept without any questioning this particular rule (see, for instance, Mayne's Hindu Law, 9th Edition, page 834; Trevelyan's Hindu Law, 2nd Edition, page 391; Mulla's Hindu Law, 4th Edition, page 91; and even Gharpure's Hindu Law. 1921 Edition, page 307). Again in *Haribhai Gulab* v. *Mathura Lallu* (8) Shah, J., who himself comes from Gujarat, treats the rule as unquestioned. Russell, J., in *Haridas* v. *Ranchordas* (9) also follows the interpretation of the rule accepted in the Privy Council case I have already mentioned. The construction which the learned Judge there gives to "the share of their father" in the translation that was furnished to him, is no doubt open to criticism; but, on the other hand, this case affords a definite judicial recognition of the rule about all nephews sharing in the succession, and no subsequent case has been cited where this interpretation has been questioned.

The only commentators who appear to favour the view put forward by Mr. Ramdutt Desai for plaintiff No. 1 are Messrs West and Majid, who in the 4th Edition of West and Bühler's Hindu Law, at page 104, limit the right of a nephew to succeed to the particular case of his father being alive when the succession opens, but dying before the partition of the estate takes place; and it is added that "Representation is not recognised in the case of a predeceased brother who has left sons. These nephews are excluded by their surviving uncles. It is only on the complete failure of brothers of the deceased that brothers' sons succeed to him.". In a foot-note on the same page it is stated:—

"Some surprise may be felt that this rule should have seemed necessary. But according to Hindu notions, as possession is generally necessary to the completion of ownership, so separate possession is essential in theory to the completion of a separate ownership of a share derived from a prior joint ownership of the aggregate. The father, however, having once become a co-parcener, his son has acquired a concurrent interest which is but expanded by the father's death."

Two cases are cited in support of this proposition, *viz.*, *Burham Deo Roy* v. *Punchoo Roy* (10) and *Chandika Bakhsh* v. *Muna Kuar* (7). With great respect, I cannot follow how these two cases really support it. I have referred to the report of *Burham Deo Roy* v. *Punchoo Roy* (10), and the head-note of that case sufficiently shows the nature of the decision. It says "According to the Mitakshara Law, a step-brother inherits after the widows, if he survives them; otherwise a uterine brother's son succeeds." The Privy Council case of *Chandika Bakash* v. *Muna Kuar* (7) contains, so far as I can see, nothing on the subject. It merely assumes the existence of the rule, as I have already mentioned, that the sons of a brother who is dead share along with the surviving brothers. There is another thing which goes against their view. Among the replies of Shastris collected in West and Majid's Hindu Law at page 492 will be found a case at Ahmednagar in 1859, where the question put to the Shastri and his answer were as follows:—

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(6) 26 Ind. Cas. 785; 39 M. 298; 16 M. L. T. 587; 2 L. W. 38; (1915) M W. N. 48.

(7) 29 I. A. 70; 24 A. 273; 6 C. W. N. 425; 4 Bom. L. R. 376; 8 Sar. P. C. J. 233 (P. C.).

(8) 77 Ind. Cas. 224; 25 Bom. L. R. 929; 47 B. 940; A. I. R. 1924 Bom. 140.

(9) 5 Bom. L. R. 516.

(10) 2 W. R. 123.

Q.—A deceased woman has no sons or other near relations, but there are one brother-in-law, and four sons of another brother-in-law who are all united in interests. The question is : which of these will be her heirs.

A.—The brother-in law and the sons of brother-in-law will all be her heirs.

This seems to show that in 1859 the Shastri who advised was following the Mayukha rule, as generally interpreted by modern commentators, and the Mayukha is in fact mentioned among the authorities given below the reply, for the Shastri can hardly have rested his opinion on the fact that the brothar-in-law and the sons of the brother-in-law were united in interest, as this affords no basis either under the Mitakshara or the Mayukha for the sons of the other brother-in-law joining in the succession.

Ahmednagar is one of the places where the Mayukha is considered to be of equal authority with the Mitakshara but generally not capable of overruling it [see *Collector of Madura* v. *Moottoo Ramalinga Sathupatty* (5) and *Bhagirthibai* v. *Kahnujirav* (11).] In the Ahmednagar Zilla, however, the Mayukha was then supposed to have a special authority, as mentioned by West, J. in the case last cited, and this seems to account for the adoption of the Mayukha rule in this case. The learned authors Messrs. West and Majid have put a footnote to this case that "the brother-in-law must have the preference as nearer by one degree," but the case shows the contrary interpretation of the rule is fairly old.

No doubt the rule is an exception to the general principle that the nearer *sapinda* excludes the more remote, and the view of Messrs. West and Majid may be the correct one, but the exception seems to be so well established that, in the absence of something fairly conclusive to the contrary, I do not think we should hold that the accepted rule is erroneous, and decide in favour of the suggested restriction that the brother's sons' father must be alive when the deceased uncle died. The principle of *stare decisis* is clearly applicable to a question of the present kind which relates to property and title. Lord Loreburn in *West Ham Union* v. *Edmonton Union* (12), says:—

> "Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted, and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House (of Lords) to overrule them, if it has not lost the right to do so by itself expressly affirming them."

But in the present case it has not been shown that the previous interpretation of this para. 17 in the Mayukha is plainly wrong or that any of the other considerations mentioned by his Lordship applies.

Therefore I would answer the question by holding that the nephews, namely, plaintiffs Nos. 2, 3 and 4 and defendants Nos. 1 and 2, are entitled to be treated as the legal representatives of Bai Chaturba, and to share in the estate of the deceased Himatlal, which is now in question, along with plaintiff No. 1.

Z. K. *Answered accordingly.*

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(11) 11 B. 285 at p. 294; 6 Ind. Dec. (N. S.) 187.

(12) (1908) A. C. 1 at p. 4; 77 L. J. K. B. 85; 98 L. T. 1; 72 J. P. 9; 6 L. G. R. 39; 24 T. L. R. 108.

OUDH CHIEF COURT.

SECOND RENT APPEAL No. 69 OF 1925.

March 13, 1926.

Present:—Mr. Justice Raza.

GAJADHAR SINGH—PLAINTIFF —APPELLANT

versus

HAR PRASAD SINGH AND OTHERS— DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 108—Mortgagee with possession, whether co-sharer—Suit for profits—Entry in khewat, *Revenue Courts whether bound by.*

A mortgagee with possession is a co-sharer within the meaning of s. 108, cl. (15), Oudh Rent Act, and can sue and be sued for profits. [p. 695, col. 1.]

Aziz-un-nissa v. *Mohammad Saiyed Khan*, 2 O. C. 64 and *Sadika Bibi* v. *Akbar Singh*, 2 O. C. 299, referred to.

It is sufficient for a plaintiff, in order to establish his title to the share of profits, to prove that his name stands recorded in the *khewat*, and the Revenue Court need not go behind the entry in the revenue papers in deciding the case. [*ibid.*]

Durga Parshad v. *Hajari Singh*, 11 Ind. Cas. 116; 33 A. 799; 8 A. L. J. 1025 referred to.

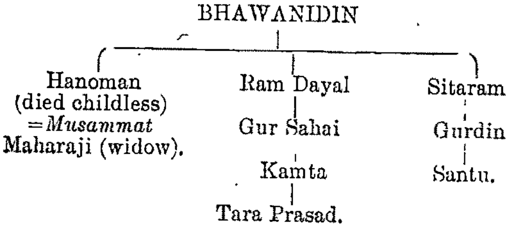
Second rent appeal against a judgment and decree of the District Judge, Fyzabad, dated the 31st August 1925, in Rent Appeal No. 42 of 1925, and setting aside that of the Deputy Collector, Fyzabad, dated the 26th May 1925.

Messrs. *Haider Husain* and *Ramaput Ram*, for the Appellant.

Mr. *M. Wasim*, for Respondents Nos. 1 and 2.

JUDGMENT.—This is an appeal from a decree of the learned District Judge, Fyzabad, dated the 31st August 1925, setting aside a decree of the Assistant Collector, Fyzabad, dated the 26th May 1925.

This appeal arises out of a suit for profits under s. 108 cl. (15), of the Oudh Rent Act. The following pedigree will elucidate the statement of facts:—



Hanoman was owner of a certain share in village Pure Bazar, *Pargana* Pachhimrath, District Fyzabad. He died about 20 years ago leaving a widow *Musammat* Maharaji who died in or about 1920. On her death two persons, namely, Kamta and Santu, claimed to be the nearest reversioners and mutation was effected in their favour in equal shares in July 1921. During the pendency of the mutation proceedings, Kamta gifted his share to Mahabir and Jagannath. Santu mortgaged with possession his share to Gajadhar and mutation was duly effected in favour of the latter. Thus Gajadhar became a recorded co-sharer. Santu then sued for possession of the other half claiming to be the sole heir of Hanoman and denying also the gift mentioned above. His suit was, however, finally dismissed by the late Court of the Judicial Commissioner of Oudh on the 25th November 1924. It should be noted that it was found in that suit that Santu was descended through males from one brother of Hanoman and Kamta from the other. Kamta was dead. His son Tara and his transferees Mahabir and Jagannath were defendants in that suit. While the suit mentioned above was pending Mahabir and Jagannath brought a suit against (1) "Sant Prasad son of Ram Dayal," (2) Gajadhar and (3) Tara for a declaration that they were the owners of the entire property under the deed of gift executed in their favour by Kamta, on the 16th February 1921. Sant Prasad and Gajadhar, who were defendants Nos. 1 and 2 in that case, were the principal defendants. It was alleged in that suit that Lachhman *alias* Santu son of Gurdin was dead. It should be borne in mind that this Santu was that very man whose suit for the other half share was finally dismissed by the late Court of the Judicial Commissioner of Oudh on the 25th November 1924. It is clear that Santu son of Gurdin was not dead as stated by Mahabir and Jagannath in their plaint dated the 22nd May 1923. Santu failed to appear but the suit was contested by Gajadhar. Gajadhar alleged in his defence in that suit that Mahabir and Jagannath were not entitled to any relief against him, that they were not in possession of the property and the suit for declaration was not maintainable. He denied, of course, that he was a transferee from "Sant Prasad son of Ram Dayal" and alleged that the plaintiffs had no cause of action against him. The fact is that he was the transferee from "Santu son of Gurdin" and not from "Sant Prasad son of Ram Dayal." He never stated in his defence in that suit that he had no concern with the property in suit. However, the plaintiffs discharged Gajadhar, the contesting defendant, from the suit and obtained an *ex parte* decree against that person whom they had described as "Sant Prasad son of Ram Dayal" in their plaint. That suit was decided on the 27th August 1923. It should be noted that Santu sued for setting aside the *ex parte* decree of the 27th August 1923 but his suit was eventually dismissed and his appeals also failed.

The present suit for profits was brought by Gajadhar Singh against Jagannath and Mahabir. Santu was also added as a defendant. The learned Assistant Collector gave the plaintiff a decree for Rs. 52-0-2 against Mahabir and Jagannath. Santu was discharged. Mahabir and Jagannath appealed and their appeal was allowed by the learned District Judge on the 31st August 1925. The learned District Judge dismissed the suit holding that "Santu *alias* Sant Prasad" had no title to the property in suit and consequently his mortgagee Gajadhar had no better title than what "Santu *alias* Sant Prasad" had to the property. Gajadhar has now come to this Court in second appeal.

In my opinion this appeal should be allowed. It appears that the finding of the learned District Judge, that Gajadhar mortgagee has no right to the property in suit is based on the fact that the *ex parte* declaratory decree mentioned above was passed by the Civil Court on the 27th August 1923. I am not prepared to agree with him on that point. Mahabir and Jagannath knew that Gajadhar was the mortgagee of the share in dispute from Santu and was, therefore, interested in the property. However, they deliberately discharged him from the suit when they found that the suit was contested by him. He is the mortgagee with possession of the share in suit and mutation has been duly effected in his favour. His name still stands recorded in the *khewat*. When Mahabir and Jagannath deliberately discharged him from the suit, the *ex parte* decree which they obtained against "Sant Prasad son of Ram Dayal" cannot be held to be binding on him (Gajadhar) in the present suit for profits. It it sufficient for the plaintiff, in order to establish his title to the share of profits, to prove that his name stands recorded in the *khewat*. The Revenue Court need not go behind the entry in the revenue papers in deciding the case [see the principle of decision in *Durga Parshad* v. *Hajari Singh* (1).] Gajadhar is a mortgagee with possession and as such is a co-sharer within the meaning of s. 108, cl. (15) of the Oudh Rent Act and can sue and be sued for profits [see *Aziz-un-nissa* v. *Mohammad Saiyed Khan* (2) and *Sadika Bibi* v. *Akbar Singh* (3).] Mahabir and Jagannath have not yet got possession of the property in suit as against Gajadhar, the plaintiff in this case. In my opinion Gajadhar's claim was properly decreed by the first Court.

Hence I allow the appeal and setting aside the decree of the lower Appellate Court restore that of the first Court with costs. The plaintiff will get his costs from the contesting defendants in all the Courts.

R. L.   *Appeal allowed.*

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(1) 11 Ind. Cas. 116, 33 A. 799; 8 A. L. J. 1025.
(2) 2 O. C. 64.
(3) 2 O. C. 299.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 559 OF 1923.
December 23, 1925.
Present:—Mr. Justice Harrison and
Mr. Justice Zafar Ali.
Mahant BASANT DAS—DEFENDANT—
APPELLANT
versus
HEM SINGH AND OTHERS—PLAINTIFFS—
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 92—Sikh and Singh distinguished—*Udasis, *whether Sikhs—Singhs, interest of, in* Udasi *shrine—Religious community, identity of—Suit for change of management of shrine, who may bring.*

Sikh and Singh are not interchangeable terms. *Udasis* constitute a sect of their own quite distinct from the orthodox Sikhs of the previous generations as well as from the modern Singhs. [p. 697, col. 1; p. 698, col. 2.]

The followers of Guru Gobind Singh have no such interest in an *Udasi* shrine as is contemplated by s. 92, C. P. C., and are, therefore, not competent to maintain a suit under that section in respect of an *Udasi* shrine. [p . 700, col. 2.]

The mere fact that their ancestors or some members of their community made gifts to the shrine does not confer on them the said right. [p. 700, col. 1.]

Per *Harrison, J.*—Identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies and texts. [p. 702, col. 2.]

Free Church of Scotland v. *Lord Overtoun*, (1904) A. C. 515; 91 L. T. 395; 20 T. L. R. 730, referred to.

Any man having a right of worship can bring a suit under s. 92, C. P. C., but the right to worship connotes the profession by the would-be worshipper of the religion practised in the place of worship, and even though the views of the majority of the worshippers may change and develop to such an extent that they wish to alter and even to make a radical change in the form of worship, they have no right to do so, and the minority, however small, which adheres to the original practice retains the control and possession of the place of worship and its endowments. No question of the majority of persons can affect the question but the original purposes of the trust must be the guide. [p. 702, col. 2; p. 703, col. 1.]

Narinjan Singh v. *Kirpal Singh*, 85 Ind. Cas. 111; A. I. R. 1925 Lah. 189; 5 L. 455; 1 L. C. 139 and *Ramachandra Aiyar* v. *Parameswaran Unni*, 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; (1919) M. W. N; 370; 9 L. W. 492, referred to.

Appeal from a decree of the Senior Sub-Judge, Lahore, dated the 7th March 1923.

Dr. *Gokul Chand Narang* and Lala *Durga Dass*, for the Appellants.

Messrs. *Moti Sagar*, R. B., *Shoukat Rai* and *Dyal Das*, for the Respondents.

JUDGMENT.

Zafar Ali, J.—This first appeal arises out of a suit instituted with the sanction of the Collector of Lahore for the removal of the defendant Basant Das from the office of the *mahant* of shrine of Bhai Pirthi situate in the village Manak, and for the appointment of a committee to take possession of the shrine and its property and to manage its affairs. Basant Das is a *sadhu* of the well-known *udasi* order founded by Sri Chand son of Guru Nanak while the plaintiffs, eight in number, are all Singhs, *i.e*, followers of Guru Gobind Singh. These eight plaintiffs do not come from one place; one belongs to the village Bhai Ket, one to Lahore, five to village Araian, and only one to the village Manak. The origin and genesis of the litigation lies in the recent extensive quickening amongst Sikhs of this Province which engendered a well-organized movement for taking possession of all temples or shrines to which the term "Gurdwara" in addition to or as an alternative for "*udasi dera*" had been applied. This movement was directed by a representative body called the Shromani Gurdwara Prabandhak Committee which had under its control a number of *jathas* or bands of Akali Sikhs and these *jathas* under the guidance of the Committee began to take forcible possession of *udasi* temples and to oust their *udasi mahants.* To oppose this aggressive movement the *udasi Mahants* also formed a committee which they designated the *Udasi maha mandal*, and Basant Das defendant, who was presumably an influential *mahant* was appointed Secretary of the said *maha mandal.* He thus drew the attention of the Akalis towards himself and a *jatha* took possession of his temple on the 6th March 1921 and turned him out. For this act of lawlessness twenty members of the *jatha* were tried and convicted of dacoity and house-breaking and sentenced under ss. 395 and 452 of the Indian Penal Code to various terms of imprisonment in September 1921. The present suit was filed on the 1st December 1921, and it appears that some of the plaintiffs are near relations of the men involved in the criminal case. For instance, Kahan Singh, plaintiff No. 4 of the village Araian, is a brother of one of the convicts, namely, Wadhava Singh of the same village, and Puran Singh, plaintiff No. 7, is a son of the said Wadhawa Singh. Lal Singh, plaintiff No. 5 was accused No. 24 in that case.

The grounds on which the plaintiffs seek dismissal of the defendant from this office are given in para. 3 of their plaint and are briefly as below:—

"Before the defendant was appointed *mahant* in *Sambat* 1964 (corresponding to May 1907) he had executed an agreement that he will give up his wife and children and will revert to single life; but in contravention of that agreement he is keeping his wife with him and begetting children. According to the custom of the institution, the *mahant* is bound to observe celibacy. Further the defendant has been making use of the *wakf* property as if it was his own and has willed it to his son Ram Parshad who is a minor. He misappropriates the income and omits to apply it to the legitimate customary purposes, as for example, keeping a free kitchen and feeding *sadhus*; moreover, he is a bad character and drunkard."

The defendant denied the charges against his character, etc., and pleaded that subsequent to his appointment he was allowed by the *bhek* (Council of *udasi mahants*) which had appointed him to keep with him his wife and children, that it was not absolutely necessary for a *mahant* to remain single, and that it was with the approval of the *bhek* that he appointed his son his successor. He also pleaded that the property was not *wakf* but withdrew this plea at the end of the trial. His main contention, however, was that the shrine of Bhai Prithi being an *udasi dera* and not a Sikh Gurdwara, the plaintiffs, who were Singhs, had no interest in it and no right to interfere with its management and they had, therefore, no *locus standi* to sue for his removal and for the appointment of a committee of management. It is not denied that according to custom the *mahant* of an *udasi* shrine is appointed by the *bhek*, that Basant Das was appointed by that body and that the office had always devolved on a *chela* of the late *mahant.*

The Trial Court (Senior Subordinate Judge of Lahore) found that the plaintiffs were entitled to worship in the shrine and so had such interest therein as is contemplated by s. 92 of the C. P. C. But with regard to the character of the shrine he came to the conclusion that it was an *udasi* institution and that its management could not be entrusted to a committee of Sikhs. He held further that the defendant had not been discharging his duties properly and was not a fit person to continue in his office, and after taking the opinion of some *udasi mahants*, he appointed one Dyal Das to that office and dismissed the defendant.

In the light of evidence that is before us almost every important conclusion arrived at by the Court below appears to us to be untenable.

The two vital questions in the case which were put in issue were:

(1) Are the plaintiffs so interested in the institution as to have a *locus standi* to sue?

(2) What is the origin and nature of the institution?

It is unreservedly stated that the plaintiffs are not Hindus and in contradistinction to Hindus are Singhs or Sikhs. But Mr. Moti Sagar, who appears for the new *mahant* appointed by the Court below, maintains that *udasis* are also Sikhs. Even if they are, they are not Singhs or followers of Guru Gobind Singh. "Sikh" and "Singh" are not interchangeable terms, though the word "Sikh" is now-a-days commonly used for "Singh," and Sikh means "disciple," and the followers of all the *gurus* were called "Sikhs." Gobind Singh initiated or according to Trumpp, renovated the rite called Pahul (baptism by the dagger and sweetened water) and he gave the epithet of "Singh" to every person to whom he administered the Pahul. He received the Pahul himself also and changed his name from Gobind Rai to Gobind Singh. He thus converted Sikhs into Singhs, and he enjoined every Singh to keep five *kakkas*, *i.e.*, to have always on his person the following five things which commence with the letter *kakka* (*k*), *viz.*, *kes* (long hair), a comb, a *kara*, (bangle), a *kirpan* (sword) and a (*kachh*) shorts. Nanak condemned the exaggerated observance of caste and received all men as his disciples without any regard to caste, but he did not attempt to abolish it and married his own children within his Khatri caste. Gobind Singh, on the other hand, abolished caste altogether and admitted untouchables also into the pale of Singhs. Further he abolished *kiria shradh* and all other rites and ceremonies of Hindu origin and strictly prohibited the adoration of *samadhs* (tombs of saints) and rejected the authority of Vedas, Purans and Shastras. In the hymn that he composed on his funeral pyre he said: "The Smriti, the Shastras and the Vedas all teach many modifications. I did not recognize one (of them)." Such being the innovations introduced by Gobind Singh in the religion of Nanak, the plaintiffs, who are his followers say that they are not Hindus and it follows that they cannot claim a direct interest in or power of control over a temple or shrine which is in inception a Hindu institution and where Hindu idols and deities are worshipped, *samadhs* are adored and Hindu scriptures are held in respect as revealed or inspired books and are recited as such. But before adjudging the character of the shrine in suit we pass on to the question whether *udasis* are Sikhs or "Singhs" as alleged by the plaintiffs or *Sanatou Dharmi* (orthodox) Hindu as pleaded by the defendant. The plaintiff's theory is that Sri Chand, the founder of the *ndasi* order was himself a Sikh or disciple of his father Nanak and that *udasis* are neither Hindus nor constitute a separate sect but are Sikhs of an ascetic order which sprang from among the followers of Nanak. In this connexion we observe that all the *gurus*, with the exception of the last, remained within the pale of Hinduism so much so that each employed a Brahman as a family priest. Trumpp in his sketch of the religion of Sikhs says: "The dignity of the Brahmans as family priests, etc., was likewise left untouched and of nearly all the *gurus* it is reported that they had their family priests though the teaching of the Brahmans as well as the authority of the Vedas and Purans is often reproved. It was the last Guru Gobind Singh, who positively prohibited the employment of Brahmans in any capacity and introduced a new ritual party taken from the Granth and partly from his own compositions" (Trumpp's Introduction to his translation of the Adi Granth, page *cxii*).

Where a Brahman was employed as a family priest, it is natural that all rites and ceremonies at birth, death, or marriage were performed in accordance with Hindu religion. Nanak himself performed the *shradh* of his deceased father (Trumpp, page *lxvv*), and "he remained a thorough Hindu according to all his views." (Trumpp page *ci*). Gobind Singh had been in his youth a special votary of the Hindu goddess Durga and at the instance of Brahmans he in his early life cut off the head of a disciple and offered it to the goddess (Trumpp, page xc). All this very clearly indicates that Nanak as well as the *gurus* that succeeded him, except the last, were Hindus. Sri Chand and his followers also though Sikhs could not be anything but Hindus. Gobind Singh renounced Hinduism and rejected everything that smacked of it.

Further it is clear that Sri Chand founded the *udasi* order in opposition to the second Guru Angad. Nanak disowned his sons as they were disobedient. He said to his wife: "Sri Chand and Lakhmi Dass are thy sons. Lahina (Angad), who obeys me, is my son." The *guru's* wife duly admonished her sons, giving them hope at the same time "that if they obeyed their father's order, one of them might be found fit to succeed him. The mother's words were addressed to deaf ears, for the sons in no wise showed filial affection or obedience". (The Sikh religion by Macauliffe, Vol. II, page 11). In the Introduction to his book (page lxxix, bottom) Macauliffe says: "There were three great schism of the Sikh religion. ***The schismatics were known as the *udasis*, the *minas*, and the *handalis*. The first schism of the Sikhs began immediately after the demise of Guru Nanak. Some of his followers adopted Sri Chand, his elder son, as his successor and repudiated the nomination of Guru Angad. The followers of Sri Chand were termed *udasi* or solitary and they now constitute a large body of devout and earnest men."

Thus the *udasis* formed a rival sect and Sri Chand kept aloof from Guru Angad and his successor Amar Das and did not recognize and follow them as *gurus*. Guru Amar Das ex-communicated *udasis* because they refused to submit to his authority. The *udasis* were thus cut off from the Sikhs.

Sri Chand lived to a very advanced age and no less than five *gurus* succeeded Nanak and passed away one after the other during Sri Chand's lifetime. By the lapse of time the bitterness that originally existed between the heads of the two sects disappeared and friendly relations were established when the later *gurus* showed respect and regard for the old son of Nanak. Sri Chand and his disciples, however, remained quite separate from the *gurus* and their followers, the ritual and tenets of the former being different from those of the latter. We will state here briefly the points which discriminate the two sects.

Udasis are ascetics, Sikhs are not. The *gurus* were *ghristies*, (house-holders) and discouraged retirement from the world. Sri Chand renounced the world and remained single all his life. The general rule among his followers is to observe celibacy. *Udasis* wear ocre coloured clothes. Sikhs do not. An *udasi* may or may not keep *kes* (long hair). He is not enjoined to keep the five *kakkas*, nor do *udasis* receive the Pahul. Cap and cord are their peculiar badges, but to wear a cap is for a Singh to seal his perdition. *Udasis* observe Hindu rites and ceremonies; the present day Singhs do not. *Udasis* make a ball of the ashes of their *udasi guru* and that is the chief object of their worship. A ball of ashes is kept in the shrine in question also. Further they adore *samadhs* and hold Hindu scriptures in respect; the followers of Guru Gobind Singh condemn all this. *Udasis* and Sikhs are, therefore, poles asunder in their respective creeds and observances. *Udasis* are within the pale of Hinduism; Singhs are not.

Macauliffe says: "There are two great divisions of Sikhs-Sahij Dharis and Singhs. The latter are they who accept the baptism inaugurated by Guru Govind Singh. All other Sikhs are called Sahij Dharis. The Sahij Dharis include the *udasis* founded by Sri Chand. (Macauliffe's Sikh Religion, Volume I, page 111). Thus according to Macauliffe also *udasis* are not Singhs.

It is true that *udasis* hold the *gurus* in the highest respect and like all other Sikhs believe the Granth to be an inspired book, but by so doing they do not lose the distinctive characteristics of their order.

It may be observed here that there was no Granth in writing when the *udasi* sect came into existence. The Granth was complied for the first time by Arjan, the fifth *guru* and it contains hymns composed by *gurus* and others including two Mussalmans, *viz.* Kabir and Sheikh Farid. The pantheistic tenets propounded in the book are not altogether alien to the Hindu mind and religion. As the first nine *gurus*, and their followers did not cease to be Hindus so *udasis* did not merge into Sikhs by accepting the Granth as a divine book.

It was argued that *udasis* became Sikhs when a reconciliation took place between Sri Chand and Har Gobind the sixth *guru*, and the former adopted a son of the latter and made him his *chela* and successor. But the result of this adoption was that the *Guru's* son became an *udasi* and not that Sri Chand became a Sikh or disciple of the *guru*. If relations between the heads of two sects became friendly it does not follow that the two sects became one. We, therefore, come to the conclusion that *udasis* constitute a sect of their own quite distinct from the orthodox Sikh of the previous generations as well as from the modern Singhs.

Having cleared the ground so far we proceed to determine the question whether any of the former *mahants* of the shrine were followers of Guru Gobind Singh. The saint of the shrine, Bhai Prithi Sahib by name, is the spiritual ancestor of the defendant in the 11th degree, succession being from *guru* to *chela*. Bhai Prithi was a Brahman and it was admitted before the learned Subordinate Judge that he was a Sanatan Dharmi Hindu. This is denied before us, but there is nothing to indicate that he was not an *udasi*. He died in *Sambat* 1789 (corresponding to 1744 A. D.) and was succeeded by his nephew Bhai Jagat Bhagat. The plaintiffs' story is that Bhai Jagat Bhagat was a *chela* of Bhai Pheru and that the latter was a disciple of Guru Govind Singh. But even if it be conceded that Jagat Bhagat was a *chela* of Bhai Pheru and not Bhai Prithi, the plaintiffs fail to establish that Bhai Pheru was a disciple of Gobind Singh. Bhai Pheru was employed as a tithe collector or Masand by Har Rai, the seventh *guru*, and continued to serve in that capacity, all his successors one after the other. Gobind Singh was so much pleased with his good work that he seated him by his side, gave him half his turban and conferred on him the title of Sangat Sahib Sachi Darhi. From this the learned Subordinate Judge drew the inference that "Bhai Pheru must be regarded as a follower of Guru Gobind Singh." But in the absence of any direct evidence and in the light of the circumstances that neither Bhai Pheru nor Jagat Bhagat nor any one of his suceessors added the epithet of "Singh" to his name, it is impossible to conclude from the fact than Bhai Pheru was honoured by Gobind Singh in the way stated above that he received the Pahul and became a Singh of Gobind Singh. As some other Masands were punished by Gobind Singh for bad work, Bhai Pheru was rewarded for his meritorious services. Beyond this nothing is known and we find that it was not established that Jagat Bhagat was a follower of Gobind Singh. On the other hand an historic incident, which may be briefly related here, shows that there was no love lost between the followers of Bhai Prithi and those of Gobind Singh.

Among the followers of Bhai Prithi there were the two Khatri brothers Jaspat Rai and Lakhpat Rai who held high posts under the Mughal Governors of Lahore. An armed band of Singhs having made its appearance in Eminabad near Gujranwala with intent to plunder, the Governor sent a small detachment of troops under Diwan Jaspat Rai to disperse them, but the Singhs overpowered the Mughal troops and killed Jaspat Rai. When Lakhpat Rai heard of his brother's fate he vowed vengeance saying: "The founder of Sikhism was undoubtedly a Khatri, but I shall not call myself a Khatri if I do not blot out its name from the page of existence." He came out with a large army, defeated the Singhs, and took 1000 of them as prisoners to Lahore where they were beheaded one by one. One of them was Tara Singh, an old companion of Guru Gobind Singh. This occurred in 1746, *i. e.*, about 39 years subsequently to the death of Gobind Singh (see Mohammad Latif's History of the Punjab, page 213, and Dr. Gokal Chand Narang's transformation of Sikhism page 134). It is not conceivable that Lakhpat Rai would have treated the followers of Govind Singh so mercilessly if there had been any spiritual relationship between his *guru* and Gobind Singh.

The next question is whether the shrine is an *udasi* institution or Gurdwara. From what the learned Subordinate Judge saw in it, it clearly appears to be the former. There are pictures of Hindu gods and goddesses on its walls and there were *thakars* lying on a wooden stool besides the Granth Sahib. The *samadhs* (tombs) of all the *mahants* from Bhai Pheru downwards are also in the shrine. The learned Subordinate Judge says: "It may also be true that some Hindu modes of worship like the ringing of bells and waving of lights are adopted by Hindu visitors to the shrine." With all these indications of the purposes for which the shrine is used it is impossible to hold that it is a Gurdwara.

Further we find that in all old Government documents the shrine was described as the *samadh* or Dera of Bhai Prithi and not as Gurdwara. In the statement of Wills prepared in the Settlement of 1868 the then *mahant* is described as *gadi-nashin* of the *samadh* of Bhai Prithi Sahib. (See paper book, page 35). In the Settlement Extra Tehsildar's report dated the 13th May 1892 the shrine is mentioned as Dera Bhai Prithi: (see paper-book page 37,) In the register of *jagirs* prepared at the Settlement of 1915-16 it is mentioned as Dera: (see paper-book pages 58 to 60, col. 6). One of its former *mahants*, *viz.*, Sobha Ram, executed and registered a Will to nominate his successor

This is printed at pages 10 and 11 of the paper-book and is dated the 21st June 1905. In this Will also the shrine is referred to as Dera. But in an entry in the mutation register dated the 7th December 1887 the shrine is spoken of as the Gurdwara of Bhai Prithi (see paper-book, page 9). Latterly the defendant himself began to style it as Gurdwara, but there can be no manner of doubt that it was generally known as an *udasi* Dera or *samadh* of Bhai Prithi. It may be noted here that Guru Gobind Singh was opposed to the erection of *samadhs* and his last words were: "If any one erect a shrine in my honour, his off-spring shall perish. (Macauliffe, Volume V, page 244).

It is, therefore, natural that Guru Gobind Singh's followers have no respect for *samadhs*, and it will be highly objectionable to place under their control a shrine which contains *samadhs*.

The plaintiffs claim an interest in the shrine on the further grounds:

(1) That their ancestors had made gifts of land to the shrine;

(2) that they and other Sikhs have been making offerings to the shrine and have been worshipping therein; and

(3) that Sikhs have a voice in the appointment of the *mahant* of the shrine and give *saropas* and presents to the *mahant* appointed.

It was, however, not established that any of the donors were ancestors of the plaintiffs and it is obvious that mere making of offerings confers no rights. Further it is clear from the lists of *saropas* and presents that are on the record that presents to a *mahant* at the time of his installation are made by *mahants* of other shrines and Sikhs as well as by Hindus and Mussalmans (see pages 38 to 47 of the paper-book). It cannot, therefore, be said, that people who make these presents have a voice in the appointment of the *mahant*.

Sikhs no doubt worship the Granth Sahib that is kept in the Dera and is recited therein, but the shrine was evidently erected for the worshippers of the *samadh* of Bhai Prithi and the *samadh* occupies the most prominent position in the building. But it appears that as Sikhs and Hindus also visit the shrine a copy of the Granth Sahib and some *thakars* are also kept therein for Sikhs and Hindus respectively for their worship. *Udasi Sadhus* are probably not idol-worshippers themselves; but it is matter of common knowledge that Hindus, men and women, consider it a virtue to pay respect to *sadhus*, to feed them and to make offerings to them, and *thakars* are kept in *udasi* shrines for the sake of Hindu visitors. The plaintiffs' witnesses gave evidence to the effect that the *thakars* were introduced by the defendant about one year before suit but the *patwari* produced a photograph taken in the shrine some four years back showing therein *thakars* also. One of the plaintiffs' own witnesses, *viz.*, Kala Singh (P. W. No. 3) deposed that *thakars* were introduced 7 or 8 years ago. The defendant examined several respectable witnesses including two Tahsildars to prove that *thakars* have been in the shrine from old times. The observation of the learned Subordinate Judge that *thakar* worship appears to have been recent innovation was, therefore, not well-founded. Equally baseless is his remark that in the agreement that the defendant executed before his appointment as *mahant*, he bound himself to abstain from *thakar puja* because there is not a word about *thakar puja* in the agreement.

The lower Court also found that the shrine is an *udasi* temple and that "the plaintiffs certainly desire that the orthodox Hindu practice should be discontinued." As they could not retain what they had seized by force the plaintiffs now seek to recover it through Court and the relief that they seek is not the appointment of a new *udasi mahant* but the removal of the institution from the control of *udasis*. They are, therefore, dissatisfied with the decision of the lower Court and have appealed against the order appointing an *udasi mahant*.

From all the facts reviewed above the conclusions that follow are:—

(1) That *udasis* constitute a separate sect of schismatics from the religion founded by Nanak;

(2) that they are Hindus as well as Sikhs;

(3) that their mode of life, ritual and religious observances are materially different from those of the followers of Guru Gobind Singh; and

(4) that such followers of Guru Gobind Singh, as do not profess to be Hindus, have no such interest in an *udasi* shrine as is contemplated by s. 92, C. P. C., and are, therefore, not competent to maintain a suit under that section in respect of an *udasi*-shrine.

That being our decision we need not enter into a detailed discussion of the remaining issue concerning the defendant's conduct and character. The lower Court found that the charges against his character were not established and it further found that the rule of celibacy was not stringently in force; but in face of the fact that a previous *mahant* of the shrine, namely, Mehr Das, was also a married man, the lower Court held that "in this shrine celibacy has always been emphatically insisted on," and that the defendant was guilty of breaking his agreement to remain aloof from his wife and children. But many *mahants*, some of whom appear to be members of the *bhek*, filed an application in the Court below stating that they considered the defendant to be a capable *mahant* and were opposed to his removal and that according to the custom of the shrine its *mahant* could marry. It appears that, as stated by the defendant, he was allowed by the *bhek* subsequent to his appointment to keep his wife with him. The appointment of his son as his successor was also made by him with the approval of the *bhek*. Further no misappropriation of the *wakf* income was proved. It has been urged before us that the fact that the defendant is highly thought of by many Government officials and has received the honour of being made a *kursi nashin* unfit him for the performance of his duties. We do not agree. We are of opinion that there was no good ground for removing the defendant from his office. Further, we are of opinion that the Court could not appoint an *udasi mahant*, it being by custom the function of the *bhek* to do so. A custom of a religious institution should be respected and the Court should not usurp the authority of the *bhek*.

We accept the appeal and reversing the judgment and decree of the Court below we dismiss the plaintiffs' suit with costs throughout and set aside the order appointing Dyal Das as *mahant*. The plaintiffs' cross-objections are also dismissed with costs.

Harrison, J.—I agree with the views expressed by my learned brother in the preceding judgment. It appears to me to be established as an historical fact that at the end of the fifteenth century a great religious teacher known as Guru Nanak undertook the task of simplifying, purifying and popularizing the Hindu religion, which in his opinion, had become overgrown by elaborate rituals and ceremonials. He preached, as many other great teachers have done, that God is one, that he is a spirit and those who worship him must worship him in spirit and in truth; that He dwelleth not in temples made with hands; and, above all things, that the latter killeth while the spirit gives life. He attacked, as all such teachers must attack, the vested interests of the priestly caste and their exaggerated pretensions. He sought to distract his disciples from the worship of the unessential and to draw them upwards to a higher, a simpler, and a purer faith. While doing so he never sought to undermine the foundations of the Hindu religion such as transmigration of souls and *karma*; and not only did he not do so but, as pointed out by my learned brother, he maintained a Brahman as a family priest, respected the observances of the Khatri caste, to which he belonged, and shortly before his death performed the *shradh* of his father. The sayings and commandments of this great teacher were not recorded in writing during his lifetime, but were handed down by word of mouth until more than a hundred years later the fifth *guru* compiled the sacred words known as the Granth Sahib, which is the bible of the Sikhs. This contains not only the sayings of Guru Nanak, as handed down, but hymns composed by other holy men including those of some of his successors and disciples, among whom there was one Muhammadan. Even if the actual words were in all cases accurately preserved which would be little short of miraculous, it stands to reason that in a vest anthology of this sort texts and passages can be found which, if divorced from their context, do not give a correct impression of the original teaching. I do not propose, therefore, to produce the elaborate arguments based on such selected texts but merely to give the general conclusions arrived at by us. This wonderful book, the Granth Sahib, has achieved the position which it enjoys, not only because of its intrinsic merit, its religious fervour, and literary beauty, but also because it is written in the vulgar tongue and can be read by all literate *Punjabis* in contradistinction to the old Hindu scriptures, which are written in Sanskrit and can only be read and interpreted by scholars. The case as presented by Counsel for the respondents, has been briefly as follows:—The plaintiffs are not Hindus but Sikhs from the beginning and from the days of Guru Nanak were not Hindus but the followers of a new religion, which has varied in essentials from the date of its birth. The *udasis* are a sect of Sikhs. The plaintiffs are entitled to worship at the *udasi* shrine at Manak and are, therefore, entitled to bring this suit. The main proposition that Sikhs are not Hindus is said to be proved in the following way :—The essentials of Hinduism without which Hinduism cannot exist, are, so says Mr. Moti Sagar, caste, idol-worship, the worship of the Vedas and Purans. Guru Nanak denounced all these.

Now this premise, on which the whole argument is built, appears to me to be redically unsound ; for a man can discard caste as understood by an orthodox Hindu or idol-worship, or both, and remain a Hindu and for this proposition I have what, to my mind, amounts to the authority of all the eminent Counsel, who appeared in this case. The great teacher Swami Daya Nanad, who founded the Arya Samaj denounced the doctrine of predetermined caste and the practice of idol-worship as clearly and as emphatically as any Sikh, and his followers most assuredly claim to be, and are universally accepted as Hindus, and to this latter proposition all Counsel appearing have agreed. If I may persume to dogmatize as to the main essentials of the Hindu religion, they are ; a belief in transmigration of souls, "*karmas*" and the sanctity of the cow ; and none of these was questioned by Guru Nanak nor do I believe, by any of his successors. The Granth Sahib tells us at page 1476 that full Hindu ceremonies were observed at the *kiria* of the third Guru Amar Das. The other faulty premise, from which the argument was developed, is that "Sikh" has always meant the same thing from the days of Guru Nanak till to-day. At first it meant a disciple, as the word implies, and a disciple of Guru Nanak." Now it is used generally to include those, who hold the same views as those disciples, and those who profess a very much more advanced and, in some cases, an antagonistic creed, a fact which has been fully dealt with by my learned brother. The most advanced are those, who, like the present plaintiffs, declare that they are not Hindus. The fact that these plaintiffs have done so simplifies our task in the present case. Had they claimed to be Hindus, and had the claim been denied, the question raised would have been far from easy to decide; but here we have a body of plaintiffs, who, on their own showing, are not Hindus, claiming to interfere with the management of institution which in its inception was Hindu. True, it was founded by a son of the reformer Nanak but it was nonetheless Hindu. The order of ascetics which he founded was a Hindu order and nonetheless so because it gave a place of honour to the Granth Sahib, when this great book came to be written. As stated by Mr. Macauliffe in the Encyclopædia Britannica the *udasis* were Sikhs dissenting from the main body of Sikhs of the time in certain unessentials just as the Sikhs were a sect of Hindus dissenting from the orthodox main body of their co-religionists. Now it has been established by no less an authority than that of the House of Lords that the identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies and texts. The bond of union of a Christian association (and I take it of any other religious association) may contain a power in some recogized body to control, alter or modify the tenets or principles at one time professed by the association, but existence of such power must be proved : *Free Church of Scotland* v. *Lord Overtoun* (1).

Here we have not a case of a Hindu plaintiff contending that a Hindu foundation is not observing the tenets and principles existing at the time of the foundation or subsequently modified but of non-Hindus claiming to interfere with the management of a Hindu foundation.

It is a common place that any worshipper has a right to bring such a suit as this. It has further been held by this Court in *Narinjan Singh* v. *Kirpal Singh* (2) following the decision of a dissenting Judge in the Full Bench decision of the Madras High Court in *Ramachandra Aiyar* v. *Parameswara Unni* (3) that any man having a right to worship can do so, but the right to worship connotes the profession by the would-be worshipper of the religion practised in the place of worship, and even though the views of the majority of the worshippers may change and develop to such an extent that they may wish to alter and even to make a radical change in the form of worship, they have no right to do so, and the minority, however, small, which adheres to the original practice retains the control and possession of the place of worship and its endowments. In the words of Halsbury, L. C. "No question of the majority of persons can affect the question but the original purposes of the trust must be the guide."

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(1) (1904) A. C. 515; 91 L. T. 395; 20 T. L. R. 730.

(2) 85 Ind. Cas. 111: A. I. R. 1925 Lah. 189; 5 L. 455; 1 L. C. 139.

(3) 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 201; (1c19) M. W. N. 370; 9 L. W. 492.

I agree in accepting the appeal and restoring the appellant to his benefice. I further agree that under no circumstances could the Court usurp the function of the *bhek* in appointing an *udasi mahant.*

R. L. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 85 OF 1924.
December 9, 1925.
Present:—Mr. Hallifax, A. J. C.
Mahant NANDKISHORDAS—
PLAINTIFF—APPELLANT
versus
KALA BAI—DEFENDANT—RESPONDENT.

*Hindu Law—Inheritance—*Guru *and* chela*—Deity, property belonging to—Manager, power of, to sue—Idol, status of.*

For purposes of inheritance under the Hindu Law, the relationship of a *guru* and his *chela* is that of [illegible]ther and son, and a *chela* is for this purpose the grandson of his *guru's guru* and two *chelas* of the same *guru* are brothers and so on. There is no limit to which this principle may be extended.

A manager of the property of a deity can sue as a next friend of an infant plaintiff for the recovery of property belonging to the deity even though there is a flaw in his title as the *mahant* of the temple in which the deity is lodged.

A Hindu idol is a 'juristic entity' and has a juridical status with the powers of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers, which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir.

Pramatha Nath v. *Pradyumna Kumar*, 87 Ind. Cas. 305; 52 C. 809; 23 A. L. J. 537; A. I. R. 1925 P. C. 139; 49 M. L. J. 30; (1925) M. W. 431; 41 C. L. J. 551; 2 O. W. N. 557; 27 Bom. L. R. 1061; 22 L. W. 492; 30 C. W. N. 25; 3 Pat. L. R. 315; 52 I. A. 245 (P. C.), followed.

Appeal against a decree of the Second Subordinate Judge, First Class, Raipur, dated the 21st July 1924, in Civil Suit No. 11 of 1923.

Mr. *J C. Ghosh,* for the Appellant.

Sir *B. K. Bose* and Messrs. *V. Bose* and *P. N. Rudra*, for the Respondent.

JUDGMENT.—If there were any question in this case of the plaintiff Nandkishordas being the heir of the deceased *mahant* Gobardhandas, it would be impossible to maintain the decision of the lower Court that he is not. It is admitted by everybody that for purposes of inheritance the relationship of a *guru* and his *chela* is that of father and son. It seems also to be accepted, as it must be, that this relationship can be carried further so that a *chela* is, for these purposes, the grandson of his *guru's guru* and two *chelas* of the same *guru* are brothers. The learned Subordinate Judge has, however, found himself unable to carry this principle as far as eight degrees, though he has not stated the number of degrees to which in his opinion it can extend. There is obviously no limit, and both Gobardhandas and Nandkishordas are, in matters of inheritance, great-great-grandsons of the same ancestor, Biharidas, that is they are third cousins.

But the question does not arise at all. The suit was brought by the manager of the properties of the deity Shri Ramchandra Swami for property belonging to that deity, and it cannot and has not been denied that Nandkishordas is in fact the manager of that property and has been so since the death of the last manager Gobardhandas in March 1922. Of the validity of his appointment also there can be no question, though we are not really concerned to enquire into that; his position in the suit is that of the next friend of an infant plaintiff and he would obviously be the person whom the Court would allow to sue as representative of the deity even if there were any flaw in his title to be the *mahant* of the temple.

In *Pramatha Nath* v. *Pradyumna Kumar* (1) their Lordships of the Privy Council said: "A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a 'juristic entity'. It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities, for this doctrine, thus simply stated, is firmly established."

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(1) 87 Ind. Cas. 305; 52 C. 809; 23 A. L. J. 537; A. I. 1925 P. C. 139; 49 M. L. J, 30; (1925) M. W. N. 431; 41 C. L. J. 551; 2 O. W. N. 557; 27 Bom. L. R. 1064; 22 L. W. 492; 30 C. W. N. 25; 2 Pat. L. R. 315; 52 I. A. 245 (P. C.).

The decree of the lower Court will be set aside. In its place a decree will issue ordering the defendant Kala Bai to hand over possession to the plaintiff Nandkishordas, as Manager of the properties of the deity Shri Ramchandra Swami, of Lawan and on behalf of the deity, of the whole of the village of Mudiadih with all rights appertaining thereto, and also of four bullocks, one cow and one buffalo or of their value which is Rs. 75. The defendant must pay all the costs of the plaintiff in both Courts.

G. R. D.
Z. K. *Decree set aside.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No 54 OF 1923.
September 24, 1925.
Present :—Mr. Justice Fawcett and Mr. Justice Madgavkar.
ATMARAM JAMNADAS SHAH—
PLAINTIFF—APPELLANT
versus
NAZIR, DISTRICT COURT—DEFENDANT—RESPONDENT.

Hindu Disposition of Property Act (XV of 1916)—Act, whether retrospective.

There is nothing in the Hindu Disposition of Property Act to suggest that it is retrospective in its operation.

First appeal from the decision of the Joint First Class Subordinate Judge at Ahmedabad, in Suit No. 749 of 1920.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *Amin* (with him Mr. *M. H. Mehta*), for Respondent No. 4.

Mr. *Jayakar* (with him Mr. *N. P. Desai*), for Respondent No. 5.

JUDGMENT.

Madgavkar, J.—It is argued for the appellant that the residuary legatees are the appellant and not Babli but a son of Babli, if any, in equal shares; and as no such son was in existence at the time of the testator's death the bequest to him is under the rule laid down since the Tagore case void and Atmaram becomes sole residuary legatee. The Hindu Disposition of Property Act XV of 1916 has no application to the Will which came into effect on the testator's death in 1902.

[The clauses of the Will and the postscript are omitted not being necessary for purpose of report:—] The Will and the clauses quoted above with the postscript leave no doubt as to the testator's intentions. He wanted to leave the residue in equal shares to Atmaram, and to Babli's son, if any. And whatever the confusion in cl. 45, the postscript makes it quite clear that the residuary legatee, if any, along with Atmaram, was not Babli but Babli's son, even if he was born after Atmaram attained twenty-five years and had been placed in possession of the estate.

But the law applying to this Will, which came into effect in 1902 on the testator's death is the law in the Tagore case and not Act XV of 1916 which, unlike Madras Act I of 1914 by its s. 2, is not retrospective. No son of Babli was in existence at the time of the testator's death and the provisions in his favour, therefore, entirely fail. Babli, respondent No. 5, is entitled to Rs. 2,500 in the postscript.

Fawcett, J.—I agree. I think the Hindu Disposition of Property Act, 1916 cannot apply to the present case. It contains no words making it in any way retrospective in its operation, unlike the provisions to that effect contained in s. 2 (2) of the Madras Act I of 1914 and Government of India Act VIII of 1921. On the contrary, the heading and preamble of the Act show that it is intended only to remove *existing* disabilities in respect of the power of disposition of property by Hindus, etc., and it is not put in such declaratory language as the Acts operating in Madras. Consequently s. 2, in my opinion, only covers the case of a disposition made after the commencement of the Act.

R. L. *Appeal allowed.*

PATNA HIGH COURT.

Criminal Revision No. 55 of 1926.
February 18, 1926.
Present:—Mr. Justice Ross and
Mr. Justice Kulwant Sahay.
PARMESHWAR DAYAL—Petitioner
versus
EMPEROR—Opposite Party.

Penal Code (Act XLV of 1860), s. 411—Receiving stolen property—Possession of accused—Witness—Hostile witness.

The accused, along with several others, was found in the house of one of them, quarrelling over the division of certain stolen property, which consisted of packages of cloth which has been cut through and were lying open in the house:

Held, that the accused was in possession of the property for purposes of s. 411 of the Penal Code. [p. 705, col. 2.]

Reg. v. *John Wiley*, (1850) 4 Cox C. C. 414; 2 Den. C. C. 37; T. & M. 367; 20 L. J. M. C. 4; 15 Jur. 134; 4 New Sess. Cas. 363; 16 L. T. (o. s.) 514; 15 J. P. 770; 169 E. R. 408, distinguished.

The prosecution is not entitled to declare a witness hostile merely because he is a neighbour of the accused and does not support the prosecution storey unless there is something in his deposition which conflicts with earlier statements made by him, and which would afford ground for thinking that he has been gained over by the defence. [p. 706, col. 1.]

Criminal revision from a decision of the Sessions Judge, Bhagalpur, modifying that of the Sub-Divisional Magistrate, Bhagalpur, dated the 3rd November 1925.

Messrs. *Yunus*, *S. P. Varma* and *Bhagwat Prasad*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Ross, J.—The petitioner is one of eight persons who have been convicted under ss. 411 and 414 of the Indian Penal Code, in connection with the theft of three large bales of cloth and one box containing packages of medicine bottles from the Railway Station at Bhagalpur. The stolen property was recovered in a house rented by one of the accused, Singheswar Lal, situated near the Railway Station.

The first contention on behalf of the petitioner is that there is no evidence or finding that the petitioner was in possession of any of the stolen goods; and as regards s. 414, there is no evidence of any overt act done by the accused towards disposing of or making away with the property. Now the findings of the Appellate Court are that "the evidence to implicate the appellants is that they were all in this house on the 9th of March 1925 disputing as to what was to be done with the booty"; and, again, that "about a dozen people were seen discussing as to how the cloth was to be divided." The findings of the Trial Court are more detailed and are that the witnesses have proved that the packages were found cut through and the cloth in the bales was lying open in the house of Singheswar Lal and all the first nine accused were sitting inside the house and quarrelling over the division of the property, and were claiming a share in the same. There is a further finding that there is also sufficient evidence to show that the accused had cut open the packages of cloths and assisted in concealing or disposing of the stolen property. The learned Counsel for the petitioner referred to the case of *Reg.* v. *John Wiley* (1). In that case the Jury convicted the accused but the case was reserved for the opinion of the Court of Appeal. There was a division of opinion, and the majority of the Court held that the conviction was wrong. The facts are thus stated by Baron Martin "Two men stole some fowls, which they put into a sack, and carried to the house of Wiley's father, for the purpose of selling them to Wiley. All three went together from the house to an outhouse; the bag was carried on the back of one of the thieves; and when the Policemen went in, the sack was found lying on the floor, unopened, and the three men around it as if they were bargaining, but no words were heard. Now I am of opinion that Wiley, under those circumstances, never did receive those fowls." Lord Campbell whose opinion was that of the minority, said that "the material question is, whether there has been a possession *malo animo;* and all the Judges, I believe, are of opinion that there may be a sufficient possession, though there is not a manual possession." In that case there was no possession by the accused Wiley. But here possession is the basis of the finding; and the only question in debate between the accused was as to the actual division of the property. *Wiley's case* (1), therefore, is no authority on the present question; and, in view of the findings, I am of opinion that so far as that question is concerned the conviction under ss. 411 and 414 is sustainable.

The main question, however, relates to the case of this particular accused. His defence was that he was falsely implicated and had been brought by the Police, from outside, to the house where the stolen property was found. The learned Sessions Judge has referred to the evidence of thirteen witnesses nine of whom are Police Officers, two are search witnesses, and two are private persons who were declared hostile. Four of the Police Officers speak to the presence of the petitioner in the group of men in the house. But whereas Ramrachya Singh (P. W. No. 22) says that he assisted Ramrup Singh, who is prosecution witness No. 13, in arresting Parmeswar Dayal, Ram Rup Singh himself says nothing on this point. Prosecution witness No. 20, who identified the petitioner in the house called him Bhubneshwari. There is, therefore, some uncertainty about the case of this man on the prosecution evidence alone. Now the two witnesses who were declared hostile, Abdul Wahid (P. W. No. 19) and Madan Barhi (P. W. No. 26) in their cross-examination made statements consistent with the defence raised by the petitioner. They say that Parmeshwar Dayal was brought subsequently by the Police from outside, from the direction of his own house. The contention on behalf of the petitioner with regard to this evidence is that there was no justification for declaring these witnesses hostile. The learned Sessions Judge has said nothing on this point and the reasons given by the Trial Court are, in my opinion, no reasons at all. What the Trial Court said was that these witnesses do not support the prosecution story, but they are admittedly neighbours of the accused and they have been won over by them. Witness No. 19 is a tout and witness No. 22 is a man of straw and quite unreliable. These are no reasons for declaring the witnesses hostile; and, unless there is something in their depositions which conflicted with earlier statements made by them, which would afford ground for thinking that they had been gained over by the defence, the prosecution is not entitled to declare them hostile. Now Abdul Wahid was only examined to prove that he had let his house to Singheswar and he did make that statement. He was then cross-examined by the defence; and, apparently because of statements made in that cross-examination, he was allowed to be cross-examined by the prosecution. Madan Barhi was not examined in chief, but only tendered for cross-examination; and it was after his cross-examination by the defence, that he was allowed to be cross-examined by the prosecution. This procedure was, in my opinion, erroneous; and the fact that these witnesses are neighbours of the accused is not sufficient ground for treating them as hostile in order to discredit the statements that they made favourable to the defence. Apart from this, a large body of evidence was given on behalf of Parmeshwar Dayal to show the circumstances in which he was arrested. It is true that some of the witnesses are persons of little consideration and others are his own relatives; but one of the witnesses is a Sub-Registrar whose evidence was *prima facie* entitled to considerable weight. The learned Sessions Judge has not discussed the evidence of this or any other defence witness with a view to showing why it should not be relied upon he has merely said that he prefers the prosecution evidence, and has considered certain probabilities. The Trial Court disbelieved the Sub-Registrar on the ground that he is a caste-fellow of the petitioner. This reason is, in my opinion, insufficient: and the evidence of this witness ought to have received fuller consideration.

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(1) (1850) 4 Cox C. C. 414; 2 Den. C. C. 37; T. & M. 367; 20 L. J. M. C. 4; 15 Jur. 134; 4 New Sess. Cas. 363; 16 L. T. (o. s.) 514; 15 J. P. 770; 169 E. R. 408.

In view of the doubt that is thrown on the prosecution case by the defects of the prosecution evidence itself which I have referred to above, it seems to me that there is a distinct element of doubt as regards the complicity of the petitioner. I would, therefore, allow this application and set aside the conviction and sentence of Parmeshwar Dayal and direct that he be acquitted and released from bail.

Kulwant Sahay, J.—I agree.

N. H. *Application allowed.*

RANGOON HIGH COURT.

CRIMINAL REVISION NO. 780A OF 1925.

September 12, 1925.

Present:—Mr. Justice Doyle.

EMPEROR—PROSECUTOR

versus

NAG KYAING—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 162—Evidence Act (I of 1872), s. 27—Statement of accused by gesture in Police custody—Admissibility.

Section 162, Cr. P. C., prevails over the provisions of s. 27 of the Evidence Act.

A statement can be made by means other than words. Therefore, the gesture of the accused in pointing out to the Police where revolver lies is inadmissible in evidence.

Criminal revision from the judgment of the Special Power Magistrate, Tharrawaddy, in Criminal Regular Trial No. 81 of 1925.

JUDGMENT.—U Ba Pe, Circle Inspector of Police (P. W. No. 1), has stated that, while Maung Kyaing was in custody, acting on information received from Maung Kyaing, he took him to Inspector of Land Records, U Nge's house. He said to Maung Kyaing "please point out the revolver as you promised." Maung Kyaing pointed out a piece of Plank and when it was opened the Circle Inspector said to Maung Kyaing "Take up your own thing.". Maung Kyaing picked up a packet, which was found to contain a revolver and 8 loaded cartridges.

Maung Kyaing pleaded guilty to having under his control a revolver and 8 cartridges and was sentenced to two years' rigorous imprisonment.

U Ba Pe should not have been allowed to state in the witness-box that he had received information from Maung Kyaing. He should not have been allowed to state that Maung Kyaing pointed out a Plank and said "It was under this."

The utmost that could be proved against Manng Kyaing was that he accompanied the Police to the house of U Nge and that a revolver was found there. His gesture, in pointing out to the Police where the revolver was, was inadmissible as it, to all intents and purposes, was a statement. It must not be forgotten that statements can be made by other means than by words. There was really no admissible evidence on which Maung Kyaing could be convicted, since s. 162 of the Cr. P. C. must be taken as overriding s. 27 of the Evidence Act.

The conviction and sentence are, therefore, set aside and Maung Kyaing is acquitted as far as this case is concerned.

R. L. *Conviction and sentence set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 657 OF 1925.

(CRIMINAL REVISION PETITION NO. 544 OF 1925.)

October 23, 1925.

Present :—Mr. Justice Jackson.

In re ARULAY—COMPLAINANT—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 350 (1) (2)—Magistrate, transfer of—Accused, application of, for de novo *trial—Subsequent waiver—Mere cross-examination of prosecution witnesses, effect of—Re-trial, privilege of, whether claimable by complainant.*

Where an accused, on a transfer of a Magistrate, claimed the privilege of re-trial under s. 350, Cr. P. C., but when the prosecution witnesses appeared, changed his mind and was content to cross-examine the witnesses:

Held, that the procedure adopted was not irregular and the Court was free to exercise its statutory option and act upon the evidence recorded by its predecessor. [p. 708, col. 1.]

The privilege under s. 350, Cr. P. C., is that of the accused and not of the complainant and if the accused declines to act under sub-cl. (1) (*a*) the complainant of necessity must suffer any disadvantage which follows upon the Magistrate electing to proceed upon the evidence already recorded. [*ibid.*]

Petition, under ss. 435 and 439, of the Cr. P. C., 1898, praying the High Court to revise the judgment, dated the 16th September 1925, of the Taluk Second Class Magistrate, Sivaganga, in Calendar Case No. 60 of 1925.

Mr. *A. Srinivasa Iyengar*, for the Petitioner.

ORDER.—The petitioner seeks to revise an order of acquittal in C. C. No. 60 of 1925 on the file of the Court of the Second Class Magistrate of Sivaganga. After the case was charged, there was a transfer of Magistrates, and in exercise of his privilege under s. 350, Cr. P. C., the accused asked that the prosecution witnesses might be re-summoned and re-heard. When they appeared, he said he would be content to cross-examine them. The question raised is whether his original application had the effect, as it were, of cancelling the evidence recorded by the Magistrate's predecessor, so that on the adjourned date of hearing the only course was to examine the witnesses afresh, or whether on the contrary the accused could change his mind and leave the Court free to exercise its statutory option and act upon the evidence recorded by its predecessor. The petitioner relies upon the rulings in *Sobh Nath Singh* v. *Emperor* (1) in which it was held, no doubt, that the accused has no right to change his mind.

My difficulty in following these rulings is that they seem to assume that the ordinary procedure under the Code when the Magistrate is transferred in the course of the hearing, is a re-trial, and if there is no re-trial, the accused must be held to be gravely prejudiced. "It is impossible to say that the accused have not been materially prejudiced by the procedure adopted, for it is evident that the Honourary Magistrate has arrived at the conclusion on the evidence the whole of which was not recorded by himself" page 139. "If the law requires that there should a trial *de novo* on the transfer of a case from one Magistrate to another the waiver of the accused goes for nothing." *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (2). The short answer to these observations is that the law requires no such thing, and if an accused is materially prejudiced by the Magistrate passing judgment on his predecessor's record, it is a prejudice by the Statute. It would be a very different case if the Statute forbade the Magistrate to act upon this record and the accused was induced to plead that he would allow the recorded evidence to go in spite of the Statute. That was the point in *In re Kothammal Kolathingal Ummar Hajee* (3), which has no reference to s. 350. If a Magistrate acting under s. 350, sub-cl. (1) says that he is prepared to act on his predecessor's record, and the accused states that he does not wish to press his privilege under sub-cl. (1) (*a*) but would like some witnesses recalled for cross-examination, it could be done quite regularly under s. 540, Cr. P. C. Of course in that case it would still be open to a superior Court to consider, whether a material miscarriage of justice had resulted from the act that the Magistrate who convicted had not seen and heard the winesses but his procedure could not be said to have been *ipso facto* irregular. In *Narayan Reddy* v. *Enmula Bogamma* (4) on which petitioner also relies, it seems that the accused exercised his privilege under the proviso and the Magistrate confined him to cross examination which was clearly wrong. The present is a case where the accused did not exercise his privilege. Of course the complainant has no privilege under s. 350, and if the accused declines to act under sub-cl. (1) (*a*), the complainant of necessity must suffer any disadvantage which follows upon the Magistrate electing to proceed upon the evidence already recorded. To try to get an acquitted man again put upon his trial, because he failed to insist upon the prosecution witnesses being re-heard is a recourse chiefly commendable for its ingenuity.

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(1) 12 C. W. N. 138 at p. 140; 6 Cr. L. J. 431.

There is no ground of interference, the petition is dismissed.

V. N. V. *Petition dismissed.*

R. L.

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(2) 12 C. W. N. 140; 6 Cr. L. J. 434.

(3) 69 Ind. Cas. 636; 46 M. 117; (1922) M. W. N. 644; 16 L. W. 697; 43 M. L. J. 659; A. I. R. 1923 Mad. 32; 23 Cr. L. J. 748.

(4) 90 Ind. Cas. 668; (1925) M. W. N. 652; 49 M. L. J. 423; A. I. R. 1925 Mad. 1280; 26 Cr. L. J. 1596.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 1087-B OF 1924.
February 10, 1925.
Present:—Mr. Justice Carr.
MAUNG MAUK AND ANOTHER—PETITIONERS
versus
MAUNG PO YON—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 537—Dispute as to immoveable property—Preliminary order, service and publication of—Irregularity.

Under sub-s. (3) of s. 145 of the Cr. P. C. a copy of the preliminary order made by the Magistrate must be served on the parties and must also be published by being posted on the land itself. The failure to serve and publish the order in this manner is, however, an irregularity which is curable under the provisions of s. 537 of the Code and does not by itself vitiate the proceedings.

Criminal revision from an order of the Sub-Divisional Magistrate, Nyaunglebin, in Criminal Miscellaneous Trial No. 89 of 1924.

Mr. *Vertannes*, for the Petitioner.

Mr. *Choon Foung*, for the Respondent.

JUDGMENT.—Counsel for the petitioner has pointed out that the Magistrate did not comply with the provisions of s. 145, Cr. P. C. This is so. Clause (1) of the section requires the Magistrate to make an order in writing stating the grounds of his being satisfied that a dispute exists which is likely to cause a breach of the peace. The Magistrate did this. But cl. (3) requires a copy of the order to be served on the parties and this was not done. The notice actually issued was not a copy or translation of the order and gave no grounds. And no copy was published by being posted on the land itself, as is also required by cl. (3).

These are decided irregularities, but I think that they are cured by s. 537, Cr. P. C., and do not invalidate the proceedings. The Magistrate should, nevertheless, see that thay do not recur in future cases. These provisions appear to be very generally overlooked.

[The remainder of the judgment is not essential for the purposes of this report.—[*Ed.*]

Z. K.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1289 OF 1925.

January 15, 1926.

Present:—Mr. Justice Broadway.

HARNAM SINGH AND ANOTHER—ACCUSED —PETITIONERS

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Accused discharged—Further enquiry, when to be ordered.

Further enquiry should not be ordered unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. The opinion of the Court that the prosecution evidence requires more careful attention than it has received is no ground for ordering further enquiry.

Criminal revision from an order of the District Magistrate, Ferozepur, dated the 26th May 1925.

Mr. *Anant Ram*, for the Petitioners.

JUDGMENT.—In this case a Magistrate had discharged a complaint brought by Sucha Singh against Harnam Singh and Mangal Singh under s. 342, Indian Penal Code. The complainant moved the learned District Magistrate who, in the exercise of his revisional powers, directed a further enquiry. Harnam Singh and Mangal Singh have come up to this Court in revision through Mr. Anant Ram.

The learned District Magistrate says as follows:—

"There is a good deal of evidence in support of this story. The Magistrate had discharged the accused on the ground that the evidence is discrepant, and that certain additional witnesses were produced before the Court though it was stated by one of the earlier witnesses that only he and Arjan Singh were present. I consider that the Magistrate has given insufficient ground for rejecting a considerable volume of evidence recorded against Mangal Singh and Harnam Singh." He then goes on to say: "I consider that the evidence produced by Sucha Singh requires more careful consideration than it has yet received."

Now, it had been held more than once by this Court that further enquiry in cases of this nature should not be ordered unless the order of discharge was manifestly perverse or foolish, or was based upon a record of evidence which was obviously incomplete. It has not been suggested that the record of evidence in the present case is incomplete nor had the District Magistrate found that the order of discharge was manifestly perverse or foolish. In this connection reference may be made to *Nabi Bakhsh* v. *Emperor* (1). In the circumstances, in my opinion, the order of the learned District Magistrate is erroneous and accepting the petition, I restore the order of discharge passed by the Magistrate and quash the further proceedings ordered.

R. L. *Application accepted.*

(1) 56 Ind. Cas. 777; 1 L 216; 21 Cr. L. J. 521; 109 P. L. R. 1920; 8 P. W. R. 1920 Cr.

BOMBAY HIGH COURT.

CRIMINAL REVISIONAL APPLICATION No. 276 OF 1924.

August 5, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

December 5, 1924.

Present:—Justice Sir Amberson Marten, KT., and Mr. Justice Pratt.

BAI JIBA—APPLICANT

versus

CHANDULAL AMBALAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 148 (3), 423 (d), 439—Dispute with regard to immoveable property—"Forcibly and wrongfully," meaning of—Order confirming possession, duration of—Revision—Costs, whether can be awarded.

Per *Marten, J.*—The distinction drawn in the first proviso to sub-s. (4) of s. 145 of the Cr. P. C. is between forcible entries which are rightful and forcible entries which are wrongful; and that depends on whether the person entering was entitled to use force, and not merely on whether he had a legal right to possession. [p. 710, col. 2.]

Per *Pratt, J.*—The phrase "forcibly and wrongfully" used in the first proviso to sub-s. (4) of s. 145 of the Cr. P. C. has the same meaning as forcible entry without due warrant of law; in other words "wrongfully" means no more than "otherwise than in due course of law." [p. 712, col. 2.]

Possession taken by a show of force is a forcible dispossession within the meaning of the first proviso to sub-s. (4) of s. 145. [*ibid.*]

Per *Fawcett* and *Madgavkar, JJ.*—Sub-s. (6) of s. 145 of the Cr. P. C. and the connected form No. 22 of Sch. V to the Code allow a Magistrate to give directions as to possession with a legal effect that is valid until actual eviction or ouster by due course of law and not merely until the institution of a civil suit for the purpose of determining the legal right to the property [p. 713, col. 1.]

The High Court has power, under s. 439 read with ss. 423 (*d*) and 148 (3) of the Cr. P. C. to pass an order for costs incurred in the hearing of a revision petition arising out of a proceeding under s. 145 of the Code. [p. 714, col. 1.]

Criminal appeal against an order of the Resident Magistrate, First Class at Nadiad.

JUDGMENT.

Marten, J.—This case raises a dispute under s. 145 of the Cr. P. C. It is eminently a beneficial section passed with the express object of preserving the peace. But in many cases it is apt to result in the parties treating it as a sort of preliminary suit with reference to the merits of their respective claims to certain immoveable property, though both parties know that those disputes cannot finally be determined except by a Civil Court. I feel, therefore, that when one gets a dispute of that nature, as we have in fact here, there is an unfortunate waste of money by the litigants, and to some degree a waste of public time, in considering detailed facts or difficult points of law, because after all the only order that can be passed by the Court is a temporary order to preserve the peace, while the civil rights of the parties to the property in dispute are being settled.

In the present case it appears that one Shivlal died on January 9, 1922, leaving a widow Jiba and a brother Bapalal. The widow Jiba alleges that she was in sole possession of the property after the death of her husband, and remained so with the consent of Bapalal, who was the heir to the property subject to the widow's right of maintenance. It is further alleged that the widow was the manager of the property. She brought these proceedings under s. 145, Cr. P. C., against one Chandulal, alleging that Chandulal had wrongfully taken possession of the property and dispossessed her (Jiba) of that property. The learned Magistrate does not find definitely whether the act of dispossession was on November 21, 1923, or on November 22, 1923. He says if it was on November 21, then no force was used. So it was not a forcible dispossession within the meaning of the proviso to sub-s. (4) of s. 145. But if it was on November 22, then it was a forcible dispossession.

The ground on which the learned Magistrate came to his decision to dismiss the application was that whether the date was the 21st or the 22nd, and whether it was a forcible entry or whether it was not, it was not a wrongful dispossession within the meaning of the above proviso, because Chandulal was then rightfully entitled to possession of the property under an agreement for sale which Bapalal, the heir, had entered into on September 12th, 1923, and under a further document of November 21, by which Bapalal had purported to give him the possession of the property.

The view the learned Magistrate took of that word "wrongful" was that it involves that the dispossessor has no legal right to the possession of the property. In support of that view he referred to the definition of "wrongful gain" in s. 23 of the Indian Penal Code. Before us it has been conceded by Counsel on both sides that this view of the proviso in question cannot be supported. If one considers for a moment the general principles applicable to a forcible entry into a building, one will see the reason why, one main anxiety of the law is to preserve the King's peace. Accordingly even a rightful owner, such, for instance, as a landlord who is entitled to possession in a case where his tenant is wrogfully holding over, can only take possession peaceably. If his possession is opposed however wrongfully, then the landlord has no right to break down the doors, to assault the inmates and to turn them *vi et armis* out of the building. He must go to the Civil Court and get the necessary warrants or ejectment orders to enable, if necessary, the proper authorities to effect a forcible entry or a forcible ejectment according to law.

But, if the view of the learned Judge was to prevail, then it would not matter for the purpose of this proviso whether the landlord came with an armed force and broke down the doors and forcibly turned the inmates out or not. That, I think, is not the true view of the section. I think the distinction drawn is between forcible entries which are rightful and forcible entries which are wrongful: and that depends on whether the person entering was entitled to use force, and not merely on whether he had a legal right to possession. If, for instance, a landlord came armed with a writ or a warrant in his favour to eject his former tenant then although force might in the end be used, it would not be a wrongful dispossession. If, on the other hand, he took the law into his own hands and used force without any such legal sanction by means of a warrant as I have referred to, then that would be an instance to my mind of where he would have forcibly and wrongfully dispossessed his former tenant.

I appreciate of course that the words are "forcible and wrongful." On the other hand, the construction which I prefer, receives assistance, I think, from the opening part of sub-s. (4). The proviso in question is only a proviso to that particular sub-section, and that sub-section opens by saying that "the Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute" do certain things. But if the opposite construction was to prevail, then for the purposes of determining whether any particular case came within this proviso, the Magistrate would have to determine that very thing, *viz.*, whether on the merits or on the claims put forward, A or B had a legal right to enter into possession.

In the view, therefore, which I take, the ground on which the learned Magistrate dismissed the application cannot be supported.

But we then come to this difficulty which, speaking for myself, I have not been able to surmount, and that is whether facts are so found as to enable us to make a definite order on this application. In the first place, as regards the date of dispossession, and whether it was forcible or not, there is, as I have already pointed out, no finding. The learned Magistrate says it may be one day or another day. If it is the first day no force was used. If it is the second day, there was force. We, therefore, think we must have a definite finding on that point before we can decide what is the proper order to make having regard to our decision on the point of law.

Speaking for myself, I also feel another difficulty, *viz.*, what is the learned Magistrate's finding as to who was in possession of the property immediately prior to the date on which Chandulal took possession. The finding on page 11 of the judgment is; "Thus we find that oral evidence on both the sides is almost useless for arriving at any definite conclusion about the actual possession of the *dehla* under dispute." It may be that the learned Magistrate is there referring to the oral evidence as opposed to some of the rest of the evidence. What I should like to have is a definite finding on all the evidence in the case as to who, the learned Magistrate is of opinion was in possession at this date, *viz.*, whether it was Jiba and Bapalal or either and which of them or how otherwise. For instance, at page 9 of the judgment, the learned Magistrate finds out that the ownership of Bapalal was not denied by Jiba. Then he refers to certain rent-notes passed apparently in favour of both of them. He then states he believes the deposition of the Pleader entirely, who states that Bapalal told him that the whole property was in possession of Bai Jiba. Then later on the learned Magistrate says:—"The only thing that is established from the evidence of Bai Jiba and her witnesses is that the *dehla* under dispute was of the joint ownership of Jiba and Bapalal and that Bapalal was using it for sitting purposes whenever he was at Nadiad." But the learned Magistrate had already found, as I understand it, that the ownership as distinct from possession was in Bapalal alone. Whether thus in this last quoted passage he intended to refer to joint possession and not joint ownership I am not altogether clear. I merely mention these passages to show why I am unable to see clearly the conclusions of fact which the Magistrate has arrived at. I, of course, follow that in the view he took, these points were not essential because he decided the case on the point of law. But as we are unable to take the same view on that, it necessarily follows that we must be definite on the findings of fact.

I would, therefore, as is suggested by the learned Government Pleader, remand this case to the learned Magistrate for his findings on the definite issues which will be mentioned in the judgment of my learned brother.

Speaking for myself, I would like to add this, that one or the other of the parties had much better file a civil suit to determine their rights and then have the present proceedings stayed. Otherwise what will probably happen is that they will go back to the Magistrate and incur further expense, and come back here with more expense, and even then the rights of the parties will not finally be determined. That can only be determined in a Civil Court. But of course if the parties choose to go on fighting and spending moneys in this way, I regret I do not see my way to stop them doing it.

Pratt, J.—The Magistrate has not found whether the opponent took possession on the 21st or 22nd.

If possession was taken on the 22nd he says it was forcible but not wrongful because the opponent was acting under, or under colour of, an authority signed by the owner, But this is a misconstruction of the word "wrongfully" in the first proviso to s. 145 (4). The section makes it clear that the Magistrate is not concerned with title or with claims of right. The phrase "forcibly and wrongfully" has the same meaning as forcible entry without due warrant of law under the English Statute. A forcible entry must be wrongful unless it is in execution of a legal process. It was held in *Frankum* v. *Earl of Falmouth* (1) that in an action for trespass the word "wrongfully" does not put title in issue. The word "wrongfully," therefore, means no more than "otherwise than in due course of law" in s. 9 of the Specific Relief Act. The proviso was inserted because under the Code of 1872 the Courts were embarrassed by having to recognise a forcible possession. The case of *In the matter of the petition of Mohesh Chunder Khan* (2) is an instance where the Court overcame the difficulty by declaring that the possession to be recognised must be peaceful possession.

On the other hand, if possession was taken on the 21st the Magistrate says the proviso does not apply as the possession was not forcibly taken—but the Magistrate found Pathans on the premises and it is not clear whether he has understood possession taken by a show of force is a forcible dispossession. The case of *Edwick* v. *Hawkes* (3), is a clear exposition of the law on this point.

I am inclined to think that the Magistrate intended to find that the petitioner was in possession. But his judgment on this point is not very clear and I would, therefore, remand the case to the Magistrate for findings on the following issues:—

(1) Whether the possession was taken by the opponent Chandulal on November 21 or 22, 1923?

(2) Whether the possession was taken on either of those dates forcibly and wrongfully?

(3) Whether immediately prior to such dispossession by opponent the *dehla* in dispute was in possession of Bai Jiba or how otherwise?

Findings to be returned within two months.

The case was accordingly sent back to the Trial Magistrate for necessary findings. Meanwhile Chandu Lal filed a suit in the Civil Courts for the specific performance of a contract of sale for the property in dispute entered into with Bapalal the petitioner's husband's brother. On the case being returned to the High Court, the following judgment was pronounced:

Fawcett, J.—The present application for revision was before this Court in December last and the case was remanded to the Magistrate, First Class, Nadiad, for findings on certain issues. It was explained in the judgment of this Court that the Magistrate had placed a wrong construction on the word "wrongfully" in the first proviso of sub-s. (4) of s. 145 of the Cr. P. C., and as the exact facts were not sufficiently ascertained this remand was necessary. The result of the Magistrate's findings is that he holds that the opponent Chandulal took forcible and wrongful possession of the premises in question on November 22, 1923, from the petitioner Bai Jiba, who was in possession immediately prior thereto. He had in his previous order held that the conditions of s. 145 were satisfied and that he had jurisdiction to pass an order under that section. In view of his misconstruction of the word "wrongfully," the order that he passed was one in favour of the opponent Chandalal Ambalal, declaring him to be entitled to possession of the premises until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction under s. 145, sub-s. (6), Cr. P. C. It follows from the findings of the Magistrate, and this is not disputed by Mr. Velinker for the opponent, that the applicant is entitled to have that order set aside and to have an order in her favour substituted under sub-s. (6) of s. 145, Cr. P. C., unless this is prevented (as he contends it is) by certain events that have happened since the Magistrate gave his findings. These findings were given on June 13, 1925, and affidavits have been put in yesterday that a suit was filed in the Court of the First Class Subordinate Judge, Nadiad, by the opponent against the petitioner and her brother-in-law Bapalal for specific performance of a written agreement, under which the opponent claims to be entitled to the premises in question, and that an *interim* injunction has been granted by the Subordinate Judge in that suit, restraining the defendants from taking possession of the building or from disturbing the plaintiff or his tenants in its possession. Mr. Velinker urges that, in view of this injunction, the Court should, at any rate, not act under the latter part of sub-s. (6), namely, exercise its power of restoring possession to the petitioner. He also urges that, in view of this injunction, the Court should refrain from passing an order even under the first part, declaring the petitioner to be entitled to possession until evicted in due course of law and forbidding all disturbance of such possession until such eviction.

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(1) (1835) 2 Ad. & El. 452; 4 L. J. K. B. 26; 111 E. R 175.

(2) 4 C. 417; 2 Ind. Dec. (N. S.) 265.

(3) (1881) 18 Ch. D. 199; 53 L. J. Ch. 577; 45 L. T. 168; 29 W. R. 914.

It is, of course, desirable to avoid a conflict of authority between a Criminal and a Civil Court, and Mr. Thakor for the petitioner does not object to the question of restoration of possession being held over until the petitioner has had an opportunity of appearing in the injunction matter and endeavouring to get that injunction dissolved, or at any rate, not continued. That, in our opinion, is the best course to adopt. It is quite possible that, when the Subordinate Judge has considered the effect of the proceedings between the parties under s. 145, Cr. P. C., he will not continue the injunction, in view of the fact that sub-s. (6) and the connected form No. 22 in Sch. V, allow a Magistrate to give directions as to possession with a legal effect that is valid until actual *eviction* or *ouster* by due course of law. But in saying this, I do not of course in any way wish to prejudge the question, which will have to be determined by the Subordinate Judge and which it is entirely for him to decide. But in regard to the other question whether we should not substitute the declaratory order that we should normally have passed for the Magistrate's order which is the subject of our revision, it seems to me clear that it would be unfair to allow the opponent all the advantage of his forcible and wrongful dispossession, merely because he has, since the Magistrate's findings, gone to the Civil Court, almost at the very last minute before the matter came before us for final orders. Proceedings under s. 145 are generally taken as a preliminary skirmish before the actual battle in a Civil Court. One side or the other generally gets some advantage out of the proceedings. But, in the present case, the advantage should, under the decision of the Magistrate as now finally settled, be given to the petitioner, and any subsequent civil suit ought to start on the basis of her having obtained that advantage. I am certainly against any action which would allow her to be jockeyed out of this advantage by manœuvres of the kind that have taken place in the present case, and I think that the matter should be disposed of on the basis as if the Magistrate himself had had jurisdiction to alter his previous order on June 13, 1925, when he recorded his findings. Subject to the decision in a subsequent civil suit between the parties, he could then have passed an order in favour of the petitioner just as he had passed an order in favour of the opponent in the original proceedings. Again, this Court could, in December 1924 have passed a similar order, had it not been necessary to clear up some of the facts. Therefore, in spite of the *interim* injunction, I think that this Court should at once pass an order substituting the petitioner for the opponent in the actual order that the Magistrate passed, that is to say, declaring that the petitioner should be treated as being in possession of the property in dispute inasmuch as she was forcibly and wrongfully dispossessed thereof by the opponent on November 22, 1923, and so entitled to retain what the law considers in the circumstances to be her actual possession, until ousted by due course of law, and strictly forbidding any disturbance of her possession in the meantime. Of course in view of the subsequent suit and the undesirability of any judicial conflict, this last prohibition is without prejudice to what may be decided in the injunction matter and what we may further order about it, when the matter comes up before us again.

The other question before us, namely, whether we should actually direct the Magistrate to restore possession to Bai Jiba, is adjourned for three weeks.

After hearing Counsel we think that the Magistrate's order that each party should bear his own costs should also be revised and that, as the petitioner has substantially succeeded and it has been held that she was wrongfully dispossessed by the opponent, we should substitute for that order an order that the opponent should bear the petitioner's costs incurred in the Magistrate's Court, including any costs in connection with the remand to his Court in December 1924: the Magistrate to assess the costs so recoverable by the petitioner.

Mr. *N. P. Desai*, for the Applicant.

Mr. *Velinker* (with him Mr. *C. N. Pandya*), for the Opponent.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

[The Subordinate Judge who was trying the civil suit dissolved the *interim* injunction on July 27, 1925, and Chandu Lal appealed against that order in the Court of the District Judge. Jiba applied in revision to the High Court and the following judgment was delivered:—]

JUDGMENT.

Fawcett, J.—The First Class Subordinate Judge of Nadiad has now passed an order on July 27, 1925, dismissing the application for a temporary injunction with costs. This means that the *interim* injunction that he had granted is dissolved. That being so, there is nothing now to prevent our directing the Magistrate under sub-s. (6) of s. 145 to restore possession of the premises to the applicant Bai Jiba, who (it has been held) was forcibly and wrongfully dispossessed thereof. The only request that is made to us is that we should restrain our hands at present, on the ground that an appeal has been made to the District Judge from the Subordinate Judge's order. An affidavit has been filed which states that such an appeal has been made and shows that the District Judge has refused to grant an *interim* injunction *ex parte*. We think that there is clearly no sufficient ground for our not now passing the order that we would have done on July 1 last, but for the impediment that existed owing to the Subordinate Judge's *interim* injunction. That being cleared out of the way, we do not think that there is any reason why the opponent, who resorted to the Civil Court at the very last stage, should benefit by this manœuvre. The restoration of possession, just like the injunction, will be subject to the decision of Civil Courts in the matter, and, therefore, no undue hardship is caused to the opponent by giving the applicant the full benefit of the proceeding under s. 145, Cr. P. C., in which she has succeeded. Accordingly, we refuse to grant a further adjournment, and now direct the Resident Magistrate, First Class, Nadiad, to restore possession of the premises in question to the applicant Bai Jiba, the widow of Shivlal Maganlal.

In this case we think that costs should be allowed to the petitioner on the ordinary appellate side scale. It is no doubt true that the powers of the C. P. C. as to costs cannot be imported into criminal proceedings. But in the present case the Magistrate can award costs under the express provisions of s. 148, sub-s. (3), and costs have in fact been so awarded. It is argued that we have no power in revision to pass an order for costs incurred in the hearing of the application to this Court. I think, however, that such an order is covered by the wide powers given in s. 439, Cr. P. C. This refers to s. 423, and the present case can be held to fall under cl. (*d*) of that section. As the Magistrate has power to award costs, it is a consequential order that is just and proper to allow the applicant the costs incurred in the application to this Court, which was necessitated by a misapprehension of the Magistrate and in which she has succeeded. There is also a precedent in the order passed by this Court in Revisional Application No. 149 of 1924, in which a similar order of costs was made. The applicant is, therefore, allowed her costs, as already mentioned.

Z. K. *Rule made absolute.*

PATNA HIGH COURT.

In the matter of CRIMINAL REVISION NO. 20 OF 1926.

February 16, 1926.

Present:—Mr. Justice Ross and Mr. Justice Kulwant Sahai.

SUBDA SANTAL AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Vakalatnama—*Criminal cases—Appearance by Advocate or Vakil on behalf of accused—Written authority, necessity of filing—Criminal Procedure Code (Act V of 1898), ss. 340, 419.*

There is no provision either in the Cr. P. C., or in the rules of the Patna High Court requiring an Advocate or Vakil of that Court to file a duly stamped appointment in writing in order to enable him to present an application or appeal or conduct a criminal case on behalf of the accused. [p. 716, col. 2.]

Mr. *S. M. Gupta*, for the Petitioner.

The Government Advocate, for the Crown.

JUDGMENT.

Kulwant Sahay, J.—Mr. S. M. Gupta, an Advocate of this Court, presented an application for revision on behalf of Subda Santal and another, under the provisions of ss. 435 and 439 of the Cr. P. C. The application was admitted and notice was ordered to issue. Mr. Gupta was thereupon asked by the office to supply an authority on behalf of the petitioners duly stamped. He objected on the ground that in criminal cases no authority in writing was necessary. The Registrar has referred the matter to us; and the question for decision is whether a duly stamped appointment in writing is necessary to be filed by an Advocate or a Vakil of this Court appearing on behalf of accused persons in criminal cases.

As the matter was of importance we thought it necessary to issue notice to the Government Advocate and we have heard the Government Advocate as well as Mr. Gupta. Mr. Gupta contends that no authority in writing is necessary for an Advocate or a Vakil in criminal cases and the Government Advocate supports him.

The office has drawn our attention to the rules of this Court. Rule 21 of Ch. XII of the High Court Rules provides that "a criminal appeal which is to be presented to the Court shall in the first instance be given to the trial clerk, who shall note on it whether it is properly stamped, is within time and is admissible and shall return it at once". Rule 1 of Ch. XII prescribes "that the rules in Ch. III shall apply as far as possible to applications made under Ch. XII which deals with the procedure in criminal cases. Rule 4 (*iv*) of Ch. III provides that every petition shall be presented either by the petitioner or declarant or his recognised agent or his Pleader or some person appointed in writing in each case by such Pleader to present the same"; and the note attached to this rule says that "Pleader" means Advocate, Vakil or attorney. These rules do not prescribe that in criminal cases an authority in writing has to be filed by an Advocate or Vakil when presenting a criminal appeal or application.

Rule 5A of Ch. XVII of the High Court Rules prescribes that "notwithstanding anything contained in O. III, r. 4 (3) of the First Schedule of the C. P. C., 1908, no Advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognized agent or by some other agent duly authorized by power-of-attorney to act in this behalf; or unless he is instructed by an attorney or Pleader duly authorized to act on behalf of such person". This rule refers to civil cases governed by the C. P. C., and has no reference to criminal cases. There is, therefore, nothing in the High Court Rules requiring an Advocate or a Vakil to file an appointment in writing when presenting a criminal appeal or application.

Section 340 of the Cr. P. C., 1898, provides that "Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a Pleader". The word "Pleader" is defined in s. 4 (*r*) of the Code, when used with reference to any proceeding in any Court, to mean "a Pleader or a *mukhtar* authorised under any law for the time being in force to practise in such Court, and includes (1) an Advocate, a Vakil and an attorney of a High Court so authorised, and (2) any *mukhtar* or other person appointed with the permission of the Court to act in such proceeding". Section 419 of the Code prescribes "every appeal shall be made in the form of a petition in writing presented by the appellant or his Pleader". The Cr. P. C., unlike the C. P. C., nowhere prescribes the mode of appointment of Pleaders; and I find no authority for the proposition that in criminal cases a Pleader must file an authority from his client in order to enable him to present an application or appeal on behalf of his client, and to act for him in criminal cases.

Article 10 of Sch. II to the Indian Court Fees Act prescribes a fee for *mukhtarnamas* and *vakalatnamas* when presented for the conduct of any one case to any Civil or Criminal Court including a High Court. This merely means that when an authority is filed, such authority must be stamped. It does not make it necessary that a *vakalatnama* or *mukhtarnama* must be filed in criminal cases.

When we examine the older enactments relating to procedure in criminal cases, we find it provided that persons accused of criminal offences are entitled as of right to be defended by Pleaders. Act, XXXVIII of 1850, which was known as the Mofussil Prisoners' Counsel Act, provided that in all Courts and before all Magistrates, every person on trial for commission of any offence shall be admitted to defend himself either personally or by his authorised agent; and it provided that "in those Courts in which any person now has by law the right of employing whomsoever he can employ as Counsel or Pleader nothing in this Act shall be deemed to restrict that right; in all other cases those persons only shall be deemed authorised agents within the meaning of this Act who are either Advocates of one of the Supreme Courts of Justice established by Royal Charter, or authorised Pleaders of the Civil Courts of the East India Company, or, by leave of the Court, Magistrate or other person before whom the prisoner is on trial, any other person who is employed by the prosecutor or prisoner as his agent." This Act does not prescribe the mode of appointment of authorized agents, and it enacted that Advocates of the Supreme Court and authorized Pleaders of Civil Courts were deemed to be authorized agents of an accused person.

In the Cr. P. C., (Act XXV of 1861) no provision was made as to the mode of appointment of Pleaders, although s. 432 of the Act provided that "every person charged before any Criminal Court with an offence may of right be defended by Counsel or authorized agent".

Act XXXVIII of 1850 was repealed by Act XVII of 1862 in places where the Cr. P. C. was brought in force; but it did not in any way affect the right of an accused person to employ a Pleader, and no provision was made for the mode of appointment of such Pleader.

Act VIII of 1869 which was the Cr. P. C., Amendment Act gave the same right to persons charged with an offence before any Criminal Court to be defended by any Barrister or attorney of a High Court, or by any Pleader duly qualified under the provisions of Act XX of 1865, or any other law in force for the time being relating to Pleaders. Section 11 of Act XX of 1865 authorized Pleaders to practise in Criminal Courts. Here also the mode of appointment was not prescribed.

Act X of 1872 which was an Act for regulating the procedure of the Courts of Criminal Judicature provided in s. 186 that "every person accused in any Criminal Court of an offence may of right be defended by any Barrister or attorney of a High Court, or by any Pleader duly qualified under the provisions of Act XX of 1865, or any other law in force for the time being relating to Pleaders."

The question was raised in the Madras High Court as to whether an Advocate or attorney of the High Court, or an authorised Pleader appearing in defence of an accused person under s. 186 of the Act of 1872 was required to file a *vakalatnama*, and the High Court ruled that no *vakalatnama* was in such a case required [*vide High Court Proceedings, 23rd November 1874* (1)].

We have referred to the provisions of the present Cr. P. C., relating to the right of an accused person to be defended by a Pleader; and we find that from the earliest time the Legislature has refrained from making any provision prescribing the mode of appointment of a Pleader to act for a person accused of an offence in Criminal Courts. The Legislature did think it fit to make such provisions for appointment of Pleaders in civil cases, but refrained from making any such provision as regards criminal cases.

I, therefore, find no provision either in the Cr. P C., or in the rules of the High Court requiring an Advocate or Vakil of this Court to file a duly stamped appointment in writing in criminal cases. It has been the invariable practice in this Court to allow Advocates to appear and act for accused persons in criminal cases without any authority in writing. The new r. 5-A of Ch. XVII of the High Court Rules makes it obligatory for an Advocate of this Court to file an appointment in writing in civil cases; but it did not in any way interfere with the practice in criminal cases. It may be observed that in some criminal cases, such as capital sentence cases, the Crown appoints a Pleader to represent a person accused of an offence, and in those cases clearly no appointment in writing from the accused person is required. I am of opinion that it will unduly restrict the right of an accused person to be defended by a Pleader in a criminal case if he is required to file a stamped authority enabling the Pleader to defend him.

I, therefore, am of opinion that no appointment in writing is necessary in order to entitle an Advocate or a Vakil to act for an accused person in criminal cases; and that no appointment in writing was necessary to be filed in the present case.

Ross, J.—I agree.

This is an application in revision against an order passed under s. 145 of the Cr. P. C. Section 340 of the Code provides that any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in such Court, may of right be defended by a Pleader; and it makes no difference to the present question whether the petitioner is a person accused of an offence or a person against whom proceedings have been taken under s. 145 of the Cr. P. C. There is nothing in that Code which requires any written authority to defend an accused person, and it differs in this respect from the C. P. C. Whereas the former Code entitles an accused person to be defended of right by a Pleader without more, O. III, r. 1 of the latter Code enacts that any appearance, application, or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent (defined in r. 2) or by a Pleader duly appointed to act on his behalf. While, therefore, an accused person can either defend himself or be defended by a Pleader, a party to a civil suit can appear either in person or by a recognised agent or by a Pleader duly appointed to act on his behalf. The present question has arisen out of r. 5 (*a*) which has been recently added to Ch. XVII of the Rules of the High Court. Now while it may be argued that although that rule refers to O. III, r. 4 cl. 3 of the C. P. C., yet that reference does not limit its application to civil proceedings and the rule, in terms, is of general application; still, I think that when the language of the rule is considered, it must be held to have been framed with reference to O. III of the C. P. C. The language closely follows that of O. III, r. 1, and the object of the rule apparently was to abolish the special privilege conferred on Advocates by r 4 of that order. I, therefore, do not think that the rule should be construed in a general sense or as intended to affect or alter the criminal practice in this Court

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(1) 7 M. H. C. R. App. 40; 2 Weir 402.

R. L.   *Order accordingly.*

RANGOON HIGH COURT.

CRIMINAL APPEALS NOS. 682 AND 683 OF 1925.

August 27, 1925.

Present:—Mr. Justice Maung Ba and Mr. Justice Doyle.

V. M. ABDUL RAHMAN AND ANOTHER —APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 100 (1) (c), 233, 235, 254, 360—Conspiracy—Sameness of transaction—Complaint, offence disclosed in—Joint trial—Joint charges—Non-compliance with s. 360, whether illegality.

The offence of conspiracy and offences committed in pursuance of that conspiracy form one and the same transaction. [p. 720, col. 1.]

Superintendent and Remembrancer of Legal Affairs, Bengal v. *Manmohan Roy*, 26 Ind. Cas. 307; 19 C. W. N. 672; 21 C. L. J. 195; 16 Cr. L. J. 3 and *Emperor* v. *Nga Aung Gyaw*, 76 Ind. Cas. 830; 1 R. 604; 2 Bur. L. J. 224; A. I. R. 1924 Rang. 98; 25 Cr. L. J. 270, followed.

When a Magistrate has taken cognizance of an offence upon complaint, it is competent for him to take cognizance of any offence that is disclosed by evidence. [*ibid.*]

Khudiram Mookerjee v. *Empress*, 1 C. W. N. 105, *Raghub Acharjee* v. *Empress*, 3 C. W. N. cclxxix (279), *Queen-Empress* v. *Deokinandan*, 10 A. 39; A. W. N. (1887) 264; 6 Ind. Dec. (N. S.) 26 and *Ahmed Esoof Bhaymeah* v. *Crown*, 10 Bur. L. R. 77; 1 Cr. L. J. 370, distinguished.

Therefore, where a Magistrate acting on the facts disclosed in the evidence for the prosecution adds a second charge in respect of an act alleged to have been done in pursuance of the alleged conspiracy contained in the complaint, his action is not only justified under s. 235, Cr. P. C., but such initiation taken by him is on the original complaint and not upon his own knowledge or suspicion. [p. 720, col. 2.]

Abdul Salim v. *Emperor*, 69 Ind. Cas. 145; 49 C. 573: 35 C. L. J. 279; 26 C. W. N. 680; A. I. R. 1922 Cal. 107; 23 Cr. L. J. 657, referred to.

Where an act of the accused is done in pursuance of the conspiracy mentioned in the original complaint, a charge in respect of that act may be framed without any further complaint. [p. 720, col. 1.]

Where the offences form part of the same transaction and law allows their joint trial, it is immaterial whether the two offences are included in one charge or whether they are separated and each of them made the basis of a charge [p. 721, col. 1.]

Subrahmania Aiyar v. *King-Emperor*, 25 M. 61; 11 M. L. J 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), construed.

Bam Subhag Singh v. *Emperor*, 30 Ind. Cas. 465; 19 C. W. N. 972; 16 Cr. L. J. 641, *Quinn* v. *Leathem*, (1901) A. C. 495; 70 L. J P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 P. J. 708; 17 T. L R. 749 and *Moharuddi Malita* v. *Jodu Nath Mandul*, 11 C. W. N. 54; 4 Cr. L. J. 415, referred to.

Where the Magistrate has tried to consult the convenience of the defence Counsel and also at the same time tried to comply with the requirements of s. 360, Cr. P. C., as far as possible and it is not alleged that failure to comply with this provision of law has resulted in any inaccuracy in the deposition of any of the witnesses, the defect is a mere irregularity curable under s. 537, Cr. P. C., and not an illegality vitiating trial. [p. 724, col. 1.]

Hira Lal Ghosh v. *Emperor*, 83 Ind. Cas. 905; 52 C. 159; 28 C. W. N. 968; A. I. R. 1924 Cal. 889; 26 Cr. L. J. 201; 41 C. L. J. 224 and *Dargahi* v. *Emperor*, 88 Ind. Cas. 733; 52 C. 499; A. I. R. 1925 Cal. 831; 26 Cr. L. J. 1213, dissented.

Bechu Chaube v. *Emperor*, 71 Ind. Cas. 115; 45 A. 124; 20 A. L. J. 874; A. I. R. 1923 All. 81; 24 Cr. L. J. 67, *Nga Hla U* v. *Emperor*, 89 Ind. Cas. 312; 3 R. 139; A. I. R. 1925 Rang. 258; 26 Cr. L. J. 1336 and *Mohiuddin* v. *Emperor*, 86 Ind. Cas. 459; 4 Pat. 488; 6 P. L. T.

154; (1925) Pat. 112; A. I. R. 1925 Pat. 414; 3 Pat. L. R. 110 Cr.; 26 Cr. L. J. 811, referred to.

Distinction between an irregularity and illegality discussed.

Criminal appeal from an order of the District Magistrate, Insein, in Cr. Reg. No. 18 of 1925.

Mr. *R. Choudury* of the Calcutta Bar (with him Messrs. *Orimiston* and *Campagnac*), for the Appellants.

Mr. *Gaunt*, Assistant Government Advocate, for the Crown.

Mr. *Patkar*, for the Respondent.

JUDGMENT.

Maung Ba, J.—The history of this case is briefly as follows:—

S. P. S. Mani Aiyar (1st appellant) filed an insolvency petition on the Original Side of the High Court on 12th December 1923, in Insolvency Case No. 258 of 1923, praying that D. K. Cassim and Sons might be adjudicated insolvent on the ground that certain immoveable properties belonging to the said firm had been under attachment for over three weeks in C. E. Nos. 98 and 99 of 1923 of the Sub-Divisional Court of Insein. The respondents opposed the application and at the conclusion of the enquiry it was dismissed on the ground that the period of attachment was less than three weeks. In the course of that enquiry the learned Judge, who decided that case, found that the attachment warrants in the two execution cases mentioned above had been tampered with and the dates of execution altered from the 27th November to the 20th and 21st November. Acting under s. 476, Cr. P. C., he took action against Abdul Rahman, Mani Aiyar and Guruswamy, and forwarded a complaint to the District Magistrate's Court of Insein on 10th March, 1924. That complaint reads as follows:— "In Insolvency Case No. 258 of 1923 of the High Court of Judicature at Rangoon in its Original Civil Jurisdiction under the Presidency Towns Insolvency Act (III of 1909), which was heard before me........... on the 21st and 22nd January, and the 13th and 15th February, 1924, the 2nd accused filed a petition whereby he sought to have his debtors, D. K. S. Ebrahim and two others, persons, carrying on business in partnership as merchants and boat-owners under the name of "D. K. Cassim and Sons" at No. 64, Tsekay Maung Tewlay Street, Rangoon, adjudicated insolvents under cl. (e) of s. 9 of the said Act on the ground that certain immoveable properties belonging to the said debtors had been under attachment for over three weeks in C. E. Nos 98 and 99 of 1923 of the Sub-Divisional Court of Insein; (2) that at the hearing of the said insolvency case instituted on the petition of the 2nd accused, S. P. S. Mani Aiyar, there were produced and given in evidence two warrants of attachment of immoveable property issued by the Sub-Divisional Court of Insein in its Execution Cases Nos. 98 and 99 of 1923, which warrants are marked in the said insolvency case proceedings as Exs. 3 and 4 respectively, (3) that as will appear from the judgment pronounced by me as such Judge as aforesaid in the said Insolvency Case No. 258 of 1923, on the 22nd day of February, 1924 (a certified copy whereof is hereunto annexed and marked "A") the High Court of Judicature at Rangoon recorded its finding that:—

(*a*) Some person or persons connected with the Sub-Divisional Court of Insein in conjunction with the accused hereinabove named appeared to have conspired together to alter the dates on the warrants. Exhibits 3 and 4 in the said insolvency case proceedings, so as to make it seem that they had been executed on the 20th and 21st November, 1923, that is, to commit the offence of forgery described in s. 463 of the Indian Penal Code; and that

(*b*) In the opinion of the Court it is expedient in the interests of justice that an enquiry should be made into the said offence which is punishable under s. 120B read with ss. 466 and 109 of the Indian Penal Code, with rigorous imprisonment which may extend to seven years.

Guruswamy and Abdul Rahman appealed against the above order in Civil Miscellaneous Appeals Nos. 41 and 42 of 1924. The result of the appeal was that the complaint, so far as it affected Abdul Rahman and Guruswamy, was set aside. The learned Chief Justice remarked that it was open to the Court, if it saw good grounds for so doing, to take action against them, or to Mahomed Ebrahim to lay a complaint before the Magistrate in respect to them. That appeal was decided on the 19th May, 1924.

Accordingly Mahomed Ebrahim on the 26th June, 1924, made a complaint to the District Magistrate, Insein, against Abdul Rahman and Guruswamy charging them with offences under s. 120B, read with ss. 465, 466 and 109 of the Indian Penal

Code. The two cases were by consent amalgamated, and the three accused tried together. Guruswamy was discharged, but Abdul Rahman and Mani Aiyar were charged, but charged only under s. 120B, Indian Penal Code. At that stage Mani Aiyar and Abdul Rahman again came up to the High Court in revision. It was then held that the District Magistrate was wrong in framing that charge without a complaint or consent of the Governor-in-Council or of the Local Government. Consequently all the proceedings against Abdul Rahman were set aside. In the case of Mani Aiyar also, the charge under s. 120B alone was set aside with a direction to the Magistrate that he had jurisdiction to frame a charge against Mani Aiyar under s. 120B read with ss. 466 and 109, Indian Penal Code, which were mentioned in the original complaint of the Hon'ble Judge. The proceedings were remitted to the Magistrate to be continued so far as Mani Aiyar is concerned as from the stage they were in when the charge was framed and to frame a charge in accordance with the complaint laid. It was further pointed out that it was open to the Magistrate to frame an additional charge under ss. 466 and 109 if he saw fit.

Mahomed Ebrahim then filed a fresh complaint in January, 1925, against Abdul Rahman after having obtained the sanction of the Governor-in-Council under s. 196 (*a*), Cr. P. C. In that complaint Ebrahim charged Abdul Rahman with the following offence:—That the accused in collusion and in conspiracy with S. P. S. Mani Aiyar instigated and abetted some person or persons unknown to alter the dates of the execution of the warrants of attachment in C. E. Nos. 98 and 99 of 1923 of the Court of the Sub-Divisional Judge, Insein, from the 27th November, 1923 to the 20th and 21st November, 1923 respectively and has thereby committed an offence punishable under s. 120B read with ss. 466 and 109, Indian Penal Code, or in the alternative with having abetted the offence of forgery, an offence punishable under ss. 466 and 109, Indian Penal Code.

The case against Abdul Rahman and that against Mani Aiyar were amalgamated and tried together by the District Magistrate, Insein. Before much progress had been made the case got transferred to the District Magistrate, Rangoon, and the trial started *de novo*. That District Magistrate abandoned the charge of conspiracy under s. 120B altogether and framed two charges against each of the accused.

The charges against Mani Aiyar are as follows:—

"That you between the 7th and 12th December, 1923, jointly with Abdul Rahman or some other unknown Indian did instigate some person or persons unknown to forge certain false dates and serial number on two documents purporting to be made by a public servant, namely, the warrants, Exs. N-2 and O-2, issued by the Sub-Divisional Judge of Insein in C. E. Nos. 98 and 99 of 1923 so as to make it appear that those warrants had been executed on the 20th and 21st November, 1923, instead of the 27th, and inasmuch as the said forgery was committed in consequence of the instigation, you thereby committed an offence punishable under ss. 466 and 109, Indian Penal Code ond within my cognizance. *Secondly* that you on or about the 8th December, 1923 jointly with Abdul Rahman or some other unknown Indian at Insein instigated the Head Process-Server, San Pe, to forge the Register kept by him as a public servant, namely, Register 4-B, Ex. Q, so as to make it appear, that the warrants, Exs. N-2 and O-2, issued in C. E. Nos. 98 and 99 had been received on the 20th and 21st November instead of November 26th, 1923 and thereby inasmuch as the forgery was committed in consequence of the said instigation, you committed an offence punishable under ss. 466 and 116, Indian Penal Code, and within my cognizance."

The charges against Abdul Rahman were the same except that in those charges the words "or some other unknown Indian" were omitted.

Both the accused were found guilty of both the charges, but they were punished only under the first charge, no sentence being passed under the second. Both the accused have now appealed, and they have taken certain legal objections to the validity of the trial. The first objection taken on behalf of Abdul Rahman is that the subject-matter of the second charge framed against him not having been disclosed either in the complaint or in the examination of the complainant the learned Trial Magistrate could only have taken cognizance of that offence under s. 190 (1) (*c*), Cr. P. C., and that the learned Magistrate not having followed the provisions of s. 191 of the said Code, his proceedings in connection with the charge are illegal and void. To consider this objection it is necessary to refer back to the original complaint made by Mahomed Ebrahim. That complaint is as follows :—"The accused in collusion and in conspiracy with Mani Aiyar instigated and abetted some person or persons unknown to alter the dates of the execution of the warrants of attachments in C. E. Nos. 98 and 99 of 1923 of the Court of the Sub-Divisional Judge of Insein."

From the above it will be seen that the charge which the complainant brought against the accused, Abdul Rahman, was one of abetment by conspiracy. The evidence of the prosecution witnesses, San Pe and Shwe Tun, if believed, would disclose an attempt on the part of Abdul Rahman to induce San Pe to alter the dates in the Process Register, Ex. IV, so that the alteration of dates on the warrants might not be detected. In other words, this alleged attempt of Abdul Rahman was in the nature of an act done in pursuance of the above conspiracy.

In the case of *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Manmohan Roy* (1) it was held that the offence of conspiracy and offences committed in pursuance of that conspiracy form one and the same transaction.

The same view was held in *Emperor* v. *Nga Aung Gyaw* (2).

When a Magistrate has taken cognizance of an offence upon complaint, it is competent for him to take cognizance of any offence that is disclosed by the evidence. It is, however, urged that such manner of taking cognizance fall within cl. (*c*) of s. 190 (1). In support of this contention several rulings have been quoted, one of which was *Khudiram Mookerjea* v. *Empress* (3). It was a case where a Magistrate took cognizance of an offence against a witness upon the facts disclosed by the evidence of another witness. It was held that the case fell within cl. (*c*) and not cl. (*a*). The judgment was a short one, and no reason was given for coming to that conclusion.

The next one was *Raghab Acharjee* v. *Empress* (4). That case is quite different from the present one. In that case the 2nd accused was brought in upon the evidence adduced on behalf of the defence of the orginal accused ; so it was held that such a proceeding could not be regarded as a proceeding upon complaint or any other foundation upon which the case originally proceeded, and that the case, therefore, fell within the terms of cl. (*c*), sub-s. (1) of s. 190.

The third case was *Queen-Empress* v. *Deokinandan* (5). The facts in that case are not similar to those in the present case. The first complaint was under ss. 352 and 504 of the Penal Code. It contained no charge of defamation, but the Magistrate added a charge of defamation upon statements made by the complainant in his examination under s. 200, Cr. P. C. So it was held that no legal complaint had been made by the aggrieved person within the meaning of ss. 4 and 198 so as to enable the Magistrate to take cognizance of the offence.

The next case was *Ahmad Esoof Bhymeah* v. *Crown* (6). In that case the prosecution of a witness, an excise case, was sanctioned for the offence of giving false evidence with regard to a certain statement, but, when the accused was charged, an entirely new state of facts was made the basis of the charge. It was held that the accused had been prejudiced, and that there was a failure of justice by reason of want of a proper trial.

In the present case, as already pointed out above, the Magistrate, acting on the facts disclosed in the evidence for the prosecution, added a second charge in respect of an act alleged to have been done in pursuance of the alleged conspiracy contained in the complaint of Mahomed Ebrahim. His action was not only justified under s. 235, Cr. P. C., but such initiation taken by him was on the original complaint and not upon his own knowledge or suspicion.

In the case of *Abdul Salim* v. *Emperor* (7) it was held that a charge under ss. 120 (*b*) and 420, Indian Penal Code, of conspiracy to cheat between certain dates may be legally joined with individual charges of every distinct offence committed in pursuance of the conspiracy by different members of it on different intermediate dates. It was further held that the legality of the joint trial depends on the accusation, and not on the result of the trial.

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(1) 26 Ind. Cas. 307; 19 C. W. N. 672; 21 C. L. J. 195; 16 Cr. L. J. 3.

(2) 76 Ind. Cas. 830; 1 R. 604; 2 Bur. L. J. 224; A. I. R. 1924 Rang. 98; 25 Cr. L. J. 270.

(3) 1 C. W. N. 105.

(4) 3 C. W. N. ccLxxix (279)

(5) 10 A. 39; A. W. N. (1887) 264; 6 Ind. Dec. (N. S.) 26.

(6) 10 Bur. L. R. 77; 1 Cr. L. J. 370.

(7) 69 Ind. Cas. 145; 49 C. 573; 35 C. L. J. 279; 26 C. W. N. 680; A. I. R. 1922 Cal. 107; 23 Cr. L. J. 657.

The second legal objection taken on behalf of appellant, Mani Aiyar, was to the effect that the proceedings were void under the provisions of cl. (*h*) of s. 530, Cr. P. C., inasmuch as the Magistrate was not empowered to frame the second charge without the complaint of the Hon'ble Judge of the High Court sitting in insolvency.

It is contended that the Bailiff's Register No. IV-B, Ex. Q, had been produced or given in evidence in the insolvency proceeding, and that in consequence a complaint of the Insolvency Court is necessary under cl. (*c*), sub-s. (1) of s. 195, Cr. P. C. In my opinion that contention is not tenable because the act imputed to Mani Aiyar was done in pursuance of the conspiracy mentioned in the original complaint. The reason for omitting cl. 5 of the old s. 195 in the amended section was to do away with sanctions granted to private persons under the old section. Under that clause a Court taking cognizance might frame a charge of any offence as disclosed by the facts different from the offence mentioned in the sanction. Such an amendment of s. 195 evidently is to stop private persons from obtaining sanction as a means of wreaking vengeance and to give the Court concerned full discretion in deciding whether any prosecution is necessary or not.

The scope of a sanction is much more limited than that of a complaint. In s. 254 it is laid down that, after evidence for the prosecution and examination of the accused has been taken and made, the Magistrate is to frame a charge of " an " offence which the accused appears to have committed, and which the Magistrate is competent to try. The Magistrate is not restricted to the orignal offence which he has taken cognizance of. Moreover, s. 235, Cr. P. C., permits a joinder of charges in respect of offences arising out of the same transaction.

The third objection taken is common to both the appellants. It is that two distinct offences committed in relation to the two attachment warrants have been lumped together in one charge in contravention of s. 233, Cr. P. C. It is urged that this joinder of two distinct offences in one charge is an illegality fatal to the trial.

On this point there is a conflict of judicial opinion. In some cases it was held that such a misjoinder amounted to an illegality while in others it was held that it amounted to a mere irregularity. The former opinion appears to have been based upon the Privy Council ruling in *Subrahmania Ayyar* v. *King-Emperor* (8). In that case offences spreading over a period exceeding twelve months were joined together in contravention of ss. 233 and 234. Their Lordships held that the disregard of an express provision of law as to the " mode of trial" was not a mere irregularity such as could be remedied by s. 537, Cr. P. C. They further held that such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for more different offences of the same kind, and that those offences being spread over a longer period than allowed by law could have been joined together in one indictment.

Different interpretations have been put on that ruling since 1901 when that case was decided. The interpretation put by the learned Judges who decided the case of *Ram Subhag Singh* v. *Emperor* (9) was that the words " mode of trial " had reference to the constitution of the trial, and not to a formal defect in the proceedings in the trial which was properly constituted. So they held that the omission to frame two separate charges instead of one was an irregularity curable by s. 537, Cr. P. C., and that the case of *Subrahmania Ayyar* v. *King-Emperor* (8) is not an authority for the proposition that the failure to observe the first part of s. 233 is fatal to the trial. They further held that the effect of the words "subject to the provisions hereinbefore contained in s. 537" cannot be that the section is to have no application if there has been any departure in any of the previous sections of the Code, and that those words must be read as having reference only to ss. 529 and 536, and not referring to the entire Code that precedes that section. The misjoinder dealt with in *Ram Subhag Singh's case* (9), was of framing only one charge in respect of hurt caused to two different persons. Here also the defect complained of was of framing one charge in respect of the alterations made on two warrants.

Lord Halsbury in *Quinn* v. *Leathem* (10), has indicated how far a judgment is to be regarded as an authority. He said: "Every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found.

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(8) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir. 271; 8 Sar. P. C. J. 160 (P. C.).

(9) 30 Ind Cas. 465; 19 C. W. N. 972; 16 Cr. L. J. 641.

(10) (1901) A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

In *Subrahmania Ayyar's case* (8), what was decided was that where the Code expressly laid down that only three offences of the same kind committed within the space of twelve months whether in respect of the same person or not could be joined and tried together, it was nothing short of an illegality to disregard that plain provision of the law and to frame charges in respect of offences spreading over more than twelve months, and to try them together. In other words, the disobedience in that case was more than an irregularity; it was an illegality going to the root of the trial. The main consideration should be whether any error, omission or irregularity would cause any embarrassment either to the defence or to the Court, whether it would prejudice the accused in his defence, and whether it had caused a miscarriage of justice. "Irregularity" has not been defined, but the Judicial Committee have said that the illustration to the section itself sufficiently shows what was meant. The illustration shows that where a signature by the Magistrate is required, but he only initials, it is purely an irregularity not affecting the validity of the proceeding. Explanation to s. 537, Cr. P. C., clearly lays down that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

In the present case in the District Magistrate's Court Mr. Campagnac appeared for Mani Aiyar, while Sir Hari Singh Gour Messrs. de Glanville and Mahomed Auzam appeared for the second accused, Abdul Rahman. Those eminent lawyers raised no objection when the two charges were framed by the District Magistrate. This joinder of the two charges does not seem to have in any way prejudiced either of the accused. It cannot be said that they have had no notice of the charges which they have had to meet, and that they have been embarrassed by having to meet charges which are in no way connected with each other. The offences form part of the same transaction, and the law allows that they can be tried together. It is immaterial whether the two offences were included in one charge or whether they were separated and each of them was made the basis of a charge. It should be remembered that the appellants have been punished as if the alterations on the two warrants constituted only one offence. This irregularity, if any, has in a sense benefited the appellants since they have escaped double punishment for the two offences.

In the case of *Mohasuddi Malita* v. *Jadu Nath Mandul* (11) three offences of theft were included in one charge, and the accused were convicted and separately sentenced for the three offences of the theft, though they had been charged with having committed "an offence." Even for such a more serious irregularity the learned Judges who decided that case held that it was an error of form, but not an irregularity or illegality.

Mr. Campagnac has also raised an objection that his client Mani Aiyar has been grossly prejudiced by being jointly tried with Abdul Rahman. The learned Advocate seems to have been inconsistent. In the Court of the District Magistrate of Insein when Mahomed Ebrahim filed his complaint against Abdul Rahman and Guruswamy, Mr. Campagnac gave his consent to the amalgamation of the case against Mani Aiyar with that against Abdul Rahman and Guruswamy, and to the joint trial of the three accused. Had Mr. Campagnac considered such a procedure prejudicial, he should have raised an objection at that time. Not only did he fail to raise an objection, but he also gave his consent to that procedure being adopted.

Another objection common to both the appellants is that, having regard to the facts disclosed in the affidavit of Naravan, a clerk of Abdul Rahman, the mandatory provisions of s. 360, Cr P. C., have not been complied with and that the trial has been vitiated thereby. That affidavit is reproduced below:—

"I, P. T. Narayan, son of Pandit Govinda

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(11) 11 C. W. N. 54; 4 Cr. L. J. 415.

Prasad Panday, aged 29 years, Hindu, clerk to Mr. V. M. Abdul Rahman, on solemn affirmation say as follows:—

1. I say that I am a clerk employed by Mr. V. M. Abdul Rahman and that from the commencement of the case against him, *viz.*, Cr. Reg. Trial No. 18 of 1925 of the Court of the District Magistrate, Rangoon, I looked after the case on his behalf till its conclusion.

2. I say that I was present on all the dates on which witnesses were examined before H. F. Sitzler, Esq., the District Magistrate, Rangoon, throughout the said trial.

3. I say that the procedure adopted by the Magistrate in the said trial and in relation to the reading over of the depositions to the witnesses, who did not know English was to hand over the depositions to the Interpreter who read over and interpreted the same to the witnesses and that while such reading over and interpretation was going on, the learned District Magistrate went on recording the depositions of other witnesses. I say that in the case of English-speaking witnesses who gave their depositions in English, their depositions were handed over to them to read and the said witnesses read the depositions to themselves silently.

I say that in the case of some witnesses who were examined in Burmese and could read English, namely, Po Shin, Head Clerk, Ba Kyaw, the Copyist, and Shwe Htun, the Process-server, the depositions were handed to them and they read their depositions to themselves silenly.

I say that in none of those instances where the witnesses read over their depositions to themselves silently, the depositions as recorded were read over and explained to the accused.

I say that even in the case of Burmese depositions, the statements of witnesses were at no time read over and explained to the accused.

4. I say that my master, Mr. V. M. Abdul Rahman, does not know Burmese."

In connection with this affidavit the learned District Magistrate has been asked by us to send in a formal report, and he has done so. It is as follows:—

"Sir H. S. Gour was extremely anxious to get the trial over as quickly as possible, so anxious indeed that he wished to go on when I wished to question a witness about his depositions. When the deposition of a witness was finished, another witness would be called and Dr. Gour would then at once prepare to cross-examine him and I had to interrupt him in order to check and sign the deposition of the witness that had been previously given. The procedure adopted in getting the depositions recorded and read over was as follows:—

"1. In the morning if the evidence of a short witness was taken, he was made to step down from the box and if his deposition was in English it was given to him to read and if it was in Burmese, it was given to the Interpreter or to the Bench Clerk to read over to him. Then the next witness was called into the box and as soon as I saw that the reading of the deposition to the first witness had been finished, I used to interrupt the recording of the deposition of the second witness and call up the first witness and ask him whether his statement was correct. If the deposition of the first witness was too long, to make this course convenient, as often happened, I would wait till the examination of the second witness has been finished and then call up the first witness and sign his deposition on satisfying myself that it had been interpreted correctly and that he had understood the deposition. Whenever corrections were made, they were always made in the presence of the accused or his Advocate.

2. Some time, owing to the desire of the parties to get on with the case, it was impossible to follow the procedure indicated above and, on such days, it was my practice to stop in the morning at 1.45 P. M. instead of at 2 P. M., the usual hour for lunch and remain on the Bench till the depositions were read out to the three or four witnesses who had been examined, one after another in the presence of the accused. Similarly, at the afternoon sitting, I used to sit on the Bench after the Advocates had left and insisted on every deposition being read over in my presence and in the presence of the accused and any correction that had to be made was explained to the accused. On the first day, as far as I can remember, when the morning sitting was over, Sir H. S. Gour, Mr. Campagnac, Mr. de Glanville and all the other parties in the case proceeded to leave the Court although I was still on the Bench and, at the same time, the accused tried to follow them. I then pointed out that in order that the law might be complied with, it was necessary that either the Advocates or the accused should remain. Mr. de Glanville also pointed out

this to Sir H. S. Gour and on the position being explained to Dr. H. S. Gour, he left the Court with Mr. Campagnac and Mr. Glanville leaving his clients behind. It follows, therefore, that the course adopted was one approved by the Advocates and the parties and they can in no way claim that it has led to a failure of justice............

3 Depositions were read by witnesses themselves when they were acquainted with English, but the Interpreter was standing by all the time ready to explain anything they did not understand and in the case of Shwe Tun, the Interpreter was consulted and he read over portions to him.

4. As all depositions were taken down in English, that is to say, if the witnesses gave evidence in English I recorded it almost in their own words, and if the witnesses gave evidence in Burmese or in other languages I recorded them almost in the very words used by Interpreters, there was no need to consider whether Mani Aiyar and Abdul Rahman knew Burmese or not.

5. I have ascertained that copies of all the depositions were supplied to the accused's Advocates............

It appears to me that if the question of the correctness of the deposition was to be raised it should have been raised at the time as soon as the parties had been supplied with copies.

6. I would remark in conclusion that in a certain number of instances, the depositions of witnesses as recorded by me were examined and read by the Advocates during the morning or ofternoon sitting before I signed them."

From that report it will appear that the learned District Magistrate tried to consult the convenience of the defence Counsel, and also at the same time tried to comply with the requirements of s. 360, Cr. P. C., as far as possible. It has nowhere been alleged that his failure to comply strictly with that provision of the law has resulted in any inaccuracy in the deposition of any of the witnesses. In the absence of such an allegation the objection taken becomes one of a purely technical or academic nature whereby neither appellant has in any way been prejudiced in his defence, nor a miscarriage of justice has been occasioned. The question is whether such a failure should be treated as a mere irregularity which does not go to the root of the trial, and which is curable by s. 537, Cr. P. C., or whether it should be under any circumstance treated as an illegality vitiating the trial.

Mr. Chowdhury has urged that such a failure amounts to an illegality which vitiates the trial, and, in support of that argument, he has cited among others two recent cases of the Calcutta High Court decided by Newbould and Mukerji, JJ.

The first case is *Hira Lal Ghose* v. *Emperor* (12). In that case seven witnesses were examined. The record of the depositions of five prosecution witnesses, who were Vakils, showed only their signatures, but there were no certificates endorsed that the evidence had been read over to the witnesses in the presence of the accused and admitted correct. The depositions of the remaining two witnesses bore neither such certificates nor the signatures of the deponents. Newbould, J., observed: "The general object to be secured by Ch. XXV of the Code, which includes s. 360, is to ensure the accuracy of the record, and also that the accused should know and understand what evidence is given at the trial. The reading over of the evidence to the witness is so essential to the framing of an accurate record that I feel bound to hold that the direction in s. 360 that the evidence shall be read over to the witness is imperative, and not only directory. It follows, therefore, that the omission to read over their evidence to these two witnesses was an illegality which vitiated the trial. It is not necessary to consider whether this omission has in fact caused a failure of justice since s. 537 can have no application" Mukerjee, J., observed: "The wording of the section is mandatory. The object of the provisions being to ensure the accuracy of the record, and also that the accused should know and understand the evidence that is given at the trial, the provisions must be held to be obligatory and not merely directory...... .... In the case before us the evidence was not read over to the witnesses at all. The depositions of five of the prosecution witnesses bear at their foot the signatures of the witnesses, and we are asked to presume from those signatures alone that the witnesses had actually read the depositions before they put their signatures down; and as regards two of the prosecution witnesses their signatures even do not appear, and it is admitted that, so far as their depositions are concerned, there was no attempt made to comply even with the spirit of the section. There is, therefore, no escape in the present case from the conclusion that the whole trial was conducted in utter disregard of the imperative provisions of the law as contained in s 360 of the Cr. P. C., and was, therefore, a nullity."

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(12) 83 Ind. Cas. 905; 52 C. 159; 28 C. W. N. 968; A I. R. 1924 Cal. 889; 26 Cr. L J. 201; 41 C. L. J. 224.

The other case is *Dargahi* v. *Emperor* (13), where it was held that the reading over, in the presence of the accused, of the deposition to a witness during the examination of another witness by the Court, is not a compliance with the provisions of s. 360 of the Cr. P. C., and that the trial is vitiated.

The sole object of this provision of the law seems to be to ensure the accuracy of the record. With great respect for the learned Judges who decided those two cases, I am of opinion that the proposition that failure to strictly comply with the provisions of s. 360 will under any circumstances vitiate a trial, no matter whether it has caused a failure of justice or not, is too broad. To take an extreme case, if this failure has occurred with reference to the deposition of a formal witness in a trial where several other material witnesses have been examined in strict compliance with the provisions of the section, should the trial become vitiated? I think it should not; but the failure should be considered as a mere irregularity curable by s. 537. Each case should be decided on its own merits. But of course it is the duty of every Magistrate to avoid such omissions, and the plain provisions of the law should not be disregarded for the sake of convenience.

In *Bechu Chaube* v. *Emperor* (14) the effect of the Privy Council ruling in *Subrahmania Ayyar's case* (8) was discussed with reference to a failure to comply with the provisions of s. 342, Cr. P. C., Stuart, J., observed: "I do not understand their Lordships to have laid down that an error, which has not in any way prejudiced a person convicted, may not be condoned under the provisions of s. 537 if it is not fatal to the validity of the decision and is concerned with the proceedings rather than the mode of trial. Their Lordships in that particular case were considering neither an error, nor an omission, nor an irregularity but an illegality. In that case the trial was vitiated in its inception. A provision of the Cr. P. C. had been transgressed, and the result of the transgression was that the Court had actually no jurisdiction to hear the case. The Court had only jurisdiction to try in one case a person for three offences of the same kind committed within a period of twelve months, and it actually had tried a person for 41 offences committed during a period of two years. Their Lordships held that the course pursued was plainly illegal, ... The tests to be applied in considering whether a particular infringement of the provisions of the Cr. P. C. is one which does or does not come within the purview of s. 537 appear to me to be these: Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature, the proceedings are vitiated in their very inception and s. 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceedings." This view was accepted by Brown, J., in the case of *Nga Hla U* v. *Emperor* (15). I am also inclined to accept this view, and decide that in the present case the learned District Magistrate has committed an error which may be condoned under the provisions of s. 537, Cr. P. C., and that, as observed with reference to the third objection, the learned Counsel for the defence could and should have raised this objection at an earlier stage in the proceedings as required by the Explanation to s. 537, Cr. P. C. This view was held also by the Patna High Court in *Mohiuddin* v. *Emperor* (16), decided in January, 1925.

Now it remains to consider the merits of the case. The points involved appear to be simple enough. They are: (1) whether the attachment warrants in question have been tampered with; (2) if so, who has done it; and (3) whether Abdul Rahman and Mani Aiyar are in any way concerned with it.

As regards the first point, material evidence should be looked for in the documents themselves. Exhibit N-2 is the original warrant issued in Civil Execution Case No. 98 bearing date 19th November, 1923. It is a copy returned to the Court after execution. It was for the attachment of a certain garden land in Sawbwagale Kwin, Kondan Circle, Insein Township, valued at Rs. 10,000. It bears an endorsement of return made by the Process-server, Shwe Htun, showing the date and manner of execution. The endorsement was in ink. A cursory examination of that endorsement may not detect an alteration in the figure showing date in that endorsement, but a close scrutiny can not fail to detect that the figure has been altered. There is a distinct erasure, and a portion of the original figure is easily discernible. The original figure was a "7" in Burmese; the leg of it has been rubbed out and the head hidden under a thick blot of ink, which forms the lower curve of the new figure "o" so the altered date reads 20 instead of 27. There are other alterations noticeable on the right top corner. The original issue numbers were written over with new numbers. The original numbers were 10599 and 10602. The new numbers are 10423 and 10425. On the left quarter margin under the signature "Shwe Htun" the date has been altered from 26 to 20. It is in evidence, and it is also common ground, that Maung Htat, Headman of Sawbwagale, was present at the time of the execution of the warrant. The Exhibit shows his signature and a date under it. Both were written in pencil. So the alteration, if any, will not show up well. However the figure "o" looks much darker than the figure "2" preceding it.

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(13) 88 Ind. Cas. 733; 52 C. 499; A. I. R. 1925 Cal. 831; 26 Cr. L. J. 1213.

(14) 71 Ind. Cas. 115; 45 A. 124; 20 A. L. J. 874; A. I. R. 1923 All. 21; 24 Cr. L. J. 67.

(15) 89 Ind. Cas. 312; 3 R. 139; A. I. R. 1925 Rang. 258; 26 Cr. L. J. 1336.

(16) 86 Ind. Cas. 459; 4 Pat. 488; 6 P. L. T 154; (1925) Pat. 112; A. I. R. 1925 Pat. 414; 3 Pat. L. R. 110 Cr.; 26 Cr. L. J. 811.

The second warrant, Ex. O-2, is a Court-copy in Civil Execution Case No. 99. It was for the attachment of another portion of the same garden land, and it was executed by the same Process-server, Shwe Htun, in the presence of the same Headman, Myung Htat. It bears date 21st November, 1923. The endorsement of Shwe Htun was in ink. In that endorsement also, an alteration in the date is manifest. By a similar process the figure "7" has been altered to "1". The erasure is plainly discernible, and an attempt has been made to hide it by a blot of ink on the other side of the paper. So the date, as altered, was intended to show that the warrant was executed on the 21st November instead of the 27th. In this warrant the issue numbers have not been altered. So, as has rightly been pointed out by the learned Counsel, Mr. Chowdhury, the first charge is partially incorrect, so far as this warrant is concerned. As regards the date purporting to be that of receipt of the warrant by the Process-server, Shwe Htun, its alteration is plainly discernible. As a faint impression of the Court seal happens to be on that spot, it is now difficult to guess what the original number might have been; but the writing shows that the figure "2" and the figure following it were originally written with one stroke of the pen. The second figure has now been rubbed off, and a big figure "1" has been written in its place. So it is evident that the alterations were intended to show that the first warrant, dated the 19th November, 1923, was received on the 20th and executed on that date, while the other one, dated the 21st November, was received and executed on that date.

Now, we have to find out when these two warrants were received in the Bailiff's office, and issued to the Process-server. Such information is to be obtained from Bailiff's Register No. IV, which is a Register of Processes, and Register No. V, Process-server's Employment Register. Register No. IV is kept in triplicate—one for civil processes, one for criminal and one for revenue—which are indicated by the Letters A, B and C, A for criminal, B for civil and C for revenue. Register IV-B, Ex. Q-1, started from the 23rd October, 1923. It shows that the warrants in question were received by the Bailiff on the 26th November, and issued to the Process-server, Shwe Htun, on the same date along with other processes. The entries in question appear to be in order; and there is nothing to show that they have been interpolated. The processes received on that day bear serial numbers from 10598 to 10648. The first number appears about the middle of page 33 and the last number ends about the third part from the top of page 36. The two entries relating to these warrants are below another entry. The first number 10598 relates to a notice from the District Court. It was shown as received on the 26th of November and issued to the Process-server, Maung Bya, on the same date. It remains to see whether the other Register No. V will support these entries in Register No. IV. Register No. V is to show how the process-servers are employed. There are 26 process-servers and they are shown separately in Register No. V, a certain number of pages being reserved for each. Entries relating to Shwe Htun begin at page 114 of Register No. V with the first serial entry starting from the 9th November. On the 26th November he was shown to have been given several processes. The processes are shown in different groups. The first group is from 13844 to 13854; the second group from 13874 to 13881; the third group from 5296 to 5301; the fourth group from 10634 to 10635; the fifth group from 5280 to 5283; the sixth group from 10599 to 10608; the seventh group 10623 by itself; and the last group 10629. These groups were written one below the other. It will be remembered that the issue numbers for the warrant in Civil Execution Case No. 98 are from 10599 to 10601, and those for the other warrant in Civil Execution Case No. 99 are from 10602 to 10605. These two serial numbers are included in the sixth group which is from 10599 to 10608; that is to say, other numbers, 10606—10608 have been included in this group. On turning to Register No. IV we find that Nos. 10606, 10607 and 10608 were shown as issued to Shwe Htun on the 26th of November. No. 10606 is a summons from the Sub-Divisional Court of Insein, that is the same Court which issued the warrants: No. 10607 is a summons issued by the Township Judge, while No. 10608 is a notice issued by the Small Cause Court. There is no reason to suspect anything about any of these entries in the two Registers. That these two warrants were issued and received by the Bailiff on the 26th of November has moreover been sworn to by the officers concerned. They are Mg. Ba Oh, Bailiff, Mg. Kya Nyun, Deputy Bailiff, San Pe, Head Process-server, Shwe Htun, Process-server, and Po Shin, Head Clerk of the Sub-Divisional Court. On that point they were positive. If from such evidence, both documentary and oral, it is held thus established that these warrants were received in the Bailiff's Office only on the 26th November, those warrants could not possibly have been executed on the 20th and 21st of November as shown by the altered dates on the warrants. In connection with those alterations another suspicious circumstance was that a page or pages in the Local Despatch Register of the Sub-Divisional Court, Ex. S, from the 15th to the 26th November, had disappeared from the book. The reason for such disappearance is not difficult to discover. Such tampering with the records and registers in a Court cannot have taken place without the knowledge or connivance or help of some of the ministerial officers of that Court. The two execution cases were closed on the 12th December when satisfaction of the amounts was certified to the Court. On his own admission Po Shin was in charge of those records as well as the Local Despatch Register. Po Shin admits that records in his charge were kept in an almirah and that he kept the key of that almirah. He also admits that he was in charge of the Local Despatch Register. So one would be justified to suspect that he was concerned with the alterations on the warrants, and also with the disappearance of the pages from the Local Despatch Register, and that, if such things had not been done by himself, they must have been done with his knowledge or connivance. It is, therefore, no wonder that he tried to put the blame upon others. It appears that a departmental enquiry was held by the Bailiff into the conduct of the Process-server, Shwe Htum. It started on the 19th of December, 1923. In that enquiry Head Process-server, San Pe, Po Shin, Ba Gyaw, a Copyist, Mudaliar (Court Interpreter) and Mahadeva Aiyar, Clerk to Mr. N. N. Burjorjee, were among those examined. As a result of that enquiry, the services of Ba Gyaw (Copyist) were dispensed with, Po Shin was censured and his increment stopped for 6 months, and Shwe Htun (Process-server), who was under suspension, was reinstated. At this juncture the circumstance under which the alterations came to light may as well be mentioned. They are as follows:—

An insolvency petition was presented by Mani Aiyar in the High Court on the 12th of December, 1923. Mahomed Ebrahim heard about it and sent his clerk, Natarajan, to Insein on the same day to get certain copies. Natarajan applied for certified copies of application for execution in the two Execution Cases Nos. 98 and 99, but those copies would not show the dates of attachment. Natarajan was sent again on the 13th of December to apply for certified copies of diaries, applications and attachment warrants in the said two cases. The copies were obtained on the 15th. The certified copies of the attachment warrants are Ex. P-1 and P-2 filed in the insolvency proceedings. Those copies are clean and show an alteration of dates in the endorsements. The dates in the endorsements are 20th and 21st of November. Mahomed Ebrahim says he showed those copies to his Advocate, Mr. N. N. Burjorjee, who then told him that the copies showed the dates of attachment as 20th and 21st of November, and advised him to ask the Ghetty's agent again. He goes on to say that he asked the Chetty, and was told that the attachment could not have been on those dates, and that he reported the result to his lawyer who then sent his clerk, Mahadeva Aiyar, to the Insein Court to inspect the records. Mahadeva Aiyar (P. W. No. 18) states that he was sent to the Insein Court on the 15th of December, which was a Saturday, that, as it was too late, he was not allowed inspection, that he went again on the 17th, had an inspection of the records, and noticed alterations on the attachment warrants, Exs. N-2 and O-2 and that he then reported the result to his Advocate. In consequence Mr. N. B. Burjorjee (P. W. No. 10), a nephew of Mr. N. N. Burjorjee, went to Insein on the 18th and inspected the records. He also noticed alterations on the attachment warrants, and brought the fact to the notice of the Sub-Divisional Judge who then initialled the entries in Baliff's Register No. IV, Ex. Q, which showed that the warrants were issued to Bailiff only on the 26th of November. Mr. N. B. Burjorjee further states that on that occasion he also inspected the Local Despatch Register, Ex. S, and found pages from the 15th to the 26th of November missing, and that he took both the registers to the Sub-Divisional Judge, and drew his attention to the fact of the pages being found missing. When the matter was brought to the notice of the Sub-Divisional Judge in this manner, the Bailiff was ordered to hold an anquiry to which a reference has already been made in the earlier part of this judgment.

Having held that the attachment warrants had been tampered with, it becomes necessary to find out who could have done it. As observed above, suspicion would necessarily fall upon Po Shin because the records of these two cases and the Local Despatch Register were in his charge, but, as the result of the enquiry made by the Bailiff shows, no definite decision was possible as to who the real offender was. It is however, almost certain that such a thing could not have been done without the assistance or connivance of some of the ministerial officers of that Court. It is also necessary to find out as far as possible the probable date or dates on which the alterations were made. If we have to rely upon the certified copies, Exs. P-1 and P-2, as correct, the only inference will be that the alterations had been made before those copies were supplied. The copies were made by Ba Gyaw, apprentice and copyist (P. W. No. 5). He states: "I did not notice the alterations on the warrants on the 13th December but simply copied the warrants as I found them." But the admits having stated to the Bailiff at the enquiry on the 26th of December this:—"I did not take notice of the corrections, but I found the alterations *since* I supplied copies on the 7th December." This attitude on his part was no doubt due to the fact that he had been called upon by the Sub-Divisional Judge to explain why he should not be punished for not bringing to his notice the alterations in question; and his answer, "I simply copied the warrants as I found them," is sufficient to show that the dates had already been altered, because the copies supplied by him, Exs. P-1 and P-2. are clean copies showing the new dates. I cannot for a moment imagine that Ba Gyaw would enter different dates in those copies for no rhyme or reason.

I have already pointed out that the warrants could not have been executed before the 26th of November. So the new dates, the 20th and 21st of November, in the copies, Exs P-1 and P-2, could only have appeared as such in those copies after the dates in the original warrants had been altered. I have, therefore, no doubt that the alterations on the original warrants had been made before the 13th of December.

Now we come to the most important point in the case as to whether either of the appellants had anything to do with these alterations.

Of course, the evidence is purely circumstantial as is to be naturally expected, because such a crime would be committed in the dark. It is necessary, therefore, to look to the surrounding circumstances such as motive, conduct and opportunity.

It is significant that the insolvency petition was filed just on the completion of 21 days from the date of the attachment appearing on the warrants after the alterations. Mani Aiyar has in his affidavit of the 12th December, 19-3, boldly declared as follows:—"That in Civil Execution Cases Nos. 98 and 99 of 1923 of the Sub-Divisional Court of Insein certain immoveable properties belonging to the insolvents have been under attachment for over three weeks." He made the same declaration in para. 3 of his petition and in verifying it he has declared: "I, S. P. S. Mani Aiyar, the petitioner above named, do hereby declare that all the facts put in the above petition are *true to my own knowledge*." From the above it is clear that Mani Aiyar professed to know personally that the properties of D. K. Cassim & Sons had been on the date of the petition under attachment for over three weeks. Now to complete three weeks the last date of attachment should be not later than the 21st of November, 1923. It is admitted by him that through Guruswamy (accused discharged) he applied for on the 7th December and obtained the certified copies of the warrants in question, Exs. R-1 and R-2, on the same date. It is also admitted by him that through the same person he had applied for on the 3rd December, 1923, and obtained copies of the diaries and description of the properties attached in the two execution cases on the 5th of December, 1923.

Another significant fact is that the copies of the warrants, Exs. R-1 and R-2, show similar alterations, that is to say, the dates, as altered, read 20th and 21st of November. A reasonable inference will be that the alterations on these copies took place after the copies had been obtained on the 7th; so the truth of Ba Gyaw's first statement became apparent. That attachment was that he noticed the alterations since he supplied the first copies (on the 7th).

In view of the declarations made in the insolvency petition and the affidavit attached to it, it was in the interest of Mani Aiyar that the attachment should be held to have taken place not later than the 21st of November. Further seeing that the dates of the warrants were 19th and 21st of November, it was not possible to make the dates of attachment appear earlier than those dates. The effect of the alteration is that the warrant, dated the 19th of November, appears to have been executed on the 20th and the other one, dated the 21st of November, appears to have been executed on the 21st. The existence of this interest supplies the motive in the case of Mani Aiyar.

In the case of Abdul Rahman it would appear that Mahomed Ebrahim and his two brothers have been behaving very badly towards Abdul Rahman. They are the sons of one Dubash Kadar who died about 1912. Abdul Rahman was the husband of their step-sister who is now dead. Dubash Kader did stevedoring business with the B. I. S. N. Company. He took two partners, Abdul Rahman and Naina Rowther, who are his sons-in-law. After the death of Dubash Kader these brothers refused to join Abdul Rahman, and so Abdul Rahman had to start business separately as "Abdul Rahman Brother and Company," while these brothers started a separate business under the style of "Cassim Brothers and Co." Both firms have since changed their names and they are at present known as "Abdul Rahman and Sons" and "Cassim and Sons". Both parties tried to secure the contract with the B. I. S. N. Co., but only Abdul Rahman's party obtained the contract. That contract runs ordinarily for five years at the time. The Ebrahim Brothers did not give in but tried to secure the contract in 1918 and 1923, and on both occasions they were defeated by Abdul Rahman Brothers and Co. It appears that in 1918 both firms were members of an association called "Cargo Boat Owners' Association," which was formed for the mutual benefit of the members and to prevent one member from competing with another in business. Clause 3 of the agreement provides that no member of the Association should either directly or indirectly accept tender or attempt to secure any contract work or business which was at that time held or being done by any other member. In spite of that agreement Cassim and Sons attempted to secure the B. I. S. N. contract which was held by Abdul Rahman and Sons. In consequence Abdul Rahman and Sons made a complaint to the Association, and one of the Ebrahim Brothers gave an undertaking not to offend again. But of course in view of the previous conduct of the Ebrahim Brothers, Abdul Rahman might not think it safe to place implicit reliance on that undertaking The danger was not entirely over yet for in a letter written by Mr. Campbell, Agent of the B. I. S. N. Company Ex. 2-N, on the 29th of September, 1923, he, in no unmistakable terms informed Abdul Rahman that though the Company were going to renew the contract for another five years from the 1st of August, 1923, they reserved the right to give a share of the contract to D. K. Cassim and Sons, if later on they considered it advisable to do so. This decision on the part of the Company, coupled with the fact that D. K. Cassim and Sons have been indefatigable in their efforts to obtain the contract in rivalry with Abdul Rahman and Sons were calculated to make Abdul Rahman uneasy in mind with regard to the contract which his firm had all along been holding since 1913. It is, therefore, reasonable to think that Abdul Rahman would seize any opportunity that might come in his way to get his rivals out of his path if possible. In the present case such an opportunity presented itself to him. Cassim and Sons were in financial difficulties, and furthermore, their properties were attached. Under cl. (*e*) of s. 9 of the Presidency Towns Insolvency Act a debtor may be adjudicated insolvent if any of his property has been attached for a period not less than 21 days in execution of a money decree.

Chellasawamy Chetty's clerk (P. W. No. 20) says that Messrs. Cowasjee and Das were their lawyers, that he used to visit their office on business, that some time in December 1923, he went there to take legal advice and met Abdul Rahman and Mani Aiyar sitting side by side with one Sundaram Aiyar, and that he overheard a part of their conversation to the effect that there would be adjudication of D. K. Cassim and Sons. This evidence goes to show that Abdul Rahman was interested in the adjudication of his rivals. As remarked above he appeared to have seized the opportunity to get rid of his business rivals.

Mr. A. B. Banerjee, Advocate (P. W. No. 12) acted for the Chettiar Firm of S. R. M. A., the decree-holder in the two Execution Cases Nos. 98 and 99 in which the attachment was effected. He states that on one occasion when the Agent of E. P. R. firm came to his office for consultation, he noticed Abdul Rahman and Mani Aiyar coming in and going out again together. E. P. R. firm is the firm which endorsed a Rs. 15,000 pro-note on 13th November 1923, to Mani Aiyar who then sued Cassim and Sons in C. Reg. No. 590 of 1923 of the High Court on 26th November 1923.

Abdul Rahman maintains that he bore no grudge against Mahomed Ebrahim and his brothers. Though he may not entertain feelings of enmity as asserted by him yet from the business point of view it is to his advantage to remove his persistent rivals out of his path should chance permit. So there is in his case also a motive, but the existence of this motive alone is not sufficient to support the charge of conspiracy to commit the alleged forgeries. Further proof is necessary to connect him with the crime. That connection depends upon the evidence of Po Shin, San Pe, Shwe Htun, Ba Gyaw and Mudaliar, and also upon their reliability.

At the Bailiff's enquiry which started on the 19th December 1923 and lasted till the 6th January 1924, no reference was made by the witnesses, with the exception of Shwe Htun and San Pe and Mudaliar, to the two appellants. On the 5th of January 1925, Shwe Htun put in a written statement to the effect that in December the Copyist (Ba Gyaw) asked him if he had executed the warrants, and that, on his re-plying in the affirmative, he asked him the name of the Headman who was present, saying that somebody had applied for copies of the warrants. Shwe Htun further states that some time afterwards three *kalas* came and asked him when he executed the warrants, that he told them that he executed them about the 27th of November and that the Court records and registers would show the exact date, that the three *kalas* then asked him to show them the register, and he referred them to San Pe, that the *kalas* went to San Pe and, on finding in the register, the date 26th November, suggested to San Pe that he must have made some mistake, and asked San Pe to alter the date of issue from the 26th of November to the 19th and 21st of November in the register, and that San Pe replied that it could not be done because the same date had been entered in other books. The Bailiff examined San Pe on the 6th of January, 1924. He then stated that three Indians did come to him in the Bailiff's Office in December 1923, and asked him to correct the date in the register according to the dates of issue in the warrants. Shwe Htun was examined again in the insolvency case on the 13th of February 1924. On that occasion he repeated his story contained in the above written statement. He identified Mani Aiyar in Court, and, as regards the other two Indians he referred to them—one as a fat man with a red cap on, and the other with a Madrasi cap and spectacles on. He further said that subsequently he learnt their names to be Mani Aiyar, Abdul Rahman and Guruswamy. That story was repeated again when he was examined on the 21st April 1925, before the District Magistrate. In the case of San Pe also, he repeated his former story given to the Bailiff on the 6th January 1924. In the insolvency case on the 13th of February 1924, he came out with the same story, and on that occasion he mentioned Mani Aiyar, and referred to the other two as a fat Muhammadan and a thin man (a *kala*) with spectacles on. To the District Magistrate he gave the same story on the 21st April 1925. Mudaliar, the Court Interpreter, supports those two witnesses. He is positive that the three Indians referred to were Guruswamy, Abdul Rahman and Mani Aiyar.

As regards the alleged visit of these three persons to the Insein Court, all the witnesses made reference to it in the insolvency case. Ba Gyaw (copyist) states that, on the occasion copies of attachment warrants were applied for, three Indians came. He identified Mani Aiyar who was present in Court at the time. When he was examined by the District Magistrate on the 21st April 1925, he struck to the same story, but added that the Court Interpreter Mudaliar brought those three Indians. He further stated that Guruswamy was one of them, and that Mani Aiyar was another.

It has been urged that this story is entirely false, and that these witnesses are quite unreliable. It is to be conceded that this visit of the three Indians came out at a late stage of the enquiry, and further that some of these witnesses have not shown up well. But Pleader Mr. Agar who signed the applications for copies of the warrants admitted in his examination in the insolvency case on the 22nd January 1924 that the applications were brought to him for signature by Interpreter, Mudaliar, and that Mudaliar was then accompanied by three men. He described one of them as a man with a red cap on, the other with a turban, and the third as a short man wearing spectacles. He, however, stated that he could not recognise them.

When he was examined before the District Magistrate he struck to his story. He then said that Mani Aiyar might have been one of those men, but that he was certain that Abdul Rahman was not one of them.

So in the case of Abdul Rahman the question is whether Mr. Agar should be believed in preference to the other five witnesses.

I have given a careful consideration to the evidence of those witnesses and the probabilities of the case. Notwithstanding some defects noticed above it has, on the whole, satisfied me that Abdul Rahman was one of those three Indians. The seemingly strange conduct of these witnesses may have been due to their anxiety not to get mixed up in this crime. As soon as the alterations came to light, there was a deparmental enquiry. That enquiry was followed by a trial of the insolvency case in the High Court and then by criminal proceedings before the District Magistrate of Insein. The mental state in which Shwe Htum, San Pe and Mudaliar were in is to be gauged from their efforts in seeking for protection, as disclosed in their petitions to the District and Sessions Judge of Insein. Exhibits Q 2, R-2 and S-2. Those petitions show how Abdul Rahman tried to win them over to his side, that they did not consider it safe to do so, and that in consequence they apprehended danger to themselves. So it is no wonder that they should have behaved in the manner they did. Their evidence appears to contain some exaggeration here and there, but, considering the details, it on the whole savours of truth so far as the main issues are concerned.

In his petition Mudaliar refers to a visit of Abdul Rahman to his house late on the night of the 12th of December. In that connection he made these allegations: "Abdul Rahman told me that as he has no other course he has presonally come, that he is now in a fix, that he never expected that things would turn to such a worse condition, that he solely relied on a Burman clerk to whom he brought an introductory letter from an intimate friend of his at Rangoon and I should only save him without any negative reply whatever, and that as for the Process-server, he would make necessary arrangements as he has already done with Mr. Agar, Pleader, Insein." Now, as regards this visit, Mudaliar in his evidence states that about 10 or 15 minutes after Abdul Rahman's departure he went over to the D. S. P., Mr. Hardie, that, finding Mr. Hardie out, he left a chit for him, that on the following morning Mr. Hardie sent for him and he made a report to him.

Mr. Hardie (P. W. No. 18) admits that Mudaliar came to his house in his absence and left a chit, that he sent for Mudaliar the next morning and Mudaliar told him something. Mr. Hardie says he cannot remember the conversation at all well, but, as far as he can remember, Mudaliar asked him to send a Police Officer to watch his house as some people were loafing about it.

I have already pointed out that the first person to be suspected was the Head Clerk, Po Shin. In his case too he remained silent until he was examined before the District Magistrate, Insein. He now said that three Indians came, that the applications signed by Mr. Agar were brought to him and that they came with Mudaliar, the Court Interpreter. He was positive that the two appellants were two out of three Indians, and that the third Indian was Guruswami. He further stated that four of them came to his room and stood in front of his table. He had also mentioned the visit of these Indians in his statement to the District Magistrate, Insein. For his previous silence Po Shin has offered this explanation: "After I had read Mr. Justice Rutledge's orders and found that he did not believe my evidence because I had not mentioned them (meaning Indians) I revealed what I knew and mentioned them in the Insein Court."

Shwe Htun has also given an explanation, and that was that he made the disclosure because he was afraid of a prosecution.

Mudaliar is a Tamilian; so is appellant Mani Aiyar. Abdul Rahman is a Chulia. There is nothing extraordinary that Mudaliar should have been taken into confidence by them; but, as ill-luck would have it, Mudaliar is a friend of Ponnia Pillay (P. W. No. 22), an employee of Mahomed Ebrahim. Another employee Ponnia Aiyar (P. W. No. 23) happens to live with Subbiah, a typist working in the office of Messrs. Cowasjee & Das Lawyers of Mani Aiyar. So there is reason to believe that Ponnia Aiyar and Subbiah kept both sides informed of everything that was going on. Ebrahim admits that even before the insolvency petition was filed in Court, he came to know of it; so it is not improbable that Mani Aiyar would know about the payment of the decretal amounts by the Ebrahims to their decree-holder. Possibly Mani Aiyar was under the impression that the dates of issue, 19th and 21st of November, on the warrants were the starting points for computing the period of attachment, and the idea of getting the alterations made was conceived only after the mistake had been found out. It is impossible to ascertain the exact date on which the alterations were made; but it is certain that the alterations were made before the copies, Exs. P-I and P-2, were given to Natarajan. The application for those copies was made on the 13th and, according to the endorsement on the copies, they were ready for delivery on the 14th and delivered on the 15th of December. Copyist Ba Gyaw has admitted that he copied the warrants as he found them. As the copies are clean and show the new dates the alterations must have taken place previous to that. As the copies of the warrants given on the 7th of December had originally 27th November, it would follow that the alterations must have taken place between those two occasions. I have already pointed out that the alterations must have been brought about for some purpose. It has been strongly urged by the defence that purpose was no other than that of the Ebrahim Brothers to bring about the downfall of Abdul Rahman, and to secure the B. I. S. N. Co's contract. This contention sounds highly improbable. The warrants do not support such a theory. The date of execution of the warrants was the 27th of November, and Mahomed Ebrahim paid off the decretal amounts and satisfaction was certified to the Court on the 12th of December. The Company has decided to give a portion of the contract to them whenever they are found good. Mani Aiyar has petitioned to the High Court to have them adjudicated insolvents, the ground put forward being that their properties had been under attachment for not less than 21 days. If they are adjudged insolvents, their prospect of securing any portion of the contract will be destroyed. In these circumstances the Ebrahim Brothers could not have been so blind to their own interest as to manufacture evidence which will help Mani Aiyar to accomplish his object. On the other hand Mani Aiyar has sworn to an affidavit to the effect that to his personal knowledge the properties of Cassim & Sons had been under attachment for over 21 days. It was to his interest to show that such was the case otherwise he would run the risk of being prosecuted for perjury. It has been urged on his behalf that if he had altered his own copies to make them correspond with the originals he would not have been foolish enough to produce them after the alterations on the originals had been detected. But it must be remembered that he had taken the copies, and adverse inference would surely be drawn against him in case he failed to produce them. As the Bailiff's registers, Exs. IV-B and V, coupled with the evidence of the witnesses are clear that the warrants did not reach the Bailiff's Office until the 26th of November it would follow that the attachment could not have been effected prior to that date. So the evidence of the Headman, Mg. Htat, that both the warrants were executed in his presence on the 21st of November has been rightly discarded. He admits that a revenue notice was served on him after the Tazaungdaing festival. That festival lasted two days—the 21st and 22nd of November. Register No. V shows that the revenue notice was served on the 27th of November, the same date on which the warrants were also executed. To sum up, there has been proof that Abdul Rahman was associating with Mani Aiyar in this matter. He has a strong motive to remove Cassim & Sons out of his way. His two letters written to Mr. Campbell on the 8th and 12th of September 1923, Exs. 2-J-16 and 17, will show how much he felt against Cassim & Sons and also how much he tried to poison the mind of Mr. Campbell regarding Cassim & Sons. Those letters were written evidently in consequence of a letter dated the 20th of August 1923, Ex. 2-J 5, written to Mr. Campbell by Mr. Bell of Calcutta. In that letter this passage occurs: "We might, of course, make it clear to Mr. Abdul Rahman that we reserve the right to give a share of the contract to Cassim if later on we consider it advisable to do so." After receiving those two letters from Abdul Rahman, Mr. Campbell wrote a letter dated the 17th of September 1923, Ex. 2-J-14, to Mr. Bell. Mr. Campbell wrote thus—"Abdul Rahman is rather distressed that the Company should consider giving a part of his contract to D. K. Cassim" To that letter a list was attched-ed purporting to show the insolvent condition of Cassim & Sons. That list was prepared on information given by Abdul Rahman and others. Mr. Bell's reply, dated the 20th of September, 1923, Ex. 2 J-19, to Mr. Campbell gives a reason for the company's decision. That reason was that the introduction of fresh blood in connection with the Company's stevedoring arrangements at Karachi produced excellent effect. Apart from this business point of view, the Company, as would appear from Mr. Bell's letter; dated the 6th of July, 1923 Ex. 2 J-1, to Mr. Campbell, wanted to do something for the children of Dubash Kader Cassim in recognition of his services to them, and Abdul Rahman was given the contract after the death of Dubash Kader because the Ebrahim Brothers were at that time considered to be too young and inexperienced. In spite of Abdul Rahman's protest contained in the two letters Exs, 2 J-16 and 17, the Company decided to reserve their right to give a part of the contract to D. K. Cassim and Sons should they desire to do so. This appears in Mr. Bell's letter dated the 27th of September, 1923 Ex. 2 J-21, to Mr. Campbell. That Abdul Rahman felt aggrieved at that decision is to be seen from the fact that he made a complaint to the Cargo Boat Owners' Association. A meeting was held on the 12th of November, 1923, when Syed Ebrahim gave an undertaking not to attempt to secure the works that were being done by Abdul Rahman and Sons. Since the death of his father-in-law Dubash Kader in 1912, Abdul Rahman has enjoyed the contract with the B. I. S. N. Company and has flourished over it. Now a possible danger has arisen and he may be robbed of a portion of that contract by his rivals. As pointed out above, an opportunity has presented itself to him for removing his rivals from his path by getting them adjudicated insolvents. As is naturally to be expected, a man who has shown himself to the world as a philanthropist, could not very well crush his enemies openly, especially enemies who are the children of his benefactor; so he has chosen to remain in the background as far as possible, and has employed Mani Aiyar as his tool. Mani Aiyar himself could have derived no advantage, as far as one can see, by getting Cassim and Sons declared insolvents. Moreover, Mani Aiyar, who had to borrow a small sum of money, namely, Rs. 100, from one Ramanathan Chettiar at $2\frac{1}{2}$ per cent. per mensem on the 14th of December, 1923, wished it to appear that he was able to buy a Rs. 15,000 promissory note on the 17th of November. He then filed a suit on it against Cassim and Sons. It is unfortunate that the Chetty who transferred that promissory note has left Burma and that his evidence is not available.

In a charge of abetment by conspiracy it is not necessary that all those engaged in it should consult together. It is enough if they did an act or acts in pursuance of that conspiracy. In the present case the conspiracy proved is that of fabricating evidence to support the ground put forward for adjudicating Cassim and Sons insolvents.

As regards the alleged visit of the appellants to Insein on the occasion on which they were alleged to have attempted to induce San Pe to make alterations in Register No. IV, the learned District Magisrate has put it on the 8th of December, 1923. As regards this date the evidence is far from being convincing. The Process-server, Shwe Htun, in his written statement, Ex. 35, given to the Bailiff during the enquiry used the words (*atan ngat uchain Kyapyee thee nowk*) "a little while afterwords". Those words were used in a relation to the visit of the three *kalas*. He said Ba Gyaw came and enquired who the Headman was and a little while afterwards the three *kalas* came. So from that one would have to take it that the visit of the three Indians, and the enquiry made by Ba Gyaw took place on the same day. But when Shwe Htun was examined by the District Magisrate, Rangoon, he stated that the three Indians came to him three or four days after Ba Gyaw had asked him the Headman's name. If the second statement is to be accepted, this second visit of the appellants would fall on the 10th or 11th of December. Mudaliar put that visit on the 8th of December. As no sentence has been passed on the appellants for the second charge, no useful purpose would be served by trying to fix the date of that visit, but it is only important to decide whether the alleged attempt was made at all.

The evidence of Ba Oh, Bailiff, shows that San Pe kept the key of the almirah in which Register No. IV was kept and that San Pe was responsible for the maintenance of that register. It is, therefore, not unreasonable to think that, if any alteration was to be made in that register, San Pe must be approached. As it has turned out the present cirme has in no small decree been proved by the fact that the entires in the registers have remained intact. The persons engagad in the crime must have been alive to that circumstance, and would have doubtless made some attempt to remove it. The attempt was in a way a necessary act in pursuance of the conspiracy to commit forgery to create evidence that the attachment took place on the 20th and 21st of November, 1923.

By way of rebutting evidence Abdul Rahman has examined some witnesses to prove that he was laid up and not fit to move about for ten or fifteen days beginning from the 27th of November, 1923. According to Dr. Carlos (D. W. No. 10) he first visited Abdul Rahman on the 27th of November and repeated the visits on the 29th and 30th of November and 1st of December. According to Dr. Suzuki (D, W. No. 11) he saw Abdul Rahman, on the 30th November, 1st, 5th and 7th of December, and that Abdul Rahman was better, but still weak, on the 7th of December. According to both the doctors, he was suffering from bronchitis; but we have an admission by Maricar (D. W. No. 9) that Abdul Rahman went out of his house and attended a meeting on the 9th of December for about three hours from 7-30 P. M.

Both the appellants deny having visited the Insein Court as alleged by the prosecution, and also having made any attempt to induce San Pe to alter the register. Guruswamy, who was discharged by the District Magistrate of Insein, even denied that he was with Mudaliar when Mr. Agar's signature was taken on the application forms. He stated that Mudaliar alone went and got Mr. Agar's signature. He admits that he was a Despatcher in the Secretariat, but was dismissed on a charge of having offered a bribe to a Police Officer in a case to which he was not a party.

Mr. (now Mr. Justice) Das was examined for the defence. He was responsible for the drafting of the counter-affidavit of Mani Aiyar filed in the insolvency case. He admits that he cannot read Burmese, and when the copies, Exs. R.-1 and R-2, were shown to him, he said he could not say whether they were in the same state then as when he saw them at the time he prepared the affidavit. In fact the alteration of dates on those copies has been fairly well carried out. It is hardly possible for one not acquainted with Burmese to notice it.

In my opinion the case for the prosecution remains unrebutted, and, judging from the surrounding circumstances such as motive, conduct and opportunity, I am of opinion that the first charge has been brought home to the two appellants.

Abdul Rahman is a leader of the Chulia community and the founder of the Chulia Moslem School. He has been an Honorary Magistrate since 1913 and a Municipal Commissioner since 1918. For his useful public service, in those capacities as well as for his useful work in connection with War Loans, the title of Khan Bahadur was conferred upon him. Unfortunately he has fallen, he has yielded to temptation; but he cannot be classed as a man steeped in crime. He is now 52 and to a man of his social standing any sentence of imprisonment will be a severe punishment. In view of his age and public service a reduction in the sentence seems proper. Mani Aiyar was a mere tool in Abdul Rahman's hands and there is no reason why he should be more severely punished than his principal. I, therefore, reduce the sentence of each of them to one of rigorous imprisonment for nine months.

Doyle, J.—His Lordship after dwelling upon the facts thus proceeded:—

As a preliminary to a discussion of the various law points which have been raised in the present appeal, it is necessary to consider the distinction between an "irregularity" and "an illegality in procedure". In the Privy Council ruling of *Subramania Aiyar* v. *King-Emperor* (8) it was laid down that disobedience of a definite prohibitory provisions of the Cr. P. C. constituted an illegality and was, therefore, not curable under s. 537 of the Cr. P. C. There has been a tendency in subsequent decisions of the Indian High Courts to construe this decision as signifying that disobedience of mandatory provisions of the Cr. P. C. was generally not curable under s. 537 of the Cr. P. C. Mandatory directions may be either imperative or directory. They deal either with what shall, or with what shall not be done. It is possible to have degrees of disobedience of positive but not of prohibitory directions; as an illustration may be quoted, taken in their literal sense, the two Commandments "Honour thy father and thy mother," and "Thou shalt not kill." Prohibitory directions offer very little difficulty, since disobedience amounts nearly always to an illegality.

In considering positive directions, it must be remembered that the distincion between "simple irregularities" and "illegalities" is one not of degree, but of essence. If, therefore, the disobedience of a mandatory injunction is measurable, so to speak, quantitatively, and, if a minor infringement of that mandatory injunction which does not go to the root of a trial may be admitted, a general infringement of the same nature constitutes an irregularity which may necessitate the annulment of the particular trial, but is not an illegality incurable under s. 537 of the Cr. P. C.

Inverting and applying this proposition, if failure to read over the depositions of witnesses is an illegality, failure to read over the deposition of a single witness, however, unimportant, or even to read a single line of the deposition of such a witness, would constitute an illegality vitiating the trial, *reductio ad absurdum* which, in my opinion, destroys the case stated. To allow the alternative view to prevail is to embalm Indian Procedure in the sacrosanct formalism of the Twelve Tables. I hold that a disobedience of s. 360 of the Cr. P. C. is an irregularity not amounting to an illegality, and, as in the present case, there is no suggestion that the record was either defective or inaccurate or that failure to read it over resulted in any injustice to the accused. I hold further that the trial has not been vitiated. At the same time I must point out that the convenience of Advocates, or a desire to accelerate the disposal of a case are not sufficient reasons for disobeying a mandatory injunction. Expediency *per se* has never been regarded as a warrant for a deliberate violation of law.

The objection that the first charge against Mani Aiyar is defective, as it embraces a charge of two different offences with respect to two different documents, does not demand serious consideration. The offence was instigation to forge, and it was immaterial how many documents were forged, or, for that matter, whether any documents were forged at all. The forgeries were to be a series of acts, all directed to a single purpose, and the instigation must, therefore, be regarded as a single offence.

The plea of illegality of the joint trial has been dealt with in detail by Maung Ba, J., and I desire merely to add that the joint trial was not only legal but, under the circumstance, highly proper.

As to the argument that the omission of s. 195, sub-section (5) in the Code as amended precluded the Court from taking cognizance of any other offence than that disclosed in Mr. Justice Rutledge's complaint, it must be pointed out that sub-s. (5) was omitted because it was superfluous. "Prosecution on sanction" had been re-placed by "prosecution on complaint," and as proceedings consequent on action under s. 476 are to be treated as of upon complaint under s. 200, the provisions of s. 254 would apply, these provisions being sufficiently general to justify the action of the Magistrate.

As to the objection that the Magistrate could not frame the second charge against Abdul Rahman without following the provisions of s. 191 of the C. P. C. justification for his action is to be found in s. 235 and s. 254, Cr. P. C., Even had the original proceedings commenced against Mani Aiyar alone, the learned Magistrate had full power to add Abdul Rahman as an accused, *vide* the Full Bench ruling of the late Chief Court of Lower Burma in *Nga Chan Tha* v. *Emperor* (17) *a fortiori*, having Abdul Rahman before him, he had power to frame an additional charge.

For the above reasons I consider that the convictions were correct, but I am in agreement with my learned brother, Mg. Ba, J., that some reduction of sentence is proper.

Abdul Rahman is not, as suggested, a criminal of the type of Jabez Balfour or Horatio Bottomely, masking a career of crime under the garb of smug sanctimoniousness or pinchback patriotism. He is a man of previously unblemished character who, in the past, has rendered substantial public service, and who has been tempted fortuitously into the error that has caused his downfall. Any sentence of imprisonment will be a lasting disgrace.

Mani Aiyar is merely a subordinate actor in the matter and should not, under the circumstances, be punished with a severer sentence than his principal.

R. L. *Sentence reduced.*

(17) 73 Ind. Cas. 55; 11 L. B. R. 398; 1 Bur. L. J. 183; A. I. R. 1923 Rang. 31; 24 Cr. L. J. 519.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 187 OF 1925.

July 9, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Panton.

SAMSERALI HAZI—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 360—Depositions of witnesses, reading over of—Procedure—Reading over of deposition of witnesses in interval and after close of day—Effect.

The evidence of a witness must be read over to him after it is completed and before the examination of another witness is started.

Where the depositions of witnesses who are examined one after another until the midday adjournment are read over to them during the interval and the depositions of the witnesses examined in the afternoon are similarly read over to them in the afternoon after the close of the day there is no compliance with the provisions of s. 360, Cr. P. C., and the trial is vitiated.

Abdul (Bari) Mallick v. *Emperor*, 92 Ind. Cas. 887; 42 C. L. J. 585; A. I. R. 1926 Cal. 157; 27 Cr. L. J. 375, followed.

Criminal appeal against an order of the Sessions Judge, Faridpur, dated the 7th March 1925.

Babu *Mrityunjoy Chatterjee* (with him Babu *Nirmal Chunder Chukerbutty*), for the Appellants.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The only point raised for the purpose of this appeal is that the provisions of s. 360 of the Cr. P. C. have not been complied with. It appears on the allegations made by the appellants, as well as from the explanation submitted by the Trying Judge together with the affidavit sworn by the Sessions clerk, that the witnesses were examined one after another until the midday adjournment, when their depositions were read over to them during the interval: and the depositions of the witnesses examined one after another in the afternoon were similarly read over to them in the afternoon after the close of the day. In *Abdul (Bari) Mullick* v. *Emperor* (1) we have held that the evidence of a witness must be read over to him after it is completed, and before the examination of another witness is started; and we have further held in that case that the reading over of the depositions of witnesses at the close of the day is not a sufficient compliance with the provisions of s. 360 of the Cr. P. C. The result, therefore, is that this trial must be held to be vitiated by this irregularity. In this view it is not necessary to consider the other points raised in the case. The conviction of the appellants and the sentences upon them are set aside, and it is directed that they be re-tried. The appellants will remain in Jail pending further order of the Trying Court.

R. L. *Appeal allowed.*

(1) 92 Ind. Cas. 887; 42 C. L. J. 585; A. I. R. 1926 Cal. 157; 27 Cr. L. J. 375.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 322 OF 1923.
September 24, 1925.
Present:—Mr. Justice Fawcett and
Mr. Justice Madgavkar.

MADHAVRAO RASTE—PLAINTIFF—
APPELLANT
versus
IMAM BAPU SHERKAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Grant—Saranjam—*Nature of grant—Alienation, whether binding beyond lifetime of alienor*—Mirasi *grant, nature of.*

An alienation beyond the lifetime of the *saranjamdar*, who makes it, is not ordinarily binding on his successors. [p. 738, col. 2.]

In cases when the object of the *saranjam* grant is to make a permanent provision for the maintenance of an important family, the *saranjam* or *jagir* although ordinarily hereditary, is not alienable beyond the life of the actual holder. But in cases where the object of the grant is purely personal, *e. g.*, to ensure the rendering of certain services to the State or to reward an officer on retirement for faithful services, then the grant, in the absence of express provision to the contrary, is one of an absolute estate and alienation made by the holder for the time being is binding upon his successor. Cases of the latter type are, however, exceptions rather than the rule. [*ibid.*]

[Case-law discussed.]

A grant of *mirasi* rights is not necessarily an alienation which will not be binding beyond the lifetime of the *saranjamdar* making the grant. [p. 740, col. 1.]

Second appeal from the decision of the First Class Subordinate Judge, A. P. at Satara, in Appeal No. 239 of 1921, confirming a decree of the Subordinate Judge, at Wai, in Civil Suit No. 101 of 1920.

Mr. *G.S. Rao* (with him Mr. *H. B. Gumaste*), for the Appellant.

Mr. *S. R. Bakhale*, for the Respondents.

JUDGMENT.

Fawcett, J.—These appeals arise out of three Suits Nos. 101, 102 and 103 of 1920. They were tried together, and the appeals from the decision therein were also dealt with together in the lower Appellate Court. Here also the three appeals can conveniently be disposed of in one judgment.

The plaintiff in each of these suits is Sirdar Raste, a *saranjamdar* residing at Poona, and he sued to recover possession of the plaint lands, alleging in each case that it was part of his *saranjam* property; that Umabai, as guardian of the previous minor *saranjamdar*, had let it under a *kabuliyat* to the defendants' ancestor; that this act of hers was beyond her authority and against the rule that a *saranjamdar's* estate is only a life-estate which is resumed by Government on the death of the *saranjamdar* and granted again to his successor, and that accordingly the plaintiff is not bound by these particular grants or leases.

The material facts are that in 1862 a young boy named Gangadharrao was adopted by Umabai, the widow of the last *saranjamdar* and so he became the *saranjamdar*. On February 26, 1862, Umabai granted the *miraspatra*, Ex. 16, to the ancestor of two of the defendants in Suit No. 103, and in 1863 she granted a *kabuliyat* Ex. 31, to the predecessor-in-title of the defendants in Suit No. 101. In 1866 Gangadharrao died a minor. In the same year the *saranjam* was attached and managed by Government up to 1873. While it was so under attachment, Umabai granted the *kabulayat*, Ex. 18, to the ancestor of the defendant in Suit No. 102. In 1873, Umabai, with the permission of Government adopted another boy named Anandrao. In 1896, Anandrao came of age and presumably took over the management of the *saranjam*. He died in 1908, leaving the plaintiff, his son, a minor. The *saranjam* was resumed by Government and re-granted to the plaintiff on August 4, 1908. The plaintiff came of age in February 1917, and he brought these three suits within three years of his thus attaining majority. The Trial Court dismissed all the three suits and this decision has been confirmed by the lower Appellate Court. The lower Court has held that the lands in question are part of the plaintiff's *saranjam* estate, and this is supported by Ex. 19, which shows the lands as such.

As regards the defendants' interest in the land, the lower Appellate Court has not come to any finding, except that the recitals in the documents Exs. 31, 18 and 16, as to the existence of any prior interest in the land cannot be taken as conclusive. So far as the Yerande defendants in Suit No. 103 and Appeal No. 333 are concerned, their title-deed, Ex. 16, is in terms a *miraspatra*, and their tenancy (apart from any question as to the validity of the grant) is of permanent nature. The Sherkar defendants in Suit No. 101 and Appeal No. 332, and the Dhanwe defendants in Suit No. 102 and Appeal No. 334, are not in so secure a position, because the documents Exs. 31 and 18, though mentioning previous possession, do not in terms grant permanent tenancies of a *mirasi* or other kind. But in view of the facts that the plaints seek to recover possession of the lands only on the ground that the *kabuliyats*, Exs. 31, 18 and

16, are not binding on the plaintiff, and that his *mukhtyar*, Ex 24, expressly admitted on the plaintiff's behalf that the Sherkar and Dhanwe defendants were treated as permanent tenants under the *kabuliyats*, they must be taken to be also *mirasdars*. To hold otherwise would be to make out a new case for the plaintiff contrary to the pleadings.

The main issue, therefore, is the third one framed by the lower Court, *viz.*, what is the effect of resumption and re-grant of the *saranjam* on defendants' interest in the property. The First Class Subordinate Judge held that it had none. Dewan Bahadur Rao for the appellant contends that the granting of a permanent lease is an alienation; that no *saranjamdar* can validly alienate the *saranjam* estate, which, as laid down in No. 5 of the *Saranjam* Rules is only a life-estate, for any period beyond his lifetime; that the recognition of these permanent leases by the plaintiff's predecessor-in-title was only a continuance of the tenancy for the *saranjamdar's* life; and that the plaintiff, having sued within three years of his attaining majority, is entitled to a declaration that the *kabuliyats* in question are not binding upon him.

In support of these contentions he has mainly relied upon *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande* (1) and *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (2). The first of these cases related to service *watan* lands, the alienation of which was prohibited by s. 20 of Regulation XVI of 1827 and is now prohibited by s. 5 of Bombay Act III of 1874. It, no doubt, affords clear authority, for the contention that the grant of a right of permanent tenancy is an alienation within the meaning of those enactments. But the applicability of this ruling to the present case is clearly open to question. There is no direct prohibition by the Legislature of alienation of *saranjam* lands as there is in the case of service *watan* lands. All that is enacted is that, as being lands held on political tenure, they are resumable and continuable in such manner and on such terms as Government on political considerations, may from time to time see fit to determine: see Bombay Act VII of 1863, s. 2, cl. (3); Act XI of 1852, Sch. B, r. 10, read with Bombay Act II of 1863, s. 1, cl. (2) and s. 16 (c), *Hari Sadashiv* v. *Sheikh Ajmudin* (3) and *Shekh Sultan Sani* v. *Shekh Ajmudin* (4). In the *Saranjam* Rules of 1898, there is also no express prohibition against alienation beyond the lifetime of a *saranjamdar*, though r. 5, no doubt, implies that a *saranjamdar* is a life-tenant and cannot alienate, mortgage or otherwise charge the estate beyond his lifetime; while r. 10 provides for the removal of Civil Court attachments, or other processes, which operate to divert the *saranjam* or its revenues from the *saranjamdar*. This implied prohibition is in accordance with the view taken by this Court in *Krishnarao Ganesh* v. *Rangrao* (5) and *Dosibai* v. *Ishwardas Jagjivandas* (6) and by the Privy Council in *Gulabdas Jagjivandas* v. *Collector of Surat* (7). In cases where the object of the *saranjam* grant is to make a permanent provision for the maintenance of an important family, the *saranjam* or *jagir* although ordinarily hereditary, is not alienable beyond the life of the actual holder as laid down in these rulings. But in cases where the object of the grant is purely personal, *e.g.*, to ensure the rendering of certain services to the State or to reward an officer on retirement for faithful services, then [as was held in *Dosibai* v. *Ishwardas Jagjivandas* (8)] the grant is, in the absence of express provision to the contrary, one of an absolute estate; and an alienation made by the holder for the time being is binding upon his successors. Such a case is a special one and clearly inapplicable to *saranjams* like the present one, which were entered in Col. Etheridge's *Saranjam* list as "continuable hereditary," under the circumstances detailed in Dandekar's Law of Land Tenures, Vol I, pages 171-173. Such *saranjams* clearly fall under the first category of grants made for the maintenance of an important family, and in any case are subject to the express enactments in Act XI of 1852 and Bombay Act VII of 1863 making them continuable only in accordance with rules framed by Government. In *Dosibai's case* (8) Lord Hobhouse in his judgment says (page 227*):—"But where there is a grant to a man and his heirs, and nothing to control the ordinary meaning of the words, the grantee takes an absolute interest." That principle was clearly applicable to the personal grant made by the Bombay Government in 1830 to Ardeshir, which was then under consideration. But in cases of *saranjams* of a date prior to 1751, settled under Bombay Act VII of 1863, there are the clear provisions of s. 2, cl. (3), to control any words there may be in the original grant, purporting or operating to give an absolute title; and, therefore, the ordinary rule applies that the *saranjam* is to be considered a life-estate, as mentioned by Lord Hobhouse in the course of his judgment. With great respect, I think that this distinction has been overlooked in the judgment in *Sakharam Gopal* v. *Trimbakrao Ram Chandra Mantri* (9) where *Dosibai's case* is relied upon as an authority for the view that the *saranjamdar* takes an absolute interest in the subject-matter of the grant and I adhere to my criticism of this ruling in *Secretary of State for India* v. *Girjabai Shivdeorao* (10). As pointed out by Shah, Ag. C. J., in the same case (at page 137), the *Saranjam* Rules of 1898 donot in effect state anything more than what were ordinarily known to be the customary incidents of a *saranjam* grant. So far, therefore, as *Sakharam Gopal* v. *Trimbakrao Ram Chandra Mantri* (9) is based on the view that a *saranjamdar* like the plaintiff has an absolute and not merely a life-estate, I respectfully differ from it; and I agree with Diwan Bahadur Rao that an alienation beyond the lifetime of the *saranjamdar*, who makes it, is not ordinarily binding on his successors. I would, however, except cases where estoppel, *res judicata*, limitation, or other legal impediment, may prevent this general rule applying.

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(1) 74 Ind. Cas. 362; 47 B. 798; 25 Bom. L. R. 1005; (1923) M. W. N. 689; A. I. R. 1923 P. C. 205; 33 M. L. T. 389; 28 C. W. N. 857; 20 L. W. 248; 50 I. A. 255; 47 M. L. J. 248 (P. C.).

(2) 65 Ind. Cas. 161; 44 M. 831 at p. 855; 24 Bom. L. R. 629; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 20 A. L. J. 497; A. I. R. 1922 P. C. 123 (P. C.).

(3) 11 B. 235 at p. 239; 6 Ind. Dec. (N. s.) 154.

(4) 17 B. 431; 20 I. A. 50; 6 Sar. P. C. J. 52; 17 Ind. Jur. 100; 9 Ind. Dec 281 (P. C.).

(5) 4 B. H. C. R. A. C. J. 1 at p. 24.

(6) 9 B. 561 at p. 567; 5 Ind. Dec. (N. s.) 376.

(7) 3 B. 186; 6 I. A. 54; 3 Sar. P. C. J. 889; 2 Ind. Dec. (N. s.) 125 (P. C.).

(8) 15 B. 222; 18 I. A. 22; 15 Ind. Jur. 154 & 281; 6 Sar. P. C. J. 10; 8 Ind. Dec. (N. s.) 150 (P. C.).

I also agree with Diwan Bahadur Rao that, in view of the Privy Council ruling in *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande* (1) and *Nainapillai Marakayar* v. *Ramanathan Chettiar* (11) the plea of adverse possession by the defendants, who have all along held the lands as tenants, must fail; and this was conceded by respondents' Pleaders. There was no precise plea of estoppel raised by the defendants nor any issue raised about it; and the mere fact that plaintiff's guardian and his predecessor-in-title have raised no prior objection to defendants remaining in possession cannot operate as an estoppel.

The main contention of Mr. Bakhale and Mr. Shingne for the respondents was that the *kabuliyats* did not constitute any real alienation of the *saranjam* estate, but were given in the ordinary and proper exercise of the management of the *saranjam* estate, which was for the time being in Umabai's charge. In considering this point, I revert to the Privy Council decision in *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande* (1). It was there held, as already mentioned, that the granting by a *watandar* of permanent tenancy in lands of his *watan* would, undoubtedly, be an alienation within the meaning of s. 20 of the Bombay Regulation XVI of 1827. But in the same case, in dealing with the Full Bench ruling of *Radhabai* v. *Anantrav Bhagvant Deshpande* (12) their Lordships distinguish between the case of an alienation by a lease of a permanent tenancy to a tenant of the *watan* and the case of a sale and absolute assignment to a stranger to the *watan*. In the present instances, none of the *kabuliyats* confers a rent free estate. The *saranjam* estate continued, therefore, to get revenue from the lands, and (except in the case of the *miraspatra* Ex. 16, which contains a stipulation against raising the rent) the *saranjamdar* has the ordinary right to enhance the rents within the limits of custom: *cf. Prataprao Gujar* v. *Bayaji Namaji* (13) and *Vishvanath Bhikaji* v. *Dhondappa* (14). There is no subjecting of the estate to a 'debt' or 'charge,' such as is mentioned in *saranjam* rule No. 5. And, as has been pointed out in *Madhavrao Hariharrao* v. *Anusuyabai* (15) this rule No. 5 does not provide for freedom from all tenures, rights, incumbrances and equities created in favour of another person, such as is contained in s. 56 of the Bombay Land Revenue Code. Diwan Bahadur Rao's contention that even the grant of a lease from year to year extending beyond the *saranjamdar's* lifetime would not bind his successor would lead to many difficulties, and is not, in my opinion, correct. The case-law on the subject does not (so far as I am aware) contain any authority for holding that a grant of *mirasi* rights is necessarily an alienation which will not be binding beyond the life-time of the *saranjamdar* making the grant: *Sakharam Gopal* v. *Trimbakrao Ramchandra Mantri* (9) is in fact an authority to the contrary, though I dissent from the main ground on which the judgment is based. No doubt in *Trimbak Ramchandra* v. *Ghulam Zilani* (16) Scott, C. J. says at page 341*: "It was conceded that a *saranjamdar* would not, except possibly for necessity, have power to create a *mirasi* lease to enure beyond his life-time." But, no such concession has been made before us, and, in my opinion, each case must stand on its own facts. A permanent lease may undoubtedly amount to a sale, or be otherwise so detrimental to the estate, as to constitute a clear case of alienation. But, on the other hand, as the passage I have just cited shows, it may be justifiable from necessity, or as a *bona fide* act of management benefiting the estate. Here we have to deal with agreements passed some fifty-five or sixty years ago, which have been acquiesced in by plaintiff's predecessor-in-title and his own guardian during his minority. Owing to the length of time that has elapsed, it is impossible now to get evidence as to the exact circumstances in which the grants were made. Conditions then were different to what they are now; and, in view of the acquiescence already mentioned, it seems to me to be a case where the Court should presume that the grants were made for necessary purposes and, therefore, are binding on the present *saranjamdar*. This is a presumption that was made as to a permanent lease granted by the manager of a temple in *Chockalingam Pillai* v. *Mayandi Chettiar* (17) and approved by the Privy Council in *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (2). Even on the view taken by Scott, C. J. there is, therefore, in my opinion, legal ground for upholding the decision of the two lower Courts. I hold that they are right in deciding that the resumption and re-grant of the *saranjam* to plaintiff did not give him an estate freed from the defendants' rights under the documents, Exs. 31, 18 and 16.

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(9) 61 Ind. Cas. 40; 45 B. 694 at p. 703; 23 Bom. L. R. 314.

(10) 89 Ind. Cas. 539; 49 B. 126 at p. 146; 26 Bom. L. R. 1173; A. I. R. 1925 Bom. 197.

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(11) 82 Ind. Cas. 226; 47 M. 337 at p. 354; A. I. R. 1924 P. C. 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 28 C. W. N. 809; 51 I. A. 83; L. R. 5 A. (P. C.) 33 (P. C).

(12) 9 B. 198; 5 Ind. Dec. (N. s.) 133.

(13) 3 B. 141; 2 Ind. Dec. (N. s) 94.

(14) 17 B. 475; 9 Ind. Dec. (N. s.) 309.

(15) 36 Ind. Cas. 505; 40 B. 606; 18 Bom. L. R. 768.

I may mention that Umabai was not of course a *saranjamdar*, but obviously as *de facto* managing the estate on behalf of her adopted son or while the estate was under Government attachment, she could not have higher powers than would belong to the *saranjamdar* himself.

I would, accordingly, dismiss all three appeals with costs.

Madgavkar, J.—I agree.

R. L. *Appeals dismissed.*

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(16) 5 Ind. Cas. 965; 34 B. 329; 12 Bom. L. R. 208.

(17) 19 M. 485; 6 M. L. J. 247; 6 Ind. Dec. (N. S.) 1043.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1782 OF 1922.

May 14, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Pearson.

SANTOSH KUMAR ROY AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
RAKHAL CHANDRA HAZRA AND OTHERS
—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 22 (2), 50 (2)—Ejectment suit—Fixity of rent—Uniform payment for 20 years—Presumption, applicability of.

Sub-section (2) of s. 50 of the Bengal Tenancy Act has no application to suits which are not suits under that Act but are suits under the general law for ejectment of an alleged trespasser.

The mere fact that the operation and effect of s. 22 (2) of the Bengal Tenancy Act has to be considered in a suit does not make a suit in ejectment a proceeding under the Act.

Though the special presumption laid down in cl. (2) of s. 50 of the Bengal Tenancy Act may not be applicable to a case not under the Act, a presumption may arise, apart from the Act, that where there has been a uniform payment of rent for more than 20 years the original contract was a contract to hold at fixed rate.

Appeal against a decree of the Additional Subordinate Judge, Burdwan, dated the 18th April 1922, reversing that of the Munsif, Second Court at Burdwan, dated the 18th January 1921.

Mr. *Sarat Chandra Bose* and Babu *Panchanan Chowdhury*, for the Appellants.

Mr. *Charu Chandra Biswas* and Babu *Narendra Krishna Bose*, for the Respondents.

JUDGMENT.—The plaintiffs who are the appellants before us brought a suit for *khas* possession of what they alleged to be a non-transferable occupancy holding. It is unnecessary to state all the facts of this case since it is conceded that the suit must fail if we hold that the holding was transferable and there was a valid transfer to the principal defendant.

It is not disputed that the holding has been held at an unchanged rate of Rs. 9-6-0 for more than 20 years. It is contended, however, that the lower Court was wrong in applying the presumption under cl. (2) of s. 50 of the Bengal Tenancy Act in the present case. So far as that argument goes it appears to us to be sound. It seems hardly necessary to quote authorities in support of the proposition that sub-s. (2) of s. 50 of the Bengal Tenancy Act has no application in suits, which are not suits under that Act but are suits under the general law for ejectment of an alleged trespasser. We may cite, however, the case of *Jagabandhu Saha* v. *Magnamoy Dasi* (1), where this statement of the law is made as an undoubted proposition. Further also we cannot agree with the learned Subordinate Judge that the fact that the operation and effect of s. 22, cl. (2) of the Bengal Tenancy Act, has to be considered makes this suit in ejectment a proceeding under the Act. But although the lower Appellate Court was wrong on this point of law he has based his finding that the tenancy in suit is an occupancy holding at fixed rent on other grounds which cannot be assailed in second appeal. Though this special presumption of cl. (2) of s. 50 does not apply it has been frequently held that in cases not under the Bengal Tenancy Act a presumption may arise apart from the Act that where there has been a uniform payment of rent for more than 20 years the original contract was a contract to hold at fixed rates. The learned Subordinate Judge has considered the case from this point of view and he has considered that in addition to there being evidence of no change of rent for a fixed period there is also the fact that the *pro forma* defendants who are also landlords of a considerable share made by recognizing the transfer not only admitted the transferability of the holding but also the fixity of the rent, as he points out this is something more than a mere forbearance on the part of the landlords to enhance the rent. Sitting as a Court of Second Appeal we are not prepared to hold that the lower Appellate Court was wrong in drawing this presumption.

The only other point urged on our expressing our opinion that the tenancy was transferable is that the interest transferred was that of a Hindu widow and expired after her death. We hold that this contention which was not raised in either of the lower Courts cannot be raised in second appeal. It is pointed out that there is some reference to this made in the plaint. But issues were framed in the presence of parties and none of the issues framed raised this question.

The result is that the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

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(1) 36 Ind. Cas. 884; 22 C. W. N. 89 at p. 94; 24 C. L. J. 363; 44 C. 555.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 62-B OF 1923.

July 24, 1925.

Present:—Mr. Kotval, A. J. C.

MARUTI—PLAINTIFF—APPELLANT

versus

UKARDA—DEFENDANT—RESPONDENT.

Life-estate — Lease-money — Personal debt—Rent, when due.

Rent due by a lessee to a lessor holding a life-estate is a personal debt to which a personal heir of the lessor would succeed on his death even though the property in respect of which the rent is due cannot be inherited by such heir.

The rent of a leased property is due as soon as the lease is granted, although it may not be payable till a particular time.

Haridas Acharjia Chowdhry v. *Baroda Kishore Acharjia Chowdhry*, 27 C. 38 at p. 41; 4 C. W. N. 87; 14 Ind. Dec. (N. S.) 26, referred to.

The fact that a life-estate-holder dies before the rent in respect of the estate becomes payable would not make it any-the-less his personal debt.

Appeal against a decree of the Second Additional District Judge, Amraoti, dated the 31st of October 1922, confirming that of the Munsif, Daryapur, dated the 29th of June 1922.

Mr. *D. T. Mangalmoorti*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondent.

JUDGMENT.—Banya Bai who had succeeded to certain *palampat inam* lands held by her father leased the same to different lessees for the year 1328 *Fasli*. The defendant-respondent is one of the lessees. The leases were granted on the 1st

June 1918 and the rent was payable on the 1st January 1919. Banya Bai died in November 1918. The plaintiff who is Banya Bai's husband sued for the rent as her heir. The defendant pleaded that the plaintiff had no right to the rent as under the Berar Inam Rules he did not succeed to the fields which were *inam* and had come to Banya Bai from her father. The plaintiff replied that he was entitled to succeed to the fields and further that the rent was the personal property of Banya Bai to which at any rate he was entitled to succeed.

The Trial Court dismissed the suit and the lower Appellate Court has confirmed the dismissal. The lower Courts have held that under Inam Rule V the plaintiff is not the heir to the fields. This finding is quite correct.

As to the title to the rent independent of the title to the field it was argued that the lease-money was a debt due to Banya Bai and was inherited by the plaintiff as the heir to her personal estate. The lower Appellate Court held that as the rent had not become payable in Banya Bai's lifetime there was no debt due to her which the plaintiff could inherit. This, in my opinion, is not correct; the rent was due as soon as the lease was granted but it was not payable till the 1st January 1919. It was, therefore, a debt; *vide Haridas Acharjia Chowdhry* v. *Baroda Kishore Acharjia Chowdhry* (1).

Further as between the parties to the suit the question as to who is entitled to the rent seems to me to depend upon the intention of the term in the lease reserving the rent. In this case the rent is reserved in favour of the lessor generally without mentioning her personal heirs, executors or reversioners. We have, therefore, to gather the intention from the circumstances of the case. In the present case, if Banya Bai had taken the rent in advance the reversioner would have had no claim against the tenant. The rent would have formed part of Banya Bai's estate to which the plaintiff would have become entitled. The fact that it was made payable later during the currency of the lease and Banya Bai died before the day fixed for payment is no reason why it should go to the reversioners. No such intention can be presumed from the circumstances of the case. If there is any presumption it is the other way. Banya Bai cannot have intended the money to go to the reversioners in preference to the heirs to her own property.

The decrees of the lower Courts are set aside and the plaintiff's claim decreed with costs throughout.

N. H. *Decrees set aside.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 366 OF 1924.

September 29, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice and Mr. Justice Coyajee.

BHIMJI N. DALAL—APPLICANT

versus

B. B. & C. I. RAILWAY Co.—OPPONENTS.

Jurisdiction of Courts—Statutory obligations and remedies—Civil Courts, jurisdiction of—Railways Act (IX of 1890), s. 113—Passenger travelling without ticket—Penalty, suit for recovery of, whether maintainable—Civil Procedure Code (Act V of 1908), s. 115—Assumption of jurisdiction—Revision.

The general rule of law (or rather of construction) is that where a general obligation is created by Statute and a specific statutory remedy is provided, that statutory remedy is the only remedy. [p. 747, col. 1.]

A suit by a Railway Company to recover from a passenger who has lost his season ticket, the ordinary fare plus excess charge as provided by s. 113 of the Railways Act, being a suit for recovery of a statutory penalty created by the said Act, and being unknown to Common Law is not entertainable by a Civil Court. The penalty can be enforced only by following the procedure laid down in the said Act. [p. 743, col. 1; p. 745, col. 1.]

Where upon an erroneous construction of a Statute, a Subordinate Court assumes a jurisdiction which does not belong to it, the High Court has the power to revise its decision. [p. 746, cols. 1 & 2.]

Balakrishna Udayar v. *Vasudeva Aiyar*, 40 Ind. Cas. 650; 44 I. A. 261; 19 Bom. L. R. 715; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48 (P. C.), relied on.

Mr. *O'Gorman*, for the Applicant.

Mr. *Kanga*, Advocate-General, for the Opponents.

JUDGMENT.

Macleod, J.—The B. B. & C. I. Railway Co., hereinafter called the Company, took out a summons in the Court of Small Causes at Bombay against the defendant to answer in an action for debt—damages according to the following particulars of demand.

"Amount of fares and excess charges due and payable by you according to law, you having travelled on the plaintiff Company's Railway between Church Gate and Malad and *vice versa* every day by First Class from February 26, 1924, to April 1, 1924, (as per statement and particulars annexed) without having with you a proper pass or ticket during the said period for the said journeys as required by law." Rs. 342, the amount claimed, represented First Class fare for Rs. 171, and excess charges for a like amount.

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(1) 27 C. 38 at p. 41; 4 C. W. N. 87; 14 Ind. Dec. (N. S.) 26.

The suit was tried by the Fourth Judge who dismissed it with costs.

The Full Court on a rule being granted to set aside the order of dismissal and to pass a decree for the Company made the Rule absolute and passed a decree for Rs. 338 and costs.

On the application of the defendant a notice was issued to the Company; under s. 115 of the C. P. C., to show cause why the decree of the Fourth Judge should not be restored, on the ground that the suit was for the recovery of a statutory penalty created by s. 113 of the Indian Railways Act, which being unknown to the Common Law could only be enforced by following the remedy provided in the said Act.

The defendant had purchased from the Company for Rs. 65-12 0 a season ticket or pass which entitled him to travel by First Class between Church Gate and Malad whenever and as often as he chose during the three months from January 26, 1924, to April 25, 1924.

The following notice was printed on the ticket: "This ticket is forfeited if transferred, and is issued subject to the Regulations of the Company, as notified in the Quarterly Time-table and Railway Guide. It should be given up on the day following the date of its expiry, otherwise the amount of the deposit will be forfeited. In the event of this ticket being lost a fresh ticket will only be issued on payment of full charges and fresh deposit.

This ticket must be produced when required."

On February 25, the defendant lost his pass which was stolen from his pocket while he was travelling from Malad to Church Gate. On February 28, the defendant notified the loss to the Company and said, "Since then I have been travelling without a ticket and I propose to do so until a duplicate pass is issued to me; having regard to the special circumstances of this case when on travelling on your Railway my purse containing the pass had been robbed, I hope you will make it a special case in issuing a duplicate pass up to April 24, and oblige."

The defendant was informed by letter of March 1, that a duplicate ticket could not be issued according to the rules and he must purchase a fresh ticket.

On March 14, the General Traffic Manager wrote to the defendant that it had been reported to him that the defendant was found travelling without a ticket and on being asked to pay the legal fare declined to do so. A demand for Rs. 42 12-0 the legal fare for Railway journeys made by the defendant after he lost his ticket up to the 6th March, was made. On March 15, the defendant replied that he had paid the Company for the use of its Railways full fare up to April 24, and he would like to know by what term of the contract or under what section of the Indian Contract Act his right to travel had been taken away. The Company replied on March 18 that the defendant by failing to produce the ticket had committed a breach of the contract, and in accordance with s. 113 of the Indian Railways Act he was liable to pay the charges demanded in the letter of March 14. He was also liable to pay the excess charges prescribed in s. 113 of the Act. As the defendant continued to travel on the Company's line without paying for another ticket or pass, the Company took out the summons in the case on April 2.

The Trial Judge said: "The only question to be determined is whether any liability attached to defendant, and, if so, what was the extent of it."

Following the decision of Jessel, M. R., in *West* v. *Downman* (1) that it was a settled rule that, if a Statute created a new right and gave a particular remedy for enforcing it, there was no other remedy, he held that the plaintiff had come to the wrong forum for a claim under that section. The section, however, did not exclude the Company's right to sue the defendant for breach of the contract. It was not suggested that defendant had transferred his ticket, and as no time-tables or guides had been published after the war, there was no obligation on the defendant to look for the regulation in other places.

With regard to the obligation to produce his ticket when required, the defendant was only required to produce his ticket on three occasions and failed to do so, but for such a breach of his contract the defendant was not liable to pay damages. Apart from the terms of the contract, the defendant having paid for his right to travel for the period in suit, there was no obligation at Common Law for him to pay again, if he lost his ticket.

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(1) (1880) 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6.

Section 68 of the Indian Railways Act, IX of 1890, provides that no person shall without the permission of a Railway servant, enter any carriage on a Railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket.

And by s. 69 it is provided that every passenger by Railway shall, on the requisition of any Railway servant appointed by the Railway Administration in this behalf, present his pass or ticket to the Railway servant for examination, and at or near the end of the journey for which the pass or ticket was issued or in the case of a season pass or ticket, at the expiration of the period for which it is current, deliver up the pass or ticket to the Railway servant.

The Judge pointed out that the same Statute which imposed the duty imposed by s. 69 created under s 113 a remedy in favour of the Railway Company, and the three sections had to be read together. Section 113, sub-s. (1), provides that if a passenger travels in a train without having a proper pass or a proper ticket with him, or being in or having alighted from a train, fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefor under s. 69 he shall be liable to pay on the demand of any Railway servant appointed by the Railway Administration in this behalf, the excess charge thereinafter in this section mentioned in addition to the ordinary single fare for the distance which he has travelled.

And by sub-s. (4) if a passenger liable to pay the excess charge and fare mentioned in sub-s. (1), fails or refuses to pay the same on demand being made, therefor, the sum payable by him shall, on application made to any Magistrate by any Railway servant appointed by the Railway Administration in this behalf, be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate and shall, as it is recovered, be paid to the Railway Administration. The Judge thought that there was nothing in s. 68 to entitle the Railway Company to make a passenger travelling without a ticket with him, even when he had paid for it before starting on the journey, pay a second time.

The Chief Judge was of opinion that on the terms of the contract with the defendant contained in the ticket, if the ticket was lost, the relative amount paid for its purchase was lost and the contract terminated. If the defendant wished to continue travelling on the Company's Railway he was bound to purchase a fresh ticket, or render himself liable for the consequences which would follow on his travelling without a ticket, that is to say, as provided by s. 113 (1), he would have to pay the ordinary fare and a certain excess fare.

The Chief Judge then considered whether the remedy provided by s. 113 (4) was cumulative or exclusive, and pointed out that in Halsbury's Laws of England, Volume XXVII, page 189, paras. 370 and 373, it was stated that in the case of Statutes of the third class referred to, in which a new obligation was created and a special remedy provided, when a particular mode of enforcing a new obligation was specified, such obligation as a general rule could be enforced in no other manner. He seemed to consider that the words 'as a general rule' implied that there were exceptions. In the *Crystal Palace Gas Company* v. *Idris & Co.* (2), the distinction is made clear. The Company brought an action for negligence against the defendant owing to one of their lamps having been broken by the negligent driving of one of their servants. The defendant relied on s. 20 of the Gas Works Clauses Act, 1847, which directed that persons carelessly or accidentally damaging a lamp belonging to the undertakers or under their control should pay for the damage done a sum not exceeding 5*l.*, as any two Justices or the Sheriff should think reasonable.

The Court held there was nothing in that section to oust the ordinary remedy for negligently knocking down a lamp. So under the section before us there is nothing which ousts the jurisdiction of the Court in an action by the Railway Company to recover the fare from a passenger who has not paid it. But it is quite clear that there is no jurisdiction in the Court to decree the penalty provided by the section. Once the difficulty in determining whether a particular Statute comes within the third class is solved then the rule applies.

Thereafter by means of an argument, which I am unable to follow, the Chief

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(2) (1900) 82 L. T. 200; 64 J. P. 452; 16 T. L. R. 180.

Judge considered that the defendant's contention, that as three demands only had been made, he was liable to pay for three journeys only, had been disposed of. It would have been more advisable, he thought, for the plaintiff to have made proper demands for the whole amount sued for either orally or by letter. However, it might be taken that the suit was a demand and its resistance was a refusal.

Though the cause of action was framed on the basis of the liability incurred under s. 113 (1) it sounded in damages. As the defendant had lost his ticket and so put an end to the contract, he was not entitled to avail himself of it, and so far all journeys at which he was unable to produce a ticket for inspection he was liable to pay. The jurisdiction of a Civil Court not having been taken away he could be sued in the Court of Small Causes.

A decree was then passed for Rs. 338, Rs. 4 less than the amount demanded, and costs thereon.

I granted a Rule as it seemed to me an open question whether defendant could satisfy this Court that the case came within the provision of s. 115, C. P. C., on the ground that the Small Causes Court had exercised a jurisdiction not vested in it.

When the Rule came on for hearing, it was first contended by the Advocate-General appearing for Company that the Rule was not competent.

The question whether a Subordinate Court has exercised a jurisdiction not vested in it by law is always a difficult one to determine, when the Court, by the construction it has put on a particular Statute, has held it has jurisdiction to decide the matter before it, and the question has been rendered more difficult by the somewhat confused reasons by which, with all due respect, the Chief Judge has justified his decision. If the suit was a suit for damages for breach of contract then the Court had jurisdiction. The Chief Judge said that though the suit was framed on the basis of the liability incurred under s. 113 (4), it sounded in damages and thereby appears to have deceived himself into thinking he was entitled to pass a decree for damages, the measure of damages being prescribed by section 113 (4). In the first instance it is necessary to draw a very definite line between the realm of contract and the realm of statutory obligation. The defendant by paying the proper fare had entitled himself to travel according to the particulars mentioned in his ticket. He was bound to produce it when required, and, if he lost it, he could not get another without paying for it. But if he did not produce his ticket, or lost it, the contract of carriage did not thereby come to an end. A passenger who pays for his accommodation but has not with him a proper pass or ticket cannot be sued, if he completes the journey without a demand being made upon him for his ticket, on an implied contract that if he travels by the plaintiff's Railway he undertakes to pay for the accommodation, because he has already paid. Having no pass or ticket he may be a trespasser, but then he is only liable to the penalties imposed on trespassers.

Chapter IX of the Act which contains s. 113 deals with penalties and offences.

Before the penalty imposed by s. 113 (1) can be enforced under sub-s. (4), there must be requisition on the passenger under s. 69, and a failure or refusal to present for examination or to deliver up his pass or ticket. Then there arises a liability to pay the ordinary fare plus an excess charge. The liability to pay does not arise from the contract but from the Statute, and the Statute prescribes the method by which the amount the passenger is liable to pay can be recovered.

In any event, the liability to pay only arose on three occasions on which payment was demanded and refused. It is impossible to view the filing of a suit as the demand which is required by s. 113 (1), and the resistance to the suit as the refusal. Obviously, it is the refusal which creates the right of action, if there is such a right, and that must have occurred before the suit is filed. But clearly it is intended by s. 113 (1) that the demand should be made by a Railway servant on the Company's premises before the passenger has departed therefrom. If the Court had confined itself to passing a decree for the fare on the ground that the original contract had come to an end, and that if the defendant had travelled by the Company's Railway an obligation arose upon him to pay for the accommodation, it might have been difficult to contest the decision under s. 115 of the C. P. C., but the Chief Judge has clearly considered that the Small Causes Court was entitled to pass a decree for the penalties imposed by s. 113 of the Indian Railways Act, Such a suit could not be a suit for debt or damages, it would be a suit to recover penalties provided by a special Act, and unless jurisdiction has been given to the Small Causes Court to try a suit for the recovery of the penalties which can be exacted under s. 113 of the Indian Railways Act concurrent with the Magistrate's jurisdiction under sub-s. (4), the Small Causes Court has no jurisdiction.

In my opinion, therefore, the Rule must be made absolute and the suit dismissed with costs throughout.

Coyajee, J.—The facts of this case are fully set out in the judgment of my Lord the Chief Justice. The B. B. & C. I. Railway Co., sued the defendant in the Court of Small Causes at Bombay to recover the sum of Rs. 342 according to the following particulars of demand: "amount of fares and excess charges due and payable by you according to law, you having travelled on the plaintiff's Company's Railway between Church Gate and Malad *vice versa* every day by First Class from February 26, 1924, to April 1, 1924, as per statement and particulars annexed without having with you a proper pass or ticket during the period for the said journeys as required by law." The Company brought the claim under s. 113 of the Indian Railways Act, 1890. The defence was that the plaintiff Company was seeking to enforce a statutory right, and as the Act had prescribed the manner in which it should be enforced and also indicated a special tribunal for that purpose, the Court of Small Causes had no jurisdiction to entertain the suit. The Trial Judge accepted the contention and dismissed the claim. His decree was reversed by the Full Court. The learned Chief Judge said: "The cause of action is framed no doubt on the basis of the liability incurred under s. 113 (1), but it sounds in damages. The remedy given by cl. (4) of that section is not as against an offence, where the aggrieved party should proceed by indictment." The Full Court held that the Act did not oust the jurisdiction of the ordinary Courts, and they passed a decree for Rs. 338 in favour of the Company.

The defendant has applied to us, under s. 115 of the C. P. C., asking for a revision of that decision on the ground that the said Court had erroneously assumed a jurisdiction which was not vested in it by law. In my opinion the application is competent. Where upon an erroneous construction of a Statute, a Subordinate Court assumes a jurisdiction which does not belong to it, the High Court has the power to revise its decision. In *Balakrishna Udayar* v. *Vasudeva Aiyar* (3) their Lordships referred to s. 115 and said (page 267)*: "It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." The case before us is a case of an illegal assumption of jurisdiction by the lower Court.

On the claim as made by the Railway Company, the remedy is to be found in s. 113, sub-s. (4) of the Act. The claim was in respect of "fare and excess charges" due and payable by the defendant according to law, he having travelled without having with him a proper pass or ticket. The Company relied on the following notice printed on the ticket; (1) "In the event of this ticket being lost, a fresh ticket will only be issued on payment of full charges and fresh deposit;" and (2) "This ticket must be produced when required."

It is necessary to refer to the relevant provisions of the Act, which, for this purpose, are ss. 68, 69 and 113. The first two sections come under Ch. VI which deals with the "Working of Railways." Section 68 is in these terms:—

"No person shall, without the permission of Railway servant, enter any carriage on a Railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket."

Then s. 69 says:—

"Every passenger by Railway shall, on the requisition of any Railway servant appointed by the Railway Administration in this behalf, present his pass or ticket to the Railway servant for examination, and at or near the end of the journey for which the pass or ticket was issued, or, in the case of a season pass or ticket, at the expiration of the period for which it is current, deliver up the pass or ticket to the Railway servant."

The consequences of a breach of these statutory obligations are made known in s. 113. It falls under Ch. IX which treats of "Penalties and Offences." The material portion of s. 113 runs thus: "(1) If a passenger travels in a train without having a proper pass, or a proper ticket with him" [this apparently has reference to s. 68] or, being in or having alighted from a train, fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefor under s. 69, he shall be liable to pay, on the demand of any Railway servant appointed by the Railway Administration in this behalf, the excess charge hereafter in this section mentioned, in addition to the ordinary single fare for the distance which he has travelled." Sub-section (3) deals with the excess charge referred to in sub-s. (1). By sub-s. (4) it is enacted that "If a passenger liable to pay the excess charge and fare mentioned in sub s. (1)......fails or refuses to pay the same on demand being made therefor......the sum payable by him shall, on application made to any Magistrate by any Railway servant appointed by the Railway Administration in this behalf, be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate and shall, as it is recovered, be paid to the Railway Administration." The defendant had admittedly purchased from the Railway Company for the sum of Rs. 65-12-0 a ticket or pass which entitled him to travel on the Company's Railway in a First Class carriage between Church Gate and Malad whenever and as often as he chose during the three months from January 26, to April 25, 1924. The Company, however, alleges that the defendant has committed a breach of the obligation contained in ss. 68 and 69 that he has rendered himself liable to a further payment under s. 113 (1); it accordingly claims Rs. 342 for the fare and for the excess charge. This claim the Company could enforce only in the manner prescribed by the Act. For, "the general rule of law (or rather of construction) is that where a general obligation is created by Statute and a specific statutory remedy is provided, that statutory remedy is the only remedy." (Craies' Statute Law, 2nd Edition, page 224). The defendant's liability to pay the ordinary fare and an excess charge arises not from the contract but from the Statute. And I agree with the Trial Judge when he says: "To my mind the defendant having already paid for all these journeys is not liable to the plaintiff under the Common Law for travelling without a ticket with him." The plaintiff Company has clearly brought its claim under s. 113 of the Act; the Act provides a particular remedy for enforcing it; and the plaintiff Company should follow that remedy.

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(3) 40 Ind. Cas. 650; 44 I. A. 261; 19 Bom. L. R. 715; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501. 22 C. W. N. 50; 11 Bur. L. T. 48 (P. C.).

*Page of 44 I. A.—[*Ed.*]

For these reasons, I agree to the order proposed by my Lord the Chief Justice.

N. H. *Rule made absolute.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 125 OF 1924.

February 8, 1926.

Present:—Mr. Rupchand Bilaram, A. J. C.

FIRM OF PARSRAM HIRJI—PLAINTIFFS

versus

FIRM OF PARSRAM HASSANAND—DEFENDANTS.

Stamp Act (II of 1899), ss. 32, 37, 57—Collector's certificate—Civil Court's power to question.

A Civil Court cannot review the certificate granted by the Collector under s. 32 of the Stamp Act and its validity cannot be challenged except under s. 57 of the said Act, on a reference by the Chief Controlling Revenue Authority. [p. 749, col. 2.]

Tukaram v. *Sonaji*, 10 Ind. Cas. 702; 7 N. L. R. 26, followed.

Suit on demand promissory note under O. XXXVII, C. P. C.

Mr. *Kodumal Lekhraj*, for the Plaintiffs.

Mr. *Srikishandas H. Lulla*, for the Defendants.

JUDGMENT.—This is a suit under O. XXXVII, C. P. C. for recovery of Rs. 1,970 with interest due on a demand promissory note executed by the Firm of Parsram Hassanand defendant in the suit in favour of the plaintiffs. The demand note is dated the 9th *Mangh Sambat* 1980 corresponding to the 15th February 1924. One Parsram son of Naraindas who was served as one of the partners of the defendant firm obtained leave to defend the suit and on the written statement filed by him the following issues were raised by the Court.

1. Was the defendant No. 1 (Parsram Naraindas) partner in the defendant firm.
2. Was the Bill of Exchange in suit drawn by the defendant firm and is it binding on the defendant No. 1.
3. Was there no consideration for the Bill of Exchange.
4. Had defendant No. 2 power to draw the Bill of Exchange.
5. Was the said bill presented to defendant No. 1 if not what is the result.
6. General.

On the evidence there can be no doubt that Parsram Naraindas was not only a partner in the firm but one of its principal partners and is liable on the demand note.

It appears that Parsram and Pessumal defendant No. 2 who are two brothers and one Hassanand or Assanand started their business on the *divali* day of 1923 in the name of Parsram Hassanand, Parsram being the name of the present contesting defendant, he being the older of the two brothers and Hassanand being the name of the third partner. The business which was in the actual management of Pessumal was carried on for a period of three or four months only resulting in a heavy loss. The defendant firm had dealings with the plaintiffs on which Rs. 1,970 was found due. Pessumal passed the demand note in favour of the plaintiffs and promised to get the plaintiffs money from Parsram who was then at Shikarpur. The plaintiffs deputed one of their servants Dewanmal Ex. 7 to Shikarpur to recover the amount. He presented the demand note for payment to Parsram. He was successfully put off by the two brothers and sent back to Karachi without payment and ultimately the plaintiffs were obliged to institute this suit. Pessumal has made himself scarce and the books of the partnership business are not forth coming.

The plaintiffs have proved by the evidence of Jessaram a servant at the defendant's firm that the business was started by the two brothers and Hassanand in partnership. His evidence finds corroboration in the evidence of Bhagwandas Ex. 9 who attended the opening ceremony of the firm and in the evidence of the plaintiffs' managing partner who is also one Parsram; that the defendant Parsram had come to his *kothi* to make purchases on behalf of the firm. In cross-examination of the witness Bhagwandas an attempt was made to show that the witness had never attended at the opening ceremony and his statement that he had made the customary deposit with the defendant's firm at the opening ceremony was challenged as untrue. The witness was thereupon sent to his place to produce his account books so as to substantiate his statement and within half-an-hour of the witness, giving evidence he produced his cash book kept in the regular course of business and put in entry Ex. 11 which amply corroborates his statement. The defendant Parsram has denied that he was in Karachi when the opening ceremony of the defendant's firm took place. He has been working at Karachi for over twenty years. He, however, attempted to lead the Court to believe that about this time he had temporarily gone to Bombay as a servant of one Hiranand Khushiram where he served for 5½ months and thereafter he went to Shikarpur and stayed at Shikarpur for 1½ months owing to ill health. He has failed to substantiate his evidence by the evidence of any other person. He pleaded ignorance of the business being done by his brother in the name of Parsram Hassanand and pretended that as he had not seen his brother's handwriting a long time he could not say for certain if the demand note was written by his brother though he admitted having mortgaged the family house on behalf of himself and his brother within 20 months of the date of his giving evidence, on the strength of a letter written to him by his absconding brother; that letter, however, he would not produce. I have no hesitation in holding that his evidence is false and my findings on the issues are as follows:—

Issues Nos. 1 and 2 in the affirmative.

Issue No. 3 that the demand note was for valuable consideration.

Issue No. 4 in the affirmative.

Issue No. 5 in the affirmative.

Issue No. 6. One further point has been raised and argued under this issue and which requires special notice.

The demand note sued on when it was first presented in Court bore a four-annas postage stamp. Both Parsram and Hassanand had applied for leave to defend the suit on the ground that neither of them was a partner. In his application for leave Parsram had in addition to the plea that he was not a partner raised the following further plea:—

Paragraph 3. "That a copy of the document served upon the applicant does not show that it is stamped and he consequently denies that it is valid in law."

It appears that at the hearing of the application for leave to defend he failed to urge that though the demand note bore a four-annas postal stamp it was not duly stamped and that no suit under the Summary Chapter could, therefore, be entertained. Both Parsram and Hassanand were given leave to defend on their furnishing security. Hassanand failed to give security and his application was dismissed. The order of security against Parsram was subsequently altered by the Court in view of the fact that his property had been attached and the attachment was considered sufficient security. It may fairly be assumed that the learned Additional Judicial Commissioner whose attention was drawn to the demand note at the hearing of the motion for leave to defend considered that the document was properly stamped and the learned Pleader for Parsram either waived his objection or did not consider it fit to press it. I am supported in this assumption by the fact that in the written statement filed by Parsram after he had obtained leave to defend the suit he did not raise this question or ask for a specific issue.

At the hearing when the document was being formally exhibited the learned Pleader re-agitated the question in a different form. He contended that as the document bore a four-annas postage stamp it was not duly stamped and could not be received in evidence.

Now under the Stamp Act of 1899 a demand note required the fixing of an adhesive stamp of one-anna. By Government of India Act XLIII of 1923 the duty for demand notes exceeding Rs. 1,000 in value was raised from one-anna to four annas. Under r. 16 of the Rules in force prior to the amending Act of 1923 it was permissible for the executing party to affix a stamp of one anna which was inscribed for use either for postage or for revenue or for both postage and revenue. The operation of the amending Act resulted in a two-fold hardship. On the one hand executants who were not aware of the excess duty imposed by the Legislature affixed one-anna stamp and on the other hand others, as the defendants in the present case affixed a four-annas postage stamp in ignorance of r. 16. By Act XIII of 1924 the Legislature has afforded relief in cases where the demand notes and other negotiable instruments were stamped according to the old law by declaring such documents to have been duly stamped and by r. 16 of the amended Rules promulgated on the 5th June 1925. The Legislature has further declared that the adhesive stamps affixed to a document may be those bearing the words "four-annas" or two-annas or "one-anna" or "half-anna" and such stamps may be inscribed for use either for postage or for revenue or for both postage and revenue. It would appear, therefore, that if this document had been executed after the 5th June 1925 it would indubitably have been deemed to be duly stamped. Whether r. 16 was intended to have a retrospective effect or not, in view of s. 76, cl (2) of the Act and the intention of the Legislature to remove the hardship caused by the amending Act of 1923 was a moot point. As the plaintiffs' Pleader was taken by surprise by the objection raised at the last moment, I permitted the document to be referred to in evidence subject to the decision as to its admissibility after the point was fully discussed. On 18th November 1925, I acceded to the request of the plaintiffs' Pleader to afford them an opportunity of approaching the Collector to validate the document under s. 37 of the Act and as the document had already been produced in Court directed the Registrar to send it to the Collector to enable the plaintiffs to apply to him but making it, however, clear by my order that it was for the Collector to decide and grant the necessary certificate if he considered it to be a fit case for such certificate being granted. The Collector has granted the necessary certificate. Mr. Lulla has applied for review of my order and has contended that the certificate granted by the Collector is *ultra vires* and therefore of no effect.

There is nothing in my order which requires to be reviewed. The course adopted by me was the one taken in *Tukaram* v. *Sonaji* (1) a case decided by the Nagpur Judicial Commissioner's Court. It was open to Mr. Lulla to appear before the Collector and to satisfy him that he had no jurisdiction under s. 37 of the Act, which he failed to do. If he could not attend on 18th November 1925 it was open to him to get a copy of my order and to apply to the Collector that the document could not be validated and if he has failed to obtain the copy of my order up to now he has to thank himself.

The certificate having been granted by the Collector its validity can only be challenged under s. 57 of the Act on a reference by the Chief Controlling Revenue Authority by a High Court and not by me. Under the circumstances I do not consider it either necessary or desirable to discuss the question whether the document was affixed with a stamp of improper description or not and if not whether r. 16 of the present Rules should be given retrospective effect.

I pass a decree in favour of the plaintiffs against the firm of Parsram Hassanand and its partners defendants Nos. 1, 2 and 3 for the amount in suit with interest at 6 per cent. per annum from date of suit to payment and costs.

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(1) 10 Ind. Cas. 702; 7 N. L. R. 26.

R. L. *Suit decreed.*
P. B. A.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 251 AND 264 OF 1924.
March 3, 1926.
Present:—Mr. Justice Das and
Mr. Justice Foster.
IN F. A. No. 251 of 1924
KAMLA PRASAD AND ANOTHER—OBJECTORS —APPELLANTS
versus
MURLI MANOHAR—APPLICANT AND ANOTHER—OBJECTOR—RESPONDENT.
IN F. A. No. 264 OF 1924.
CHATU LAL—OBJECTOR—APPELLANT
versus
MURLI MANOHAR—PETITIONER—RESPONDENT.

Probate and Administration Act (V of 1881), s. 21—Administration, grant of—Applicant claiming under Will—Administration completed—Application, whether to be rejected—Person challenging Will, position of—Grant of Letters—Title, effect on.

The fact that an applicant for Letters of Administration claims under the Will, but his claim is unsustainable, would not deprive him of his right to administer the estate if he is otherwise entitled to the grant under s. 21 of the Probate and Administration Act. [p. 751, col. 1.]

The distinction between an application for Letters of Administration and for Letters of Administration with the Will annexed is important and should not be overlooked. [p. 751, col. 2.]

It is of paramount necessity that the Will should be established and the establishment of the Will is one of the functions of the Probate Court, and, in the case of an application for Letters of Administration with the Will annexed, the Probate Court cannot decline to exercise that function on the ground that there is nothing to be administered. [*ibid.*]

Lalit Chandra Chowdhury v. *Baikuntha Nath Chowdhury*, 5 Ind. Cas. 395; 14 C. W. N. 463; 15 C. L. J. 305; distinguished.

A person who challenges the Will as a forgery is not entitled to make an application for Letters of Administration with the Will annexed. [p. 751, col. 1.]

A grant of administration does not decide any question of title. [p. 752, col. 1.]

Appeals from a decision of the District Judge, Muzaffarpur, dated the 10th September 1224.

IN F. A. No. 251 of 1924.

Messrs. *N. C. Sinha*, Rai *T. N. Sahai* and *Navadwipa Chandra Ghosh*, for the Appellant.

Messrs. *Khurshaid Hasnain* and *Bhagwan Prasad*, for the Respondents.

IN F. A. No. 264 of 1924.

Messrs. *C. C. Das* and *C. S. Banerjee*, for the Appellant.

Messrs. *Khurhsaid Hasnain*, *N. C. Sinha* and *Bhagwan Prasad*, for the Respondent.

JUDGMENT.

Das, J.—The question as to the genuineness of the Will was in controversy in the Court below, but is no longer in debate before us. The only question is whether Murli Manohar is entitled to a grant of Letters of Administration with the Will annexed. It is well-settled that the right of administration follows the right to the property. Murli Manohar claims that in the events which have happened he is now solely entitled to the estate of the deceased. By his Will the testator devised his estate to his widow and his two daughters-in-law and then provided as follows:—

"In case the said three *Musammats* die, Murli Manohar, son of Ram Charan Lal my brother's son shall be the heir and possessor of the properties."

It is contended on behalf of the appellant that s. 124 of the Indian Succession Act is directly applicable and that the bequest in favour of Murli Manohar cannot take effect as the uncertain event specified in the Will did not happen before the period when the "fund" bequeathed was payable or distributable. Now, the "fund", in this case, the estate of the testator, was distributable on his death and it is not disputed that all the three ladies survived him. The rule enunciated in s. 124 of the Succession Act is a rule of law and not a rule of construction, and, although it is not necessary for us to decide the point, it would appear that s. 124 operates so as to bar the right of Murli Manohar to take under the Will.

But my opinion on this point does not decide this case. The estate has never been administered in due course of law and it is necessary that the validity of the Will should be established and the estate administered. Murli Manohar is not a stranger. He is the nephew of the testator and in the words of s. 21 of the Probate and Administration Act "would be entitled to the administration of the estate of the deceased if he had died intestate". The ladies are dead and there is no other applicant for Letters of Administration. In these circumstances s. 21 of the Probate and Administration Act would seem to apply. That section provides as follows:—

"When there is no executor and no residuary legatee or representative of a residuary legatee or, he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the Will, and Letters of Administration may be granted to him or them accordingly."

It is contended by Mr. Naresh Chandra Sinha that his client Kamla Prasad is at least the sister's son of the last surviving widow and is in the position of the representative of the residuary legatee and so s. 21 will not operate in favour of Murli Manohar. There are two answers to this argument; first, the ladies were not residuary legatees but universal legatees and the representative of a universal legatee is not entitled to a grant of Letters of Administration, and secondly, Kamla Prasad is not only not an applicant for a grant of Letters of Administration, but has put it out of his power to make such an application. The position taken up by Kamla Prasad in his petition of objection is that the Will is a forgery and that the ladies were in possession not by virtue of the Will but adversely to the whole estate and had acquired a title to the estate by adverse possession. That being so we must assume that he is incapable to act in the discharge of his duties as administrator even if the term "residuary legatee" in s. 21 includes universal legatee. In my opinion s. 21 of the Probate and Administration Act is clearly applicable and Murli Manohar is entitled to the grant.

It was then contended that Murli Manohar did not base his claim on the terms of s. 21 of the Probate and Administration Act. It is quite true that Murli Manohar claimed under the Will and so far as I can see his claim under the Will cannot be sustained. But the Will has to be established and the estate has to be administered and we should not deprive Murli Manohar of his right to administer the estate if he is otherwise entitled to the grant under s. 21 of the Probate and Administration Act.

Two other points were argued before us. First, that there is nothing whatever to administer and that the Court below should on this ground have refused the application of Murli Manohar, and secondly, that the grant of Letters of Administration was in the discretion of the learned Judge and that he should not have exercised his discretion in favour of Murli Manohar. The first point raises a question of fact, a question which was not raised in the petition of objection or in the arguments in the Court below. Cases have been cited to us to show that the delay in the application should put the Court on an enquiry as to whether there is anything to be administered and the decision of the Calcutta High Court in *Lalit Chandra Chowdhury* v. *Baikuntha Nath Chowdhury* (1) was referred to. That was a case where the application was for Letters of Administration, not for Letters of Administration with the Will annexed. The distinction is important and should not be overlooked. It is of paramount necessity that the Will should be established and the establishment of the Will is one of the functions of the Probate Court and the Probate Court cannot decline to exercise that function because the administration is complete. In this case the widows were in possession for many years without applying for Letters of Administration. It is the case of Kamla Prasad that the Will is a forgery, that the widows acquired a title by adverse possession and that he, as the heir of the last surviving widow, is entitled to the whole estate. If we refuse to entertain the application, then the Will is put out of the way and there is nothing in the world to prevent Kamla Prasad from claiming a title to the property adversely to the estate of the testator. In my opinion the argument is an impossible one and should not find favour in this Court.

The last contention is that the learned Judge in the Court below should not have exercised his discretion in favour of the applicant for Letters of Administration. This is a matter not for us but for the Court below and this Court will not interfere with the discretion exercised by the learned Judge unless it is satisfied that that discretion was unreasonably exercised. I am not prepared to say that that discretion was unreasonably exercised. On the contrary having regard to the facts and circumstances of the case I am clearly of opinion that the discretion was properly exercised. The appeal fails and must be dismissed with costs.

The appellant in F. A. No. 264 of 1924 is the brother of Murli Manohar and he is anxious that nothing should be decided in these proceedings to affect his title to the estate. A grant of administration does not decide any question of title. It merely decides the right to administer. There is no substance in this appeal which must be dismissed with costs.

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(1) 5 Ind. Cas. 395; 14 C. W. N. 463; 15 C. L. J. 305.

Hearing fee five gold *mohurs* in each case.

Foster, J.—I agree.

N. H. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 168 OF 1923.
September 2, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.
JINABHAI NATHABHAI RASHIA—PLAINTIFF—APPELLANT
versus
THE COLLECTOR AND TALUQDARI SETTLEMENT OFFICER—DEFENDANT—RESPONDENT.

Gujarat Taluqdars' Act (VI of 1888), s. 33—Bombay Land Revenue Code (Act V of 1879), ss. 111, 150—Land revenue, meaning of—Taluqdari Settlement—Officer's powers to recover arrears of rent.

The term 'land revenue' as used in s. 150, Bombay Land Revenue Code, is not confined to one particular kind of land revenue, namely, assessment but covers every other kind of revenue from land payable to Government by any person on account of land held by or vested in him. [p. 752, col. 2; p. 753, col. 1.]

Section 33, Gujarat Taluqdars' Act, gives complete powers to a Government Officer in the temporary management of a *taluqdar's* estate to recover arrears of revenue including rent. [p. 752, col. 2.]

First appeal from a decree passed by the Joint Judge, at Ahmedabad, in Civil Suit No. 7 of 1921.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *Dave* (with him Mr. *R. J. Thakor*), for Respondent No. 2.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to recover the sum of Rs. 57-4-9 which the defendant's officers were alleged to have unjustly and unlawfully levied from him on September 22, 1920, and to have a permanent injunction restraining the defendant in future from recovering either by himself or through his officers any amount in excess of what he had been paying for the land in his possession. The first question was whether the plaintiff as a tenant of the suit land was a permanent tenant of the *taluqdar* of Dehwan at a fixed rent or a tenant-at-will. It can hardly be disputed that the Judge was right in holding that the plaintiff failed to prove anything in the nature of a permanent tenancy.

The next question then was whether the arrears of rent which had been recovered by the defendant were illegally recovered under powers not possessed by the defendant who was a Taluqdari Settlement Officer. Section 111 of the Land Revenue Code has been incorporated in s. 33 of the Gujarat Taluqdars' Act VI of 1888 and now runs as follows:—

"In the event of any *taluqdar's* estate coming under the temporary management of Government Officers, it shall be lawful for the Collector, Taluqdari Settlement Officer, or other officer appointed by Government in this behalf, subject, in any case, to which it applies, to the proviso to s. 29 of the Gujarat Taluqdars' Act, 1888, to let out the lands thereof at rates determined by means of a Survey Settlement or at such other fixed rates as he may deem to be reasonable, and to sell the occupancy of unoccupied lands by auction, and otherwise to conduct the revenue management thereof under the rules for the management of unalienated lands not comprised within a *taluqdar's* estate, so far as such rules may be applicable and for so long as the said estate shall be under the management of Government Officers."

It would appear that that section gives complete powers to a Government Officer in the temporary management of a *taluqdar's* estate to manage the revenue in the same way as the Collector would manage the revenue of an unalienated village. The contention is that in this case the payments exacted from the plaintiff were payments of rent and not land revenue, and that under s. 150 of the Land Revenue Code only arrears of land revenue could be recovered by the process mentioned in that section. There is no definition of the term "land revenue" in the Land Revenue Code, although in the Bombay Revenue Jurisdiction Act which was passed three years before the Land Revenue Code, "land revenue" is defined as meaning "all sums and payments, in money or in kind received or claimable by or on behalf of Government from any person on account of any land held by or vested in him, and any cess or rate authorised by Government under the provisions of any law for the time being in force." It seems to me that we cannot restrict the meaning of the term "land revenue" in s. 150 to one particular kind of land revenue, that is to say, assessment, so that, if any other kind of revenue from land is payable to Government by any person on account of any land held by or vested in him, and he falls into arrears in the payment of such revenue, it cannot be recovered from him under s. 150. But in any event the words of s. 33 of the Gujarat Taluqdars' Act are wide enough to give the Collector full powers of management for the collection of revenue in the same way as the Collector enjoys for the management of unalienated land. It would certainly be a very strange thing if the Taluqdari Settlement Officer in charge of the *taluqdar's* estate should have to proceed by the ordinary process of the Civil Courts before he could recover the arrears of revenue. A reference may be made to s. 86 by which "superior holders shall upon written application to the Collector, be entitled to assistance, by the use of precautionary and other measures, for the recovery of rent or land revenue payable to them by inferior holders, or by co-sharers in their holdings, under the same rules, except that contained in s. 137, and in the same manner, as prescribed in Ch. XI for the realization of land revenue by Government." It would be still more remarkable if, when a superior holder is entitled to get such assistance from the Collector, the Collector himself when in charge of a *taluqdari* estate had not the same powers for the recovery of arrears of revenue due from persons by whom lands within the *taluqdar's* estate are held.

Reference may also be made to *Daluchand Fulchand* v. *Gulabbhai Kanthadji* (1) in which it was held by Mr. Justice Heaton that the provisions of the Land Revenue Code would apply in cases where a *taluqdar's* estate came under the temporary management of Government Officer, so that he would be empowered thereunder to attach and recover all arrears. In that case the arrears to be recovered were arrears of assessment, but the *ratio decidendi* that s 33 gave the Collector the same powers which he had under the Land Revenue Code to recover assessment, would apply to this case, so that, in my opinion, the Collector had power to enforce the payment of arrears of revenue. I think that the judgment of the Court below is right and the appeal must be dismissed with costs.

Coyajee, J.—I agree. By s. 33 (2) of the Gujarat Taluqdars' Act, 1888, it is enacted that the provisions of the Bombay Land Revenue Code when applied to any estate to which that Act extends "shall be subject to the following modification, namely:—(*e*) for s. 111 the following section shall be deemed to be substituted, *viz.*:—

"Section 111. In the event of any *taluqdar's* estate coming under the temporary management of Government Officers, it shall be lawful for the Collector, Taluqdari Settlement Officer, or other officer appointed by Government in this behalf...to let out the lands thereof at rates determined by means of a Survey Settlement or at such other fixed rates as he may deem to be reasonable, and to sell the occupancy of unoccupied lands by auction, and otherwise to conduct the revenue management thereof under the rules for the management of unalienated lands not comprised within a *taluqdar's* estate so far as such rules may be applicable."

In my opinion the expression "rules for the management of unalienated lands" occurring in that section, whatever else it may mean, includes the relevant provisions of the Bombay Land Revenue Code. Section 111, as thus substituted, provides for the revenue management of *taluqdari* estates, which may be temporarily under Government management. It does not say that the powers of the Taluqdari Settlement Officer during his management are only those possessed by the *taluqdar* himself before the management begins. He is expressly empowered to let out the lands of the estate at such fixed rates as he might deem to be reasonable, to sell the occupancy of unoccupied lands by auction "and otherwise to conduct the revenue management thereof under the rules for the management of unalienated lands."

He is, in my judgment, empowered when necessary, to take action under ss. 150, 152 and 154 of the Land Revenue Code. This construction is in consonance both with the object and the provisions of the Gujarat Taluqdars' Act. The object apparently is that the management should be conducted expeditiously and economically within the legal rights possessed by the Collector or the Taluqdari Settlement Officer as the case may be. In this case a detailed survey was introduced in the village of Gou-a where the lands in suit are situated, in the year 1912, some time after the Government management began. All the holdings were then treated as tenancies-at-will. This led to the institution of Suit No. 22 of 1913 as a test case, in which Dola Jita and another asked for a declaration that their holdings were held by them on permanent tenure, and that they were not liable to ejectment while they paid the *salami*. The suit failed both in the District Court and, on appeal, in the High Court. Thereafter the notice, Ex. 40, was served on the plaintiff in this case in December 1918. On his failing to comply with it, the Taluqdari Settlement Officer adopted the measures of which the plaintiff now complains.

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(1) 34 Ind. Cas. 198; 18 Bom. L. R. 323.

In my opinion, the conclusions arrived at by the Trial Judge are right; and I would add that in the Trial Court the defendant's Counsel stated that his client had no intention of evicting the plaintiff and, therefore, the Judge did not consider the third issue in the case.

R. L. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 45 OF 1924.

August 11, 1925.

Present:—Mr. Kotval, A. J. C.

Musammat ASABI AND OTHERS—
DEFENDANTS—APPELLANTS
versus
KANHYALAL—PLAINTIFF—RESPONDENT.

Muhammadan Law—Dower—Widow in possession of husband's property—Widow's right against secured creditor.

A Muhammadan widow in possession of her husband's estate in lieu of her dower has no right to retain possession against a creditor of her husband whose debt is secured by that estate.

Hamira Bibi v. *Zubaida Bibi*, 36 Ind. Cas. 87; 38 A. 581; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517; 43 I. A, 294 (P. C.), *Maina Bibi* v. *Vakil Ahmad*, 86 Ind. Cas. 579; 52 I. A. 145; 23 A. L. J. 115; A. I. R. 1925 P. C. 63; 2 O. W. N. 180; L. R. 6 A. (P. C.) 25; 48 M. L. J. 667; 27 Bom. L. R. 796; 47 A. 250 (P. C.), distinguished.

Ameer Ammal v. *Sankaranarayana Chetty*, 25 M. 658 and *Beeju Bee* v. *Moorthiya Sahib*, 53 Ind. Cas. 905; 43 M. 214; 37 M. L. J. 627; 26 M. L. T. 419; 11 L. W. 150, referred to.

Appeal against a decree of the Subordinate Judge, First Class, Betul, dated the 12th of February 1924.

Mr. *Fida Hussain*, for the Appellants.

Messrs. *M. N. Fog* and *K. M. Dharmadhikari*, for the Respondent.

JUDGMENT.—The plaintiff Kanhaiyalal sues on a mortgage, dated the 20th July 1909, executed by one Sultan deceased and his sons Sarwar, Fattu and Chhotoo. Fattu and Chhotoo are dead. Sarwar is defendant No. 1. Mulanbi widow of Sultan is defendant No. 2. Minubi and Asabi widows and Kamru, Nasru and Rahmu sons of Fattu are defendants Nos. 3 to 7. *Musammat* Nazim widow and Sheikh Chand son of Chhottoo are defendants Nos. 9 and 10. Defendant No. 8 Minaruddin is a transferee from defendants Nos. 3, 5, 6 and 7.

The defence pleas with which we are concerned in this appeal are two. The first is that the mortgage-deed is not duly attested and the second that Minubi, Asabi and Nazimbi being in possession of the mortgaged property under a claim of dower since 1920, when their husbands Fattu and Chhotoo died, their lien of dower has priority over the mortgagee's lien. Both pleas have failed in the lower Court and the three widows have appealed.

[The discussion of first defence plea is not necessary for purposes of this report and is, therefore, omitted:—*Ed.*]

As regards the second point it is argued that the right of widows to retain possession is available against everybody including even the secured creditor of her husband. A claim for dower is a debt and ranks with unsecured debts of the husband: *Hamira Bibi* v. *Zubaida Bibi* (1). But when a widow has lawfully and without force or fraud taken possession of her husband's estate in lieu of dower she has the right to retain it till the dower is paid. The right has no analogy to a mortgage for the widow has no estate or interest in the property: *Maina Bibi* v. *Vakil Ahmad* (2). The cases cited in support of the right are cases between the widow and the heirs of her deceased husband where the right was held available against the heirs. No authority has been quoted where it has been held to prevail against creditors holding the security of the husband's property. The reason for allowing the right of retention as against the heirs appears to be that dower has priority over the rights of the husband's heirs and the legacies bequeathed by him.

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(1) 36 Ind. Cas. 87; 38 A. 581; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517; 43 I. A. 294 (P. C.).

(2) 86 Ind. Cas. 579; 52 I. A. 145; 23 A. L. J. 115; A. I. R. 1925 P. C. 63; 2 O. W. N. 180; L. R. 6 A. (P. C.) 25; 48 M. L. J. 667; 27 Bom. L. R. 796; 47 A. 250 (P. C.).

In *Ameer Ammal* v. *Sankaranarayana Chetty* (3) the property of which the widow was in possession had been mortgaged by the husband and the mortgagee had it sold in execution of his decree. It was held that the widow was not entitled to retain possession of it against the purchaser. This case has been cited without comment or disapproval in their books on Muhammadan Law by Mulla and Tyebji though Ameer Ali in his book expresses the opinion that the view taken in that ruling is rather strained. Ameer Ali's opinion is based on the view that once the widow lawfully obtains possession in lieu of her dower, her position becomes that of a mortgagee in possession. This view, however, has not been endorsed in *Maina Bibi* v. *Vakil Ahmad* (2). The case has also been referred to in *Beeju Bee* v. *Moorthiya Sahib* (4) apparently with approval.

I am, therefore, of opinion that a Muhammadan widow in possession of her deceased husband's estate in lieu of dower has no right to retain possession against a creditor of her husband whose debt is secured by that estate.

The appeal fails and is dismissed. The costs of respondent No. 1 will be paid by the appellants.

R. L. *Appeal dismissed.*

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(3) 25 M. 658.

(4) 53 Ind. Cas. 905; 42 M. 214; 37 M. L. J. 627; 26 M. L. T. 419; 11 L. W. 150.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 226 OF 1925.

September 29, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

SHESHAGIRI SHAMBULINGA UPADHYA AND OTHERS—APPLICANTS

versus

MANJAYA SANNAYA SHANBHOG—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Mesne profits subsequent to High Court decree—Valuation.

Mesne profits subsequent to the date of the High Court decree which have been awarded to the decree-holder, cannot be taken into consideration in making an estimate of the value under para. 2 of s. 110, C. P. C.

Raoji Bhikaji v. *Lakmibai*, 55 Ind. Cas. 972; 44 B. 104; 22 Bom. L. R. 243, *Surendra Nath Roy* v. *Dwarka Nath Chakrabutty*, 35 Ind. Cas. 605; 44 C. 119; 24 C. L. J. 350; 21 C. W. N. 530, *Mahabir Prasad Singh* v. *Anup Narain Singh*, 46 Ind. Cas. 137; 3 P. L. J. 377; (1918) Pat. 246; 5 P. L. W. 327, *Moti Chand* v. *Ganga Prasad Singh*, 24 A. 174; 29 I. A. 40; 6 C. W. N. 362; 4 Bom. L. R. 159; 8 Sar. P. C. J. 247 (P. C.), *Subramania Aiyar* v. *Sellammal*, 31 Ind. Cas. 296; 39 M. 843; 2 L. W. 1057; 18 M. L. T. 450; (1915) M. W. N. 941; 30 M. L. J. 317; *Gooroopershad Khoond* v. *Juggutchunder*, 8 M. I. A. 166; 3 W. R. P. C. 14; 13 Moo. P. C. 472; 1 Suth. P. C. J. 399; 1 Sar. P. C. J. 742; 19 E. R. 493; 15 E. R. 117; 132 R. R. 150 and *Doorga Dass Chowdry* v. *Ramanauth Chowdry*, 8 M. I. A. 262; 19 E. R. 530; 1 Sar. P. C. J. 772, referred to.

Mr. *Jayakar* (with him Messrs. *S. S. Patkar* and *S. N. Karnad*), for the Applicants.

Mr. *G. P. Murdeshwar*, for Opponent No. 1.

JUDGMENT.—A question has been raised as to whether mesne profits subsequent to the date of the High Court decree, which have been awarded to the decree-holders, can be taken into consideration in making an estimate of the value under para. 2 of s. 110 of the C. P. C. In our opinion, the answer to this is that they cannot. It has been held in *Raoji Bhikaji* v. *Lakmibai* (1) following the case of *Surendra Nath Roy* v. *Dwarka Nath Chakrabutty* (2) that the value under s. 110 ought to be ascertained as at the date of the High Court decree under appeal, and on that principle mesne profits subsequent to the decree cannot be taken into account. There is no practice of this Court allowing such mesne profits to be taken into account and the practice of the Calcutta High Court referred to in *Mahabir Prasad Singh* v. *Anup Narain Singh* (3) covers only mesne profits up to the date of the decree of the Appellate Court. The decision of the Privy Council in *Moti Chand* v. *Ganga Prasad Singh* (4) that interest subsequent to a decree should not be allowed to be included,—would seem applicable to the case of mesne profits, as has been held in *Subramania Aiyar* v. *Sellammal* (5) and the old rulings of the Privy Council in *Gooroopershad Khoond* v. *Juggutchunder* (6) and

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(1) 55 Ind. Cas. 972; 44 B. 104; 22 Bom. L. R. 243.

(2) 35 Ind. Cas. 605; 44 C. 119; 24 C, L. J. 350; 21 C. W. N. 530.

(3) 46 Ind. Cas. 137; 3 P. L. J. 377; (1918) Pat. 246; 5 P. L. W. 327.

(4) 24 A. 174; 29 I. A. 40; 6 C. W. N. 362; 4 Bom. L. R. 159; 8 Sar. P. C. J. 247 (P. C.).

(5) 31 Ind Cas. 296; 39 M. 843; 2 L. W. 1057; 18 M. L. T. 450; (1915) M. W N. 941; 30 M. L. J. 317.

(6) 8 M. I. A 166; 3 W. R. P. C. 14; 13 Moo. P. C. 472; 1 Suth. P. C. J. 399; 1 Sar. P. C. J, 742; 19 E. R. 493; 15 E. R. 117; 132 R. R. 150.

Doorga Dass Chowdry v. *Ramanauth Chowdry* (7) were against any inclusion of interest or mesne profits claimed subsequent to the decree.

Therefore, we direct the lower Court to inquire whether the final order of this Court involves directly or indirectly some claim or question to or respecting property of Rs. 10,000 or upwards taking such property to be land in suit as at the date of the High Court decree, namely, August 22, 1924, and excluding any mesne profits awarded under the decree.

R. L. *Order accordingly.*

(7) 8 M. I. A. 262; 19 E. R. 530; 1 Sar. P. C. J. 772.

MADRAS HIGH COURT.

CIVIL APPEAL No. 347 OF 1922.

February 2, 1925.

Present:—Sir Charles Gordon Spencer, KT., and Mr. Justice Odgers.

S. A. MUHAMMAD YAKUB SAHIB
—PLAINTIFF—APPELLANT
versus
MAHABOO BI BI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58—Construction of document—Sale of property with right to re-purchase—Sale or security for money.

A person executed a sale of certain properties to another for Rs. 3,500 and on the same day obtained a counter-agreement from the vendee providing that at the end of any *fasli* before three years from date, the vendor might re-purchase the property conveyed on paying the total sale price. The property sold was worth very much more than Rs. 3,500. The vendor was to bear the expenses of the deed of re-conveyance and was also to pay interest on a sum of money payable to a third person to whom the property had been usufructuarily mortgaged and whose mortgage had two years more still to run. There was no defeasance clause on the grantor or vendor failing to pay by the fixed date. There was a power in the vendee to recover the sum named as the price of re-purchase. Moreover the price payable by the grantor on the re-purchase was not fixed but was subject to an account for the cost of a well and for repairs. The two deeds were executed within two hours of each other. They were registered together and the stamp papers bore consecutive numbers:

Held, that the documents really and substantially formed a single transaction and the conveyance was not intended as an absolute sale but only as a security for the money. [p. 757, col. 2; p. 758, col. 1.]

Palaniappan v. *Subbaraya Gounden*, 22 Ind. Cas. 4; 1 L. W. 80; 14 M. L. T. 579; (1914) M. W. N. 222, *Bapuji Apaji* v. *Senavaraji Marvadi*, 2 B. 231; 1 Ind. Dec. (N. S.) 580 and *Narasingerji Gyanagerji* v. *Panuganti Parthasaradhi*, 82 Ind. Cas. 993; 47 M. 729; A.I.R. 1924 P. C. 226; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 40 C. L. J. 481; 27 Bom. L. R. 4; 29 C. W. N. 246; 51 I. A. 305; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 684 (P. C.), relied on.

Appeal against a decree of the District Court, North Arcot at Vellore, in O. S. No. 74 of 1920.

Mr. *K. Rajah Iyer*, for the Appellant.

Mr. *K. Narasimha Iyer*, for the Respondents.

JUDGMENT.

Odgers, J.—In this case the parties are Muhammadans. The plaintiff is the son of defendant No. 1 his mother. Defendant No. 2 is said to be the foster daughter's husband of defendant No. 1. The plaintiff came of age at the end of 1916. His mother and as he alleges, defendant No. 2 managad his properties during his minority. In O. S. No. 55 of 1911 on the file of the Sub-Court, North-Arcot, the plaintiff brought a suit against defendant No. 1 to recover the value of alienations improperly made by her of his property during his minority and got a decree for Rs. 3,885-14-0. On 19th July, 1908, defendant No. 1 executed to defendant No. 2 an ostensible sale-deed of her own properties (Ex. A) and on the same day a counter-agreement Ex. B for the re-purchase of these properties was executed between the same parties. On 27th November 1919, two days after the institution of the suit O. S. No. 55 of 1919 above referred to, defendant No. 1 executed another deed (Ex. G) in favour of defendant No. 2 whereby she purported to release to defendant No. 2 her right of purchase under Ex. B. The plaintiff seeks to have it declared (*a*) that defendant No. 1's right of redemption in her properties still subsists and, therefore, that it is liable to attachment to satisfy plaintiff's decree in O. S. No. 55 of 1919, in other words that Exs. A and B are in fact a mortgage by conditional sale and not a sale with an option of re-purchase and (*b*) that Ex. G is voidable and should be avoided under s. 53 of the Transfer of Property Act.

Defendant No. 1 has been *ex parte* throughout.

The District Judge found that the transaction was not a mortgage but a sale with option of re-purchase and further that Ex G did not offend against the provisions of s. 53 of the Transfer of Property Act. Hence this appeal by plaintiff.

The first question, therefore, for decision is whether Exs. A and B really evidence n intention to effect a mortgage by conlitional sale. Exhibit A was, as stated, xecuted on 19th July, 1908, and according o P. W. No. 1 at 9 A. M. in the morning. t purports to be an out-and-out sale the onsideration being Rs. 700 in cash and the ayment of Rs. 2,800 due on a prior possessory mortgage and promissory note in avour of one Ibrahim Sahib. There is no nention of Ex. B in Ex. A. Exhibit B said o have been executed at 11 A. M. on the ame day refers to Ex. A and stipulates hat at the end of any *fasli* before 30th June 1911, defendant No. 1 may re-purchase he property conveyed by Ex. A, on paying the said total sale price Rs. 3,500" "according to the followings particulars, he expenses incurred by digging and constructing new wells or by re pairs to be paid back. Defendant No. 1 was to bear the expenses of the deed of re-conveyance. The executant of Ex. B defendant No. 2 was out of possession of the properties purported to be transferred by Ex. A till 30th June 1910 the possessary mortgagee Ibrahim being in possession till then. He, therefore, stipulated that defendant No. 1 should pay him 12 per cent. on the Rs. 800 (or Rs. 700) said to have been advanced by himself. The expenses for wells and repairs were also to be ascertained and re-paid. Is this a mortgage or an outright sale with option of re-purchase? To begin with, the lands purport to be sold for Rs. 3,500. They are about 8 acres in extent. Plaintiff witness No. 1 (an attestor) declares that the lands are worth more than Rs. 3,500. Plaintiff witness No. 3 says that 10 or 12 years ago (he was giving evidence in 1922) the lands would be worth Rs. 800 (a *cawni*). He himself purchased adjoining lands at Rs. 800 a *cawni* and sold them for Rs. 1,450. Four of the $5\frac{1}{2}$ or 6 *cawnies* of the suit lands are "best". He purchased lands in 1912 for Rs. 520 to Rs 675 an acre. Objection is made that these transactions are not supported by documents whereas D. W. No. 2 purchased lands in the same village 2 acres (Ex. 5) at Rs. 485 an acre. He had, however, to build a new well at a cost of Rs. 300. The lands of defendant No. 1 have good irrigation. Defendant witness No. 3 purchased 1 acre 64 cents at Rs. 350 per acre (Ex. VI, 1906). On a consideration of the whole evidence, on this point, I have come to the conclusion that the value of the lands in question in 1908 was about Rs. 6,500; at all events, very much more than Rs. 3,500. This is a strong indication that a sale was not intended: *Narasingerji Gyanagerji* v. *Panuganti Parthasaradhi* (1). Again interest is payable on the Rs. 800. There is no evidence of bargaining over the sale price: see *Narasingerji Gyanagerji* v. *Panuganti Parthasaradhi* (1). It is said for the respondent that this was payable for two years only as defendant No. 2 was necessarily out of possession for this period that is, of course, assuming that payment had to be made by 30th June, 1910. If time was really of the essence of the contract, what was the need for Ex. G in 1919 nine years after the lands had passed according to respondents irrevocably into the possession of defendant No. 2? Further there is no defeasance clause on the grantor or vendor failing to pay by the fixed date. Again, the grantor or mortgagor (defendant No. 1) had to pay the costs of the re-conveyance; this is a sign of a mortgage, (*cf.* s. 60, Transfer of Property Act), whereby the mortgagor has a right to redeem on payment of the costs. Was there a power in the vendee, to recover the sum named as the price of re-purchase? I think there was.

"I undertake to execute a sale-deed in your favour according to your request (another sign of a mortgage (*cf.* s. 60 of the Transfer of Property Act) at your expense within the said fixed time, on condition of your paying the sale price, interest and other expenses". Moreover the price payable by the grantor on the re-purchase was not fixed but was subject to an account for the cost of the well and repairs. In addition to these facts, we have the two deeds (Exs. A and B) executed within two hours of each other. They were registered together, the stamp papers bear consecutive numbers (*cf.* cross-examination of defendant No. 2 as D. W. No. 4). In my opinion these two documents really and substantially form a single transaction within the ruling in *Palaniappan* v. *Subbaraya Gounden* (2) for although Ex. A does not refer to Ex. B. Exhibit B does refer to Ex. A. The question is whether Exs. A and B taken together were intended as a security for money. I have no hesitation in holding they were. Some of the *indicia* of such a transaction are classically set out in Butler's Coke on Litleton cited in *Bapuji Apaji* v. *Senavaraji Marvadi* (3). The passage is as follows:—

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(1) 82 Ind. Cas. 993; 47 M. 729; A. I. R. 1924 P. C 226; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J 809; (1924) M. W. N. 915; 40 C. L. J. 481; 27 Bom. L R. 4; 29 C. W. N. 246; 51 I. A. 305; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 684 (P. C.).

(2) 22 Ind. Cas. 4; 1 L. W. 80; 14 M. L. T. 579; (1914) M. W. N. 222.

"In many of these cases the Courts have found it necessary, not only to apply their general principles, but to determine the fact, whether the conveyance was intended as an absolute sale, or as a security for the money. If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him, if he was not let into the immediate possession of the estate; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest; or, if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered by the Courts as tending to prove that the conveyance was intended to be merely pignorititious".

With many of these particulars the plaint transactions agree and the passage fortifies my own opinion of them.

As my conclusion on the first point must be in favour of the appellant, it seems hardly necessary to discuss the second as to which the District Judge has given no reasons for his finding. Exhibit G does not purport to be a release of the equity of redemption. The words translated 'right of purchase' should, it is said, more properly be "the right belonging to me" I give up. In para. 10 of his written statement defendant No. 2 denies that defendant No. 1 had any right of redemption in the suit properties or that Ex. G parted with any such right. Defendant No. 2 as D. W. No. 4 says he took Ex. G from defendant No. 1 as the period fixed in Ex. B 1919 was over and he asked defendant No. 1 for the money he had lent her.

"He said she would file a suit. She said she had time to get back the lands and frightened me with threats of a suit."

This confirms the view taken of the transactions. The threatened suit could have been nothing but a suit for redemption. Defendant No. 1 said "she had time". If the property had become the defendant No. 2's on 30th June, 1910, this was of course absurd in 1919. Defendant No. 1 does not come forward to say that it was the equity of redemption she parted with by Ex. G. Defendant No. 2 admits that nothing was paid under Ex. G the consideration for which was the amount previously paid to defendant No. 1 by defendant No. 2 under the promissory note referred to in the document. The witness to this promissory-note transaction was admittedly alive and was not called. The promissory note is not forthcoming and no reasons for the borrowing are alleged. It is said to have been delivered up to defendant No. 1 when Ex. G was executed. If it was in existence, it could have been produced though defendant No. 1 was *ex parte*. No reference is made in the written statement of defendant No. 2 to the promissory note but in para. 10, defendant No. 2 says he advanced defendant No. 1 money for maintenance. This he in cross-examination admits to be untrue. He says, he had no knowledge of the institution of the Suit No. 55 of 1919. No summons had been served on him at the date of Ex. G. This is by no means conclusive as to defendant No. 2's knowledge.

An effort was made to show that there was no collusion between defendant No. 1 and defendant No. 2 but I am not satisfied as to this. In O. S. No. 55 of 1919 it is true defendant No. 1 was *ex parte*. Plaintiff withdrew the suit against defendant No. 2 with liberty to bring another. He was apparently not then in a position to prove that defendant No. 2 had anything to do with the alienation of his (plaintiff's) properties. Defendant No. 2 admits that defendant No. 1 is the widow of his wife's maternal uncle. I think that under the circumstances in which Ex. G came to be executed, as far as appears from the document and from the evidence, it was a collusive and fictitious document got up between defendant No. 1 and defendant No. 2 for the purpose of attempting to place the property of defendant No. 1 beyond the reach of plaintiff in his execution proceedings. In my opinion it falls within the mischief of s. 53, Transfer of Property Act, and should be set aside.

The result is that the appeal is allowed with costs throughout and a decree will be passed for plaintiff as prayed.

Spencer, J.—I agree.

V. N. V. *Appeal allowed.*

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(3) 2 B. 231; 1 Ind. Dec. (N. S.) 580.

OUDH CHIEF COURT.

First Civil Appeal No. 49 of 1925.
March 31, 1926.
Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.
BHAWANI DIN and others—Defendants—Appellants
versus
SATROHAN SINGH and others—Plaintiffs—Respondents.

Procedure—Mortgage, suit on—Redemption decree.

In a suit for possession by a mortgagee under the terms of the mortgage, a mortgagor endeavouring to get the mortgage set aside cannot be given a decree for redemption without a suit to that effect on his plea that in the event of mortgage being held to be good against him he should be permitted to redeem it.

Mohammad Sher Khan v. *Swami Dayal*, 66 Ind. Cas. 853; 25 O. C. 8; 44 A. 185; 20 A. L. J. 476; 9 O. L. J. 81; 49 I. A 60; 30 M. L. T. 220; 42 M. L. J. 584; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) M. W. N. 378; A. I. R. 1922 P. C. 17; 4 U. P. L. R. (P. C.) 50; 28 C. W. N. 79 (P. C.), distinguished.

Appeal against a decree of the Subordinate Judge, Sitapur, dated the 3rd February 1925.

Messrs. *A. P. Sen* and *H. K. Ghose*, for the Appellants.

Mr. *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—Bhawani Din executed on the 2nd August, 1919, a deed of mortgage in favour of the plaintiffs-respondents. Under the terms of this deed, if he did not make a certain payment by the 2nd of September 1924, the plaintiffs respondents became entitled to the possession of the mortgaged property. He did not make this payment and the plaintiffs-respondents sued for possession. Bhawani Din was permitted to take many pleas in this suit which he should not have been allowed to take. Amongst other pleas he set up that he had sons and grandsons who, with him, were members of a joint Hindu family and that they should be made parties to the suit. They were made parties to the suit. Then various unnecessary points were gone into as to antecedent debts and the like. All that the Court had to find was whether Bhawani Din, owing to the circumstances that he had, as alleged, broken his contract, was under an obligation to give possession of the land in question to the plaintiffs-respondents. The lower Court found that he had contracted to make a certain payment which he had not made and in consequence was obliged to give possession of the land. It was both undesirable and unnecessary to go into the question as to how the accounts should be made up in the event of a suit for redemption. The Trial Judge rightly refused to decide that matter as a whole, although he, somewhat unfortunately, expressed his views as to the extent to which the deed bound the sons and grandsons of Bhawani Din who had not been originally parties to the suit, but the decree was a good decree as it simply awarded possession. We do not propose to interfere with the decree, but we wish to make it clear at the outset that this judgment should not operate in any way in the event of a suit being filed for redemption when the whole matter should come up again as *res integra.*

We now come to the main point, which was argued before us on appeal. Bhawani Din, while denying all liability under the mortgage and endeavouring to get the mortgage set aside, concluded his written statement with a plea that in the event of the mortgage being held to be good against him he should be permitted to redeem it in the suit for possession. His sons and grandsons ask for a similar indulgence. The late Judicial Commissioner's Court invariably refused to permit a defendant to obtain a decree for redemption in a suit of this nature. That has been laid down in many decisions. We know of no authority of any other Court, in which such a privilege was extended to a defendant in a suit for possession. The decision of their Lordships of the Privy Council in *Mohammad Sher Khan* v. *Swami Dayal* (1) affords no authority in support of the proposition for which the learned Counsel for the appellants contends. There the mortgagee had been decreed possession over the mortgaged land. Subsequently the mortgagor sued for redemption in a separate suit. His prayer to redeem was rejected. Before he could be permitted to redeem, the possession of the mortgagee would have necessarily had to be set aside, and for this reason, and this reason only, their Lordships of the Privy Council consolidated the two appeals, and decided them both by a decision that the mortgagor should be permitted to redeem; but they nowhere countenanced the suggestion that where no suit for redemption had been brought, a mortgagor should be given a decree to redeem in a suit, where he was sued for possession which he had wrongfully refused to give to the mortgagee under the terms of the deed. If we adopt the course which the learned Counsel for the appellants would have us adopt we should be going against the practice of the previous Judicial Commissioner's Court—a practice which has been recognised and understood in Oudh for more than 50 years. Unless we are shown very strong reasons to support our departing from the former practice we shall not be justified in making the departure. On considering the point we are of opinion that to adopt the practice suggested will do considerably more harm than good. The mortgagor in this instance and his sons and grandsons will be in no way prejudiced by being directed, as we direct them, if they wish to redeem, to institute a suit for the purpose.

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(1) 66 Ind. Cas. 853; 25 O. C. 8; 44 A. 185; 20 A. L. J 476; 9 O. L. J. 81; 49 I. A. 60; 30 M. L. T. 220; 42 M. L. J. 584; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) M. W. N. 378; A. I. R. 1922 P. C. 17; 4 U. P. L. R. (P. C.) 50; 28 C. W. N. 79 (P. C.).

We accordingly dismiss this appeal with costs.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.

CIVIL REVISION APPLICATION No. 105 OF 1925.
September 29, 1925.
Present:—Sir Norman Macleod, KT.,
Chief Justice, and Mr. Justice Coyajee.
GOVIND MAHIPAT DESHPANDE—
APPLICANT
versus
BALKRISHNA NARAYAN—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 115—Bombay Hereditary Offices Act (III of 1874), s. 10—Collector's refusal to grant certificate—Revision.

Assuming that it has power to do so, the High Court will not interfere in revision with the order of Collector refusing to grant a certificate under s. 10, Bombay Hereditary Offices Act, where there is no violent misuse of authority, obvious bad faith, or reckless disregard or wanton perversion of the law on his part. [p. 760, col. 2; p. 761, col. 1.]

Mr. *A. G. Desai*, for the Applicant.

Mr. *H. B. Gumaste*, for the Opponent.

JUDGMENT.

Macleod, C.J.—The petitioner's father in this case mortgaged the *kulkarni* and Deshpande *watan* lands to the opponent under two mortgage-deeds, dated June 10, 1913, and August 6, 1914, respectively, the former by himself and as guardian of his minor sons including the petitioner, and the latter by himself alone, for cash consideration. The petitioner's father then instituted Suit No. 33 of 1920 in the Court of the Second Class Subordinate Judge, Athni, against the opponent for accounts and redemption of the two mortgages under the Dekkhan Agriculturists' Relief Act. The Subordinate Judge allowed redemption and passed an order that the plaintiff should continue to remain in possession of mortgaged land; that the plaintiff should pay to the defendant Rs. 2,210 and defendant's costs in this suit with interest on Rs. 1,460 from the date of suit till the date of realisation on or before June 8, 1921; and that on failure to pay to the defendant as stated above, defendant should apply to the Court for recovery of the sum by sale of sufficient portion of the mortgaged property.

The opponent in pursuance of the aforesaid decree filed a Darkhast No. 489 in the Civil Court at Athni and got the aforesaid *watan* property attached for sale. While the execution proceedings were thus going on the petitioner's father, the original mortgagor, died, and the petitioner, the son of the deceased mortgagor, applied to the District Deputy Collector for issuing a certificate under s. 10 of the Watan Act stating that the property attached for sale was, *watan*, and, therefore, inalienable, in order to enable the Court in which execution proceedings were pending to remove the attachment and any other process then pending against the *watan* or any part thereof. The District Deputy Collector made the following order on this application:—

"In the circumstances reported by the *mamlatdar* the Prant does not think it necessary to issue a certificate under s. 10 of the Watan Act. The applicant should be informed accordingly. If the lands are purchased by strangers the applicant may apply."

The petitioner now asks this Court to set aside this order and pass an order for issue of the certificate or such other order or orders as the Court may think proper.

In *Collector of Thana* v. *Bhaskar Mahadev Sheth* (1) the Court held that the Collector when granting a certificate, under s. 10 of the Bombay Hereditary Offices Act (III of 1874), exercises a judicial function, and is subject to the supervision of the High Court: but the High Court will not interfere with his discretion, unless there is violent misuse of authority, obvious bad faith, or reckless disregard or wanton perversion of the law on his part. In that case the Collector had issued a certificate under s. 10 of the Watan Act, and the application to the High Court was to set aside the grant of a certificate issued by the Collector.

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(1) 8 B. 264; 4 Ind. Dec. (N. S.) 550.

In this case the Collector refused to issue a certificate, but it is very doubtful to my mind whether the High Court could, under s. 115 of the C. P. C., order the Collector to issue a certificate or set aside a certificate once granted. But I do not think that that question need be pursued in this case, as there is no necessity to interfere with the order made by the Collector refusing to grant a certificate, as it certainly, using the words of the case I have just cited, "was not made in violent misuse of authority, obvious bad faith, or reckless disregard, or wanton perversion of the law" on the part of the Collector. It would only be, if such conduct were proved, that this Court could possibly interfere with an order made by the Collector on an application under s. 10 of the Watan Act. Section 10 states that :—

"When it shall appear to the Collector that by virtue of, or in execution of, a decree or order of any British Court any *watan* or any part thereof, or any of the profits thereof recorded as such in the revenue records or registered under this Act, and assigned under s. 23 of this Act as remuneration of an officiator, has or have, after the date of this Act coming into force, passed or may pass without the sanction of Government into the ownership or beneficial possession of any person other than the officiator for the time being; or that any such *watan*, or any part thereof, or any of the profits thereof, not so assigned has or have so passed into the ownership or beneficial possession of any person not a *watandar* of the same *watan*, the Court shall, on receipt of a certificate under the hand and seal of the Collector, stating that the property to which the decree or order relates is a *watan*, or part of *watan*, or that such property constitutes the profits or part of the profits of a *watan*, or is assigned as the remuneration of an officiator and is, therefore, inalienable, remove any attachment or other process then pending against the said *watan*, or any part thereof, or any of the profits thereof, and set aside any sale or order of sale or transfer thereof, and shall cancel the decree or order complained of so far as it concerns the said *watan* or any part thereof or any of the profits thereof."

We are only concerned in this case with *watan* property which may not pass into the ownership of a person who is not a *watandar* of the same *watan*. What was in the mind of the Collector when he made his order was that a *watandar* of the same *watan* might purchase the property which would be permissible under the Act. If on the contrary, it was purchased by a stranger, then the applicant might apply for a certificate, and on the issue of that certificate the Court would set aside the sale.

We cannot, therefore, interfere with the decision of the Collector which was made in the exercise of his discretion. The Rule will be discharged with costs.

Coyajee, J.—I am of the same opinion. I share the doubts expressed by my Lord the Chief Justice, but assuming that we had the power of revision in a case of this nature, it is clear this is not a case for our interference under s. 115 of the C. P. C.

R. L. *Rule discharged.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2585 OF 1925.
March 20, 1926.
Present :—Mr. Justice Zafar Ali.
SUNDAR SINGH AND ANOTHER—
DEFENDANTS—APPELLANTS
versus
GANDA SINGH AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Custom—Alienation—Alienation by widow—Suit for declaration by reversioners—Consent by father, whether binds son.

An assent given by a reversioner to an alienation by a widow of her late husband's property is not binding on the sons of such reversioner when the consent given is not *bona fide*.

Second appeal from a decree of the Additional District Judge, Amritsar, dated the 9th July 1925, affirming that of the Senior Subordinate Judge, Amritsar, dated the 21st June 1924.

Mr. *Dev Raj Sawhney*, for the Appellants.
Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The parties are *jat*

agriculturists, and the question for determination in this second appeal is whether the assent given by Bhagat Singh to the mortgage by the widow Premi of her late husband's property is binding on his (Bhagat Singh's) sons—the plaintiffs who are minors, and debars them from maintaining the present suit for a declaration that the mortgage is inoperative as against their reversionary rights. The Courts below have answered this question in the negative and the plaintiffs' suit has been decreed. The facts are briefly as below:—

Musammat Premi at first mortgaged only a portion of her late husband's land for Rs. 600 and Bhagat Singh, the nearest reversioner of her husband, obtained a declaratory decree that the mortgage was valid to the extent of Rs. 200 only. Subsequently the widow mortgaged to the same mortgagee, namely, Sundar Singh, 67 *kanals* and 15 *marlas* of land with the consent of Bhagat Singh and his two adult sons and they expressed their consent by associating their names with that of *Musammat* Premi as mortgagors, so that the mortgage was executed by all four. The mortgage money Rs. 8,600 was made up of (1) Rs. 7,000 left in the hands of the mortgagee for payment to former mortgagees Jhanda Singh and Bir Singh.

(2) Rs. 1,000 paid cash.

(3) Rs. 600 due to the mortgagee on the prior mortgage referred to above.

As regards item No. (1) it is alleged that only Rs. 1,350 out of it had been paid, and the mortgagee offers to pay the balance. But the payment of even Rs. 1,350 was not proved nor was there anything on the record to show that Rs. 7,000 was really payable by the widow or Bhagat Singh to the mortgagees mentioned in the deed, namely, Jhanda Singh and Bir Singh. Bir Singh was not put in the witness-box at all and Jhanda Singh when examined by the defendant Sundar Singh deposed that Sundar Singh made no payment to him.

The large amount of item No. (2) was not paid before the Sub-Registrar nor was a receipt taken for it and the Courts below found that this item as well as item No. (1) was fictitious. In view of the evidence on the record this finding appears to be unassailable. Thus the alienation being devoid of consideration it follows that the assent given to it was not given *bona fide*.

Counsel for the appellants contends that the suit was collusive. But this was never pleaded in the Courts below. He further contends that the mortgage should have been declared valid to the extent of Rs. 200 in respect of the third item. But there is already a declaration on this point and no further declaration is necessary.

I am, therefore, of opinion that the plaintiffs' suit has been rightly decreed and I dismiss the appeal with costs.

R. L. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2177 OF 1922.

August 7, 1925.

Present:—Sir N. R. Chatterjea, KT., Acting Chief Justice, and Mr. Justice Cuming.

MESSRS. GOPIRAM BEHARIRAM
—PLAINTIFFS—APPELLANTS
versus
AGENT, EAST INDIAN RAILWAY AND AGENT, OUDH AND ROHILKHAND RAILWAY—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Goods consigned to Railway for carriage under Risk Note Form "B"—Non-delivery—Damages, suit for—Loss, proof of—Burden of proof—Limitation Act (IX of 1908), s. 22—Suit against Railway—Defendant described as "Agent of the Railway"—Misdescription—Amendment—Limitation.

In a suit to recover damages for non-delivery of goods consigned to a Railway Company for carriage under Risk Note Form "B", the burden of proving that the case falls within the exception contained in the Risk Note *viz.*, that the goods were lost owing to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants etc., is upon the plaintiff. But before the plaintiff is called upon to prove that the goods were lost by wilful neglect or by theft, it must be shown that the goods have been lost. It is for the Railway Administration to prove in the first instance that the goods have been lost, and it will be then for the plaintiff to show that the loss was due to the wilful neglect of, or theft by, Railway servants. [p. 763, col. 2.]

Except in cases where the plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the Risk Note which *pro tanto* exempt it from liability unless and until evidence has been adduced which satisfies the Court that a loss has occurred, and the loss must be a loss of the goods by the Railway and not merely a loss to the consignor. [p. 764, col. 1.]

In a suit for damages for non-delivery of goods consigned to the East Indian Railway for carriage, the defendant was described as "Agent, East Indian Railway." The Railway Company entered appearance, put in a written statement and fought out the case and it was only in the Appellate Court that objection was taken to the description of the defendant:

Held, that as the case had been fought out on the merits by the Railway Company it was only a case of misdescription which could be rectified by a formal amendment and that, as no new defendant would be added or substituted by the amendment, the provisions of s. 22 of the Limitation Act had no application to the case. [p. 765, col. 2.]

Appeal against a decree of the Subordinate Judge, First Court, Howrah, dated the 9th June 1922, reversing that of the Munsif, Third Court at Howrah, dated the 27th April 1921.

Babus *Surya Kumar Aich* and *Sanat Kumar Chatterjee*, for the Appellants.

Babu *Ambicapada Choudhury*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to recover Rs. 703-10 as compensation for goods consigned by the plaintiff's agent for carriage by Railway which were not delivered to the plaintiff.

It appears that 13 tins of *ghee* and one tin of mustard oil, in 7 packages were consigned by the plaintiff's agent at Shahgunj a Station on the Oudh and Rohilkhand Railway to the plaintiff at Howrah. Only one package (containing 1 tin of *ghee* and 1 tin of mustard oil) arrived at Howrah and the plaintiff was asked to take delivery thereof on giving a full acquittance receipt which he refused to do. The other 6 complete packages did not arrive at Howrah at all and were not delivered to the plaintiff. The plaintiff thereupon served a notice under s. 77 of the Indian Railways Act upon the defendants and brought the suit for compensation.

The Court of first instance allowed the claim in part. The Court of Appeal below dismissed the claim altogether. The plaintiff has appealed to this Court.

Under s. 72 of the Railways Act the responsibility of a Railway Administration for the loss, destruction or deterioration of goods delivered to the Administration to be carried by Railway subject to the other provisions of the Act is that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act, 1872, but that responsibility may be limited by an agreement in writing signed by or on behalf of the sender of the goods in a form approved by the Governor-General in Council. The goods in the present case were sent under the Risk Note Form "B" which is approved by the Governor-General in Council. The Risk Note Form "B" states that the consignors, in consideration of a lower charge than the ordinary tariff rate chargeable for the consignment, agree to hold the "Railway Administration and all other Railway Administrations working in connexion therewith, etc., harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except for the loss of or damage to the said consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before during and after transit over the said Railway or other Railway lines working in connexion therewith, or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment: provided the term wilful neglect be not held to include fire, robbery from running train or any other unforeseen event or accident".

As stated above, 6 complete packages were not delivered at all, and the seventh package was tendered but the plaintiff was asked to give a full acquittance receipt. The defence pleaded non-liability under the Risk Note Form "B." The Court of Appeal below held that the burden of proving that the case falls within the exception contained in the Risk Note, *viz.*, that the goods were lost owing to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants, etc, is upon the plaintiff. That having regard to the authorities must be held to be so. But before the plaintiff is called upon to prove that the goods were lost by wilful neglect or by theft, it must be shown that the goods have been lost. Unless that initial fact is proved, *viz.*, that the goods have been lost, we do not see how the plaintiff can be required to prove how the loss occurred.

The goods were made over to the Railway for carriage, and they have not been delivered to the consignee. How is the consignor or the consignee to know whether they have been lost. We think that it is for the Railway Administration to prove in the first instance that the goods have been lost, and it will be then for the plaintiff to show that the loss was due to the wilful neglect of or theft by Railway servants. That also must in almost every case be impossible for the plaintiff to prove, but that is what he undertakes to do under the Risk Note, at any rate the decided cases hold that it is for him to prove it.

In the recent case of the *East Indian Railway Co.* v. *Jagpat Singh* (1) Page, J., considered the question exhaustively and came to the conclusion that except in cases where the plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the Risk Note which *pro tanto* exempt it from liability unless and until evidence has been adduced which satisfied the Court that a loss has occurred.

It is contended that that was a case of non-delivery as regards which no issue was raised in the present case. But the present case was also one of non-delivery. It is true, the learned Subordinate Judge refers to the suit as being one for recovery of goods *lost in transit.* Evidently he misunderstood the plaintiff's case for which the plaintiff was not responsible. The plaintiff's case (as appears from the plaint and even from the statement of the case in the judgment of the Trial Court) was that the goods were not delivered to him. The third issue, *viz.*, "Are the plaintiffs entitled to the amount of damages claimed or any portion thereof" was wide enough, and must be taken to have been framed with reference to the plaintiff's case as stated in the plaint which was one for non-delivery. Then it is said that in the notice under s. 77 the plaintiff admitted the loss of the goods. But we do not find any such admission. The notice was merely in terms of the section which provides for compensation for "the loss, destruction or deterioration of animals or goods."

We do not think, therefore, that there was any admission on the part of the plaintiffs that the goods were lost by the Railway.

It is contended, however, that "loss" means loss to the consignor and not loss of the goods by the Railway, in other words "non-delivery" of goods is "loss" of goods to the party. But if so, there would have been no necessity for the words, "loss destruction or deterioration" in the Risk Note Form "B." A non-delivery may be due to loss of the goods, but may be due to other causes, and it is possible to conceive of cases where goods have not been lost but not delivered. For instance 1 tin of *ghee* may be mixed up with thousand others in the Railway godown, and no proper search has been made for finding it out. It is unnecessary to consider whether a temporary loss is a loss within the meaning of the section, because in the present case there is not only no evidence that the goods have been lost or what became of them, but there is no suggestion of any temporary loss of the goods in the manner referred to above.

It is contended that the judgment of Page, J., is opposed to that of *Smith* v. *G. W. Railway Co.* (2). But in that case the loss of the goods was admitted by the plaintiff although the Railway Company did not offer any explanation as to how the goods were lost, and it was held that the refusal of the defendants to account for the loss of the goods was not evidence which justified the Court in inferring that the loss arose from the wilful misconduct of the defendants' servants.

In the case of the *East Indian Railway Company* v. *Jagpat Singh* (1) Page, J., has referred to a number of decisions as supporting his view as to the meaning of the expression "loss" and has considered the cases in which a contrary view was taken. We entirely agree with the learned Judge with regard to the meaning of the expression "loss".

It is contended on behalf of the respondent that the suit is not brought against proper parties, the defendants being described as "Agent, East Indian Railway" and "Agent, Oudh and Rohilkhand Railway. Reference is made to the cases of *Ram Dass Sein* v. *Mr. Cecil Stephenson* (3), *Nubeen Chunder Paul* v. *Mr. Cecil Stephenson* (4), *Agent, Bengal Nagpur Railway* v. *Behari Lal Dutt* (5) and *East Indian Railway Company* v. *Ram Lakhan Ram* (6).

In the first case the defendants were "Mr. Cecil Stephenson Deputy Agent of the East Indian Railway Company and Mr. W. B. Latimer, District Engineer of Rajmehal and Birbhum". Obviously there was no cause of action against Mr. Cecil Stephenson, Deputy Agent and Mr. Latimer, District Engineer, and they could not represent the

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(1) 79 Ind. Cas. 126; 28 C. W. N, 1001; 51 C. 615; A. I. R. 1924 Cal. 725.

(2) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com Cas. 247; 38 T. L. R. 359.

(3) 10 W. R. 366; 2 B. L. R. S. N. 6 (A); 1 Ind Dec. (N. S.) 1011.

(4) 15 W. R. 534.

(5) 90 Ind. Cas. 426; 29 C. W. N, 614; A I R 925 Cal. 716; 52 C. 783.

(6) 78 Ind. Cas. 312; 3 Pat. 230; (1924) Pat 9; A. I. R. 1925 Pat. 37; 6 P. L. R. 415.

Railway Company. In the second also the suit was against Mr. Cecil Stephenson, Agent of the Railway Company. In the third, the defendant was described as Agent, Bengal Nagpur Railway and it was held that the plaint could not be allowed to be amended as it was not a case of misdescription, but the substitution of one party for another who had been wrongly sued and the suit would have been barred by limitation at the date of the amendment. In the fourth, where a suit was instituted against "The Agent, East Indian Railway" it was held that the plaintiff was not entitled after the period of limitation for the suit had expired to amend the plaint by substituting the Railway Company for the defendant originally sued.

On the other hand in the case of *Saraspur Manufacturing Company* v. *B.B. & C.I. Railway Company* (7) where the defendant was described as the Agent of the Railway Company and the defendant Company appeared and filed a written statement raising various pleas in defence the Court held that it was a case of misdescription and allowed amendment. It is to be noted that in the case of *Agent, Bengal Nagpur Railway* v. *Behari Lal Dutt*(5) Suhrawardy, J., observed that on the facts of the above case he might hold the same opinion.

In the present case it is true the East Indian Railway in the written statement pleaded that the plaintiff had no cause of action nor any right to sue the defendant, but no specific objection was taken by the defendant, on the ground that the proper party had not been sued, and the Railway Company entered appearance, put in written statement and fought out the case. The question of the proper party not being sued is not ever referred to in the judgment of the Trial Court. The Oudh and Rohilkhund Railway pleaded that it being a Railway owned and worked by the Government, the Secretary of State should have been sued. But the Oudh and Rohilkhund Railway did not prefer any appeal against the decree of the Trial Court, and it was only the East Indian Railway which appealed and it cannot be said that the defence of the two Railways on this point was the same. There is no question of prejudice to the Company as it knew well the claim made against it and considered itself the party sued. The present case is stronger than the Bombay case, as in the present, no specific objection was taken in the Trial Court on the ground that the East Indian Railway had not been sued. We think that it is a case of misdescription which can be rectified by a formal amendment as the case has been fought out on the merits by the Railway Companies. By the amendment no new defendant would be added or substituted so as to attract the provisions of s. 22 of the Limitation Act. The appellant has put in a petition for amendment and we allow the amendment.

The result is that the decree of the lower Appellate Court is set aside and that of the Court of first instance restored. Each party will bear his own costs of this Court and of the lower Appellate Court.

Z. K. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 18 OF 1923.

November 16, 1925.

Present:—Justice Sir Jwala Prasad, KT.

PARSHAN SAHI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

G. L. RICHARDSON—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 11, 151—Dismissal of application under s. 151 challenging compromise decree—Suit to set aside same decree—*Res judicata.

A summary dismissal of an application under s. 151, C. P. C., challenging the validity of a compromise decree does not bar a regular suit for avoiding that decree on the basis of fraud. [p. 767, col. 1.]

Kailash Chandra Poddar v. *Gopal Chandra Poddar*, 26 Ind. Cas 125; 18 C. W. N. 1204, distinguished.

Ram Ratan Singh v. *Khub Lal Gope*, 39 Ind. Cas. 891, followed.

Appeal from a decision of the Additional Subordinate Judge, Muzaffarpur, dated the 18th September 1922, confirming that of the Additional Munsif, Muzaffarpur, dated the 27th September 1921.

Mr. *L. N. Sinha*, for the appellants.

Messrs. *S. Dayal* and *Sambhu Saran*, for the Respondents.

JUDGMENT.—The plaintiffs are the appellants. They ask for an adjudication of their title to and confirmation of possession over I *bigha*, 9 *kathas*, of land situate in *Mouza* Yusufpatti, *Pargana* Morwah Khurd, bearing *Tauzi* Nos. 4388 and 4390,

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(7) 73 Ind. Cas. 1027; 47 B. 785; 25 Bom. L. R. 513; A. I. R. 1923 Bom. 452.

They also seek to recover Rs. 173-8-0 as the price of sugarcane raised on the disputed land, and an injunction restraining the defendants first party from paying the price of the sugarcane to the defendants second party. The disputed land is a part of a holding consisting of 6 *bighas*, 9 *kathas*, and 1 *dhur*. The holding belonged to the defendants second party and one Abdhu Singh. It was sold in an execution sale and was purchased in the name of plaintiff No. 1, Parshan Sahi, on the 19th May, 1896, (*vide* sale certificate, Ex. M, which shows the area sold to be 3 *bighas* and not 6 *bighas* as claimed by the plaintiffs). The plaintiffs base their title upon this auction-purchase and upon a compromise said to have been filed subsequently in Suit No. 360 of 1918 whereby the defendants and Abdhu Singh relinquished their claim to the land. The plaintiffs say that in spite of the said compromise, the defendants brought a Small Cause Court suit against the defendants first party and obtained a decree for the price of the sugarcane which was supplied by the plaintiffs to the defendants first party who now refuse to give the price of the sugarcane to the plaintiffs. The plaintiffs base their cause of action upon this refusal and on account of resistance of the possession by the defendants. Defendants second party, on the other hand, contend that at the auction-sale they purchased the property in the *farzi* name of the plaintiff No. 1 who is their close relation and that the alleged compromise is fraudulent, void and inoperative and that they and not the plaintiffs are entitled to the price of the sugarcane. The defendants first party have no objection to the payment of the price of the sugarcane to the party who may be held by the Court to be entitled to receive the same. The real contest is, therefore, between the plaintiffs and the defendants second party, and several issues were raised in the Trial Court. The only important issues tried in the lower Appellate Court are:

(1) Have the plaintiffs got any title to the disputed land? and

(2) Is the compromise decree binding on the defendants?

The Courts below have concurrently held that the plaintiffs have failed to prove their title to the land in dispute, and that in spite of the purchase being in the name of the plaintiff No. 1, the defendants continued to be in possession of the property. They have further held that the auction-purchase was only *farzi*; that the real purchasers were the defendants second party in the name of their close relation, Parshan Sahi whose father, Ramdihal was the maternal uncle of Ramdhari, defendant No. 5 and that Abdhu Singh is a full brother of Ramdhari. The lower Appellate Court has further held that neither any *dakhaldehani* was taken out by the plaintiffs nor any *chalan* for payment of the purchase-money has been produced and though the sale took place prior to 1896 and the finally published Record of Rights in 1897, yet the name of Parshan was not substituted therein. Similarly the *batwara* papers of 1915 contained the name of Awadh Singh in respect of several plots including plots Nos. 12 and 24 which are the disputed ones. His name also appears in Exs. E. J and J (*a*). In the criminal case (Ex. N) defendant No. 5 was found to be in possession. It has not been shown before me that the finding of the Court below as to the purchase being *farzi* in the name of plaintiff No. 1 and the continuity of the possession by the defendants over the property in spite of the sale is in any way vitiated by the Court in not having taken into consideration any relevant evidence on the record. The finding of the Court below that the plaintiff did not acquire any title by the auction-purchase of 1896 in the name of plaintiff No. 1, is a finding of fact and not open to challenge in second appeal. As to the compromise (Ex. 4) the Court below in concurrence with the Trial Court has come to the conclusion that it was a fraudulent one. The compromise petition was filed in a suit (No. 360 of 1919) after the aforesaid criminal case was upheld. Under this compromise, Ramdhari, defendant No. 5, and Abdhu relinquished all claims to the entire land. The compromise, as stated therein, was to be given effect to by executing a registered deed. No registered deed was, however, executed. The compromise petition has not been legally proved and defendant No. 6 who is son of defendant No. 5, is no party to it. The Court below has held that it has not been proved that the defendants had any knowledge of the terms of the compromise petition. The finding of the Court below that the compromise petition is fraudulent and inoperative is again a finding of fact and cannot be challenged in second appeal.

The learned Advocate on behalf of the appellants has, however, urged that the compromise has become final and is not open to challenge by the defendants in this suit. In support of this contention he has referred to the case of *Kailash Chandra Poddar* v. *Gopal Chandra Poddar* (1). In that case, after the compromise was filed in a suit and decree prepared in accordance therewith, one of the plaintiffs applied to the Court for a review of the decree and to set aside the compromise and his application was based upon the allegation that he had not consented to the compromise. The review petition was dismissed by the Trial Court. Subsequently a suit was brought by another plaintiff along with the plaintiff who had applied for the review of the judgment. The ground of attack to the compromise taken in the suit was the same as in the review petition, *viz.*, that the plaintiffs had given no consent to the compromise. It was further suggested that there was fraud. The alleged fraud was, however, negatived and the only ground of relief was the absence of consent. It was held that the dismissal of the petition of review was a bar to the subsequent suit contesting the validity of the compromise filed in the previous suit. It seems to me that the aforesaid case was decided upon the principle of *res judicata* inasmuch as the review matter and the subsequent suit were founded upon the same ground, *viz.*, the absence of the consent to the compromise in question. The parties and the subject-matter of the relief sought were the same in both the proceedings in the suit and the review. The matter in controversy in the review proceeding and in the suit was decided and the relief sought was refused and the Court which dealt with the review-matter was competent to deal with the suit. All the conditions embodied in s. 11 of the C. P. C. were fully satisfied. The learned Advocate on behalf of the appellant, however, contends, that the principle of the aforesaid case would apply to the present case inasmuch as the defendants had challenged the compromise decree in an application made by them under s. 151 of the C. P. C., and their petition was rejected. There is no substance in this contention. The application under s. 151 was not an application which the defendants could, as a matter of right, press. It simply invoked the inherent power of the Court. In the next place the matter was not gone into in the Court below and the application under s. 151 was dismissed summarily upon the ground stated by the Munsif that he could not, under the provision of s. 151, give the defendants the relief which they sought. There was no decision as to whether the compromise was fraudulent or not in the miscellaneous application of the defendants under s. 151 of the C. P. C. and no *res judicata* can apply to a matter left undecided. The defendants in the present case stand on a firmer ground. They attack the compromise upon the ground of fraud. The learned Chief Justice, Sir Lawrence Jenkins, in the case referred to above, clearly stated that in the review question the allegation of fraud was negatived. In the present case the ground of fraud urged to impugn the validity of compromise by the Court below has heen upheld. The case will, therefore, be governed by the principle laid down by this Court in the case of *Ram Ratan Singh* v. *Khub Lal Gope*, (2). The defendants were quite competent to take the plea of fraud in order to avoid the compromise and fraud having been once established, the compromise is void and cannot stand.

The result is that the decision of the Court below is affirmed and the appeal is dismissed with costs.

R. L. *Appeal dismissed.*

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(1) 26 Ind. Cas. 125; 18 C. W. N. 1204.

(2) 39 Ind. Cas. 891.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

February 4, 1926.

Present:—Lord Finlay, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

MAHOMED KHALEEL SHIRAZI AND SONS—PLAINTIFFS—APPELLANTS

versus

LES TANNERIES LYONNAISES AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 107, O. XLI, r. 33—Evidence in appeal, taking of—Appeal, absence of, to High Court—Appeal to Privy Council—Creditor and debtor—Payment by debtor to third person—Authority to receive payment.

Power to take additional evidence in appeal should be exercised by a Court of Appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised and that such additional evidence when admitted will be evidence which if produced at the trial would have been admissible. [p. 777, col. 1.]

Where no appeal is filed to the High Court from the decree of the Trial Judge dismissing a suit against a particular defendant except as to costs, no appeal lies against him in the Privy Council. [p. 769, col 1.]

Ganga Dhar Muradi v. *Banabashi Padihari*, 24 Ind. Cas. 208; 22 C. L. J. 390, *Bhaidas Shivdas* v. *Bai Gulab*, 60 Ind. Cas. 822; 48 I. A. 181; 40 M. L. J. 519; 25 C. W. N. 605; 33 C. L. J. 488; 19 A. L. J. 409; 23 Bom. L. R. 623; 3 U. P. L. R. (P. C.) 22; 14 L. W. 7; (1921) M. W. N. 408; 29 M. L. T. 350; 45 B. 718; 30 M. L. T. 149 (P. C.), referred to.

When a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had, or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor. [p. 772, col. 1.]

Appeal from the decree of the Madras High Court in its Appellate Jurisdiction, dated 14th March 1922.

Messrs. *G. R. Lowndes* and *K. Brown*, for the Appellants.

Messrs. *A. M. Dunne*, *Blanco White* and *E. B. Raikes*, for the Respondents.

JUDGMENT.

Sir John Edge.—This is an appeal by the plaintiffs from a decree, dated the 14th March, 1922, of the High Court at Madras, which was made in its Appellate Civil Jurisdiction and varied a decree, dated the 20th October, 1920, of a Judge of the same Court, which was made in the Ordinary Original Civil Jurisdiction of the High Court.

The appeal arises in a suit which was instituted with the leave of the High Court on the 3rd February, 1919, in the Ordinary Original Civil Jurisdiction of the High Court by the plaintiffs, who live in the city of Madras, to obtain a decree against Les Tanneries Lyonnaises and their agent Monsieur, J. Marret for money alleged to be due to the plaintiffs under a contract for the sale and delivery of goat skins under a contract of the 25th May, 1917, and under a contract of the 26th January, 1918, for the sale and delivery of sheep skins. There was another defendant to the suit named, C. Sowrimuthoorya Oodayar, against whom no relief was claimed. The suit was tried and the decree of the Trial Judge was made in the Ordinary Original Civil Jurisdiction of the High Court. The French Company carries on business at Oullins, near Lyons in France. Marret and Oodayar live at Pondicherry. The contract of the 25th May, 1917, was made by Marret as the agent of the French Company with the plaintiffs in the city of Madras, and the money which might become due under it was payable at a Bank in the city of Madras. The contract of the 26th January, 1918, was made by Marret at Pondicherry, and the money which might become due under it was payable to the plaintiffs at the Bank in the city of Madras. The Trial Judge made, on the 29th October, 1920, a decree for Rs. 1,76,242-0-5, with interest thereon and for costs against the French Company, and by his decree dismissed the suit against Marret and Oodayar but decreed that Marret should pay to the plaintiffs taxed costs and interest thereon. The plaintiffs did not appeal to the High Court against the decree of the Trial Judge dismissing the suit against Marret. They had obtained a decree against the French Company for their entire claim, and with that they were then content. As appears by the record, the French Company and Marret jointly appealed to the High Court against the decrees which had been made against them. On that appeal the High Court found that the French Company was not liable to pay anything in respect of the claim under the contract of the 26th January, 1918 and by its decree modified the decree against them made in respect of their liability under the contract of the 25th May, 1917, with certain costs, and dismissed the suit againt Marret and Oodayar. Against that decree of the High Court this appeal by the plaintiffs has been brought.

In the High Court Marret on behalf of the French Company and himself had filed a joint written statement. In this appeal for the first time the French Company and Marret are represented by different Counsel instructed by separate firms of Solicitors. Those learned Counsel raised preliminary objections to the appeal, the consideration of which their Lordships decided should stand over until the arguments on the appeal had been heard. Their Lordships will now state what those preliminary objections were and what is their decision on them. Each of the learned Counsel contended that the suit was not within the cognizance of the High Court in its Original Civil Jurisdiction. The learned Counsel for Marret further contended that this appeal to His Majesty in Council is, in effect, an appeal against the decree of the Trial Judge dismissing the suit as against Marret, from which decree the plaintiffs had not appealed, and that such an appeal was not allowed by the C. P. C., 1908, or by the Letters Patent of the High Court. As to the objection that the suit was not within the cognizance of the High Court in its Original Civil Jurisdiction, their Lordships find that the contract of the 25th May 1917 was made in the city of Madras, and it was agreed that the money payable under that contract should be paid in the city of Madras, and that it was agreed that the money payable under the contract of the 26th January, 1918, should be paid in the city of Madras, and further find that the High Court, under its Letters Patent, gave leave to the plaintiffs to bring the suit in the Ordinary Original Civil Jurisdiction of the High Court, and consequently hold that the suit was within the cognizance of the High Court in its Ordinary Original Civil Jurisdiction, and disallow that objection. As to the objection especially raised by the learned Counsel for Marret, that as the plaintiffs had not appealed, against the decree of the Trial Judge dismissing the suit, excepting as to costs, against Marret no appeal lay against him, their Lordships have been referred to the C. P. C., O. XLI, r. 33, *Ganga Dhar Muradi* v. *Banabashi Padihari* (1) and *Bhaidas Shivdas* v. *Bai Gulab* (2). Their Lordships think that this appeal to His Majesty in Council, in so far as Marret is concerned, is, in effect, an appeal direct to His Majesty in Council from the decree of the Trial Judge, which is not allowable under the C. P. C., 1908, or under the Letters Patent of the High Court and they hold that the C. P. C., 1908, O. XLI, r. 33, was not intended to apply to such an appeal, and they accordingly decide that the appeal so far as Marret is concerned, should be dismissed, but without costs.

Their Lordships will now consider the appeal so far as it relates to the French Company alone. The contract for goat skins of the 25th May, 1917, was made with the plaintiffs by Marret as the agent of the French Company, and it is now admitted in this appeal by the learned Counsel for the French Company that Marret, in making with the plaintiffs the contract of the 26th January, 1918, for sheep skins, was the agent of the French Company if he represented that he was making it as their agent.

The appeal involves the consideration of some complicated questions of fact. Before referring to the facts now admitted or proved at the trial or in the appeal to the High Court, the pleadings filed in the suit will, so far as they are material, be mentioned, and an affidavit of documents made by Marret will be referred to, and then their Lordships will state who the parties to the suit were, and briefly what was the business which each of the parties carried on, as these are matters which appear to their Lordships to be more or less material in the consideration of the appeal.

The plaintiffs, alleging in their plaint that Marret was the agent of the French Company in making with them the contracts already mentioned of the 25th May, 1917, for goat skins and of the 26th January, 1918, for sheep skins and in purchasing the goat skins and the sheep skins from the plaintiffs, claimed a decree against the French Company and Marret, or either of them for Rs. 1,70,000, and, if necessary, that a decree should be made for such sum as might be found to be due, together with interest at 7 per cent. after the dates of the respective deliveries of the skins at Pondicherry, and for costs, and for such other relief as the nature of the case might require.

No written statement in answer to the suit, under circumstances which will be later mentioned, was filed by Oodayar. The French Company and Marret jointly filed a written statement, by which they submitted that the leave to sue them in the High Court ought not to have been granted and should be revoked, and in which they admitted that the contract of the 25th May, 1917 for goat skins was entered into by the plaintiffs and the French Company through Marret as their agent; and alleged that Oodayar was a partner of the plaintiffs and in effect alleged that the moneys payable to the plaintiffs under that contract were paid either to the plaintiffs or to Oodayar as a partner of the plaintiffs, and that nothing was due to the plaintiffs. As to the claim under the contract of the 26th January, 1918, for sheep skins, the French Company and Marret in their joint written statement alleged that the French Company was not a party to that contract and was not concerned in it, and that it was a contract made by Marret on his own behalf and not as an agent with the plaintiffs, to whom it was alleged that the sheep skins never did belong and had never been purchased by the plaintiffs or on their behalf, and had been bought and paid for by Marret with his own money. As later appeared, what was pleaded in the joint written statement meant that Marret had purchased the sheep skins from Oodayar and had paid Oodayar for them, and that nothing was due to the plaintiffs in respect of the sheep skins.

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(1) 24 Ind. Cas. 208; 22 C. L. J. 390.

(2) 60 Ind. Cas. 822; 48 I. A. 181; 40 M. L. J. 519; 25 C. W. N. 605; 33 C. L. J. 488; 19 A. L. J. 409; 23 Bom. L. R. 623; 3 U. P. L. R. (P. C.) 22; 14 L. W. 7; (1921) M. W. N. 408; 29 M. L. T. 350; 45 B. 718; 30 M. L. T. 149 (P. C.).

Marret was examined as a witness in the suit before the Trial Judge. His credibility as a witness is one of the serious issues in the case. His examination began on the 7th October 1920. When cross-examined he stated that he had been an agent of the French Company for nine or ten years and had first begun as their agent at Pondicherry when he made the contract for the goat skins in May 1917. He also admitted in cross-examination that he told the French Company from time to time how many skins he sent to them and that he had sent to them invoices of the skins and that he used to write letters on carbon paper to the French Company in France saying how many skins were being despatched to them according to the invoices and he supposed that the French Company received those letters. Marret on 5th March 1920 signed and swore an affidavit of documents in this suit in which not one of those letters or invoices is mentioned. His explanation was that the affidavit was prepared and forwarded to him at Calcutta where he happened to be, and that he swore the affidavit of documents without noticing that it did not mention any of those letters or invoices. That is an explanation which their Lordships find it impossible to believe. Any competent and respectable Counsel, Vakil, Solicitor or other lawyer must, in order to prepare that affidavit of documents, as part of his duty have asked Marret if he had written to his principals in France any letters informing them of the skins which he was shipping at Pondicherry to them and sending them invoices of the skins. The French Company must have received those letters and invoices as they remitted to the Bank at Madras from time to time money to pay for the skins. Marret must have made and kept copies of those letters and invoices, but neither they nor any copy of them is mentioned in the affidavit of documents. But on what information or lack of information the person who prepared that affidavit acted in preparing it their Lordships do not know. Whoever prepared it, it was a misleading and dishonest affidavit. And Marret admitted, when cross-examined, that he had read through the affidavit before he signed it and that the letters which he had written to the French Company, and had not been disclosed in it, would show the amount of skins which he was advising his principals in France, the French Company, had been shipped. He also swore that the words "Account books relating to this suit transaction," in the first schedule to the affidavit, were not in the affidavit when he swore it, but he did not suggest by whom they had been added. When that affidavit was filed in Court it may have been intended that Marret should produce at the trial some account books in support of his case. That affidavit of documents was not the only matter as to which the evidence which Marret gave in his cross-examination was in the opinion of their Lordships unsatisfactory.

It is now advisable to state who the parties to the suit were and what business they respectively or in partnership carried on. The plaintiffs are two merchants at Madras and carry on business at Madras and at Pondicherry under their firm name of Mahomed Khaleel Shirazi and Sons. Part of the business of this Shirazi firm is the purchasing at Pondicherry and in various districts of India of skins of goats, sheep and of other animals, the curing of such skins and the sale and exporting of them when cured. The elder plaintiff had carried on before 1917 a business at Pondicherry of purchasing and selling skins. The plaintiffs purchasad a tannery at Pondicherry in 1917, and at Pondicherry they sold and exported skins on their own account. The plaintiffs in 1917 extended their business of tanning skins at Pondicherry by taking some tanning pits near a tannery which Oodayar had there. The plaintiffs employed Oodayar to manage their tannery at Pondicherry, his remuneration being a one-sixth share of the net profits of the turnover in that business, but Oodayar had no authority to receive money due to the plaintiffs for skins sold by the plaintiffs on their own account. The French Company carried on business at Oullins, near Lyons, in France. It is admitted that part of the business carried on by the French Company was the purchasing of goat skins in India by Marret as their agent for delivery when cured to the Government of France for the use of French troops in the war which began in August, 1914. Marret on his own separate behalf was an exporter of cured skins from India. Marret had his skins cured by a process which is described as "half-tanning" or "pickling" them, which made the skins lighter and smaller in volume and easier for shipment and more valuable. Whether he had invented that method of curing skins their Lordships do not know, but it was known and described as his process. He alleged that he held a patent for that method of curing skins, but the attention of their Lordships has not been called to any evidence that he had a patent for curing skins which was in force in British India or in French India or elsewhere. Marret and Oodayar agreed to carry on at Pondicherry a partnership business for five years from the 1st July, 1917, for the curing at Oodayar's tannery by Marret's process or other processes which Marret should find useful of goat skins, sheep skins and heifer skins for export to Japan, each to share equally in the profits. The plaintiffs did not know of the partnership between Marret and Oodayar until Marret mentioned it in giving evidence at the trial. The document of partnership was not disclosed until this suit was in appeal before the High Court.

Oodayar was not bound to devote his whole time to the business of the plaintiffs, and he and Marret were entitled to carry on that business in partnership without informing the plaintiffs of the fact; but whether it was wise or prudent under the circumstances of their connection in business with the plaintiffs to leave the plaintiffs in ignorance of their being partners in a skin-curing and exporting business is another matter. That secret partnership placed Oodayar in a conflicting position, and had much to do with the difficulties in which the plaintiffs were involved in their suit. In their Lordships' opinion the Trial Judge rightly came to the conclusion on the evidence that Marret and Oodayar had acted in collusion against the plaintiffs. Oodayar carried on a separate business on his own account at Pondicherry as a tanner.

Their Lordships do not know what books of account, if any, Oodayar kept. Presumably, as a business man, he would keep books of account in which he would enter the accounts of the tannery which he managed for the plaintiffs, the accounts of his own separate business, and the accounts of his partnership with Marret. Their Lordships do not know how business is carried on at Pondicherry, but they conceive that the plaintiffs would have been entitled to examine such accounts, if any, of their tannery business as Oodayar kept. The senior partner in the plaintiffs' firm was not called as a witness, but his son, Abdul Hussain Khaleel, the other plaintiff swore that those books of account had not been examined by him or by his father. The plaintiffs were very seldom at Pondicherry, and when they were there their time seems to have been otherwise employed than in examining accounts. They appear to have had more confidence in Oodayar than he deserved. As has been mentioned, Oodayar was a defendant in this suit, and no relief was claimed against him. He did not file a written statement. After the time had expired within which Oodayar was entitled as of right to file a written statement, he applied to the High Court for leave to file one. That application was opposed by the lawyer acting at Madras for the French Company and Marret, and was dismissed. Oodayar did not appear as a witness in this suit and no application for an order for discovery by Oodayar was made or applied for. After all the skins to which this suit relates had been delivered, and after the plaintiffs had demanded to be paid for them, Marret sent to the plaintiffs what he alleged was a copy of an account received by him from Oodyar. The evidence of Oodayar was available. He was not, however, examined as a witness at the trial, nor was his evidence taken on commission. That copy is Ex. Q, which appears to have been much relied upon by the Judges in appeal. That alleged copy of an alleged account was not evidence of transactions which it purported to represent, nor did the plaintiffs admit that it correctly represented transactions between themselves and Marret or transactions between themselves and Oodayar or between Marret and Oodayar. The plaintiffs, however, put it in evidence as an alleged copy of an alleged account which Marret had sent to them after disputes as to the liabilities of the French Company and Marret to the plaintiffs had arisen.

Before considering separately the contracts of the 25th May, 1917, and the 26th January, 1918, their Lordships will state, so far as it is necessary to do so in this suit, what is the law in India as well as in England with regard to payments of debts to a person who, as in this suit, is alleged by a debtor to have had the creditor's authority to receive them on his behalf. It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had, or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor.

In the joint written statement which, according to the record, the French Company and Marret filed, it was alleged that payments had been made to Oodayar as a partner of the plaintiffs. It was proved at the trial that Oodayar was not a partner of the plaintiffs in either of the contracts with which this suit is concerned. That defence was abandoned and it was alleged by Marret in his evidence, as their Lordships understood his evidence, that Oodayar had been authorised by the plaintiffs to receive the payments on their behalf and later that Oodayar had been held out by plaintiffs to him as having their authority to receive them. That authority and the alleged holding out of it is not admitted and is denied by the plaintiffs, and in their Lordships' opinion there is no reliable evidence that Oodayar ever had or had been held out as having any such authority.

Their Lordships will now consider the case as to the goat skins, and will then consider the case as to the sheep skins. The claim in respect of the goat skins arises, as has been mentioned, under a contract made on the 25th May, 1917, between the plaintiffs and the French Company through their agent Marret. That contract was made at Madras and is contained in the following two letters:—

"Madras,
25th *May*, 1917,

Les Tanneries Lyonnaises, Societe Anonyme,
ad capital de 9,764,000 francs.
Ouillins, Rhone.
France.

Messrs. Mahomed Khaleel Shirazi & Sons, Madras.

Dear Sirs,

With reference to our interview, we beg to confirm you herewith the conditions by which we came to a conclusion.

The raw goat skins of different places mentioned by us, will be purchased by you, on our account and deliver to us in Pondicherry

On account of buying and financing, we agree to pay you a commission of 10 per cent. (10%) on the said purchases.

Our monthly purchases may be of about thirty thousand (30,000) skins more or less, if no objections interfere with it.

Such business to begin with, on the 1st June, 1917, to finish on the 31st December, 1917, and to be continued by mutual consent.

The skins will be purchased with our consent concerning the prices and the qualities.

During the above stated period the goods-purchased will be our property.

The said skins are to be treated by our process in your tannery in Pondicherry, under our supervision and according to our instructions.

The charges for the curing, according to the above-stated process, will be Rupees seventeen and-a-half per hundred ordinary goat skins (Rs. 17-8 0).

All expenses of the tannery and for the curing, according to the said process to be borne by you.

For the cost of the goods and the costs of curing, a credit will be opened in sterling in a Bank of Calcutta, Bombay, Madras at your choice.

Such credit to be transferred to your account as soon as the goods are received by us in Pondicherry.

Exchange of the drafts, brokerage and covering expenses done with our consent will be borne by us.

If, from the time the raw goat skins are delivered in Pondicherry, the time exceed two months, an interest of 7 per cent. per annum (7%) will be charged to us.

The delivery of the goods to be done to us after due payment.

If during the way the goods going to Pondicherry, there be any Railway or Government restrictions, we will not hold you responsible for it.

We have no objections for your tanning sheep skins in the tannery as long as it does not interfere with our work.

Please confirm textually the above agreed conditions.

Yours faithfully,
Per Pro Tanneries Lyonnaises,
(Signed) J. MARRET.

Address:—
Tanneries Lyonnaisés,
C/o J. Marret.
Commercial Hotel, Madras."
"Madras,
25*th May*, 1917.
"Mahomed Khaleel Shirazi and Sons,
Telegraphic Address: 'Khaleel'.
To—
Tanneries Lyonnaisés, Lyons.
Dear Sirs,

Yours of even date to hand. In reply we have to inform you that we confirm the same under the conditions mentioned hereunder, to which we agree upon.

Conditions.

1. The raw goat skins of different places mentioned by you will be purchased by us on your account and deliver to you at Pondicherry.

2. On account of buying and financing, we agree to receive a commission of 10 per cent. (10 %) for such purchases.

3. Your monthly purchases may be about thirty thousand (30,000) skins more or less if no objections interfere with it.

4. Such business to begin with on the 1st June, 1917, to finish on the 31st December 1917 and to be continued by mutual consent.

5. The skins will be purchased with your consent in respect of quality and prices.

6. During the said period the goods purchased for you would be your property.

7. The said skins will be treated by your process (half tan) in our tannery at Pondicherry under your supervision and according to your instructions.

8. The charges to be paid by you for curing, according to the said process, will be Rupees seventeen and a half (Rs. 17-8-0) for hundred (100) ordinary goat skins.

9. All expenses of the tannery and for curing according to the said process to be borne by us.

10. For the cost of the goods and the cost of curing a credit to be opened by you in sterling in any of the Banks in Calcutta, Bombay or Madras at my choice.

11. Such credit to be transferred to our account as soon as the goods are received by you in Pondicherry.

12. Exchange of the drafts, brokerage and covering expenses done with your consent must be borne by you.

13. If from the time the raw goat skins are delivered in Pondicherry exceeds two months an interest of 7 per cent. per annum (7 %) must be paid by you.

14. The delivery of the goods to you after the due payment.

15. We cannot stand responsible for transmitting goods to Pondicherry, if there be any restriction by Railway or by any prohibition by Government. We can tan our sheep skins in our tannery at Pondicherry provided there would be no disturbance to your work.

Yours faithfully,
MOHAMED KHALEEL SHIRAZI & SONS."

"Our process", mentioned in Marret's letter, and "your process" mentioned in the plaintiffs' letter were the process of half-tanning for which Marret alleges that he had obtained a patent. The clauses, unnumbered in Marret's letter but numbered 10 and 11 in the plaintiffs' letter, mean, as their Lordships construe them, that the French Company should secure that the payments would be duly made by opening an account in sterling at one or other of the Banks in India mentioned and that the payments should be made to the plaintiffs by cheques or orders in their favour signed by Marret. The Bank which was chosen for that purpose was a Bank in Madras. Under that contract the plaintiffs delivered to the French Company at Pondicherry the goat skins in respect of which this suit has been brought. There is no dispute as to the quantities of goat skins which were delivered under the contract. The French Company paid through Marret direct to the plaintiffs considerable sums under the contract of the 25th May, 1917, leaving a balance due by them to the plaintiffs under that contract of the 25th May, 1917, as correctly found by the Trial Judge, of Rs. 81,737-0-9 and as incorrectly found by the High Court in the appeal of Rs. 25,824-14-2. The difference between the sums of Rs. 81,737-0-9 and Rs. 25,824-1-2 is explained by the facts that the Trial Judge believed the evidence given on behalf of the plaintiffs by Abdul Hussain Khaleel, one of the plaintiffs, and did not believe the evidence given by Marret, while the High Court in appeal believed the evidence given by Marret and did not believe the evidence of Abdul Hussain Khaleel, and drew incorrect inferences from entries in Ex. Q. The difference between the sums of Rs. 81,737-0-9 and Rs. 25,824-14-2 represents sums of money which on behalf of the French Company Marret alleged were paid to Oodayar, the receipt of which by the plaintiffs is not admitted and is not proved.

Abdul Hussain Khaleel and Marret were examined, and each was cross-examined at great length before the Trial Judge, and their Lordships, having carefully read the evidence which each of them gave, are satisfied that the evidence which was given by Abdul Hussain Khaleel may be trusted as truthful evidence, and that the evidence which was given by Marret cannot be regarded as truthful. That was obviously the view which the learned Trial Judge took of their evidence. Their Lordships find that the balance which was due by the French Company to the plaintiffs under the contract of the 25th May, 1917, for goat skins was Rs. 81,737-0-9, as found by the Trial Judge.

What may have led the High Court in the appeal to think that Oodayar had the authority of the plaintiffs to receive payments from Marret on behalf of the plaintiffs was a transaction of August, 1917, which briefly was as follows:—It will be remembered that under the contract of the 25th May, 1917, the French Company was not entitled to have delivery of any of the goat skins at Pondicherry until the contract price of them had been paid to the plaintiffs. In August, 1917, there were goat skins ready to be delivered to the French Company at Pondicherry, the contract price of which was in Rs. 10,800. Marret as the agent of the French Company was anxious to ship them to France without any delay, but there was not then in the Bank at Madras a balance upon which Marret could draw a cheque in favour of the plaintiffs, and he induced Oodayar to let him have delivery of the skins for the French Company by giving to Oodayar his own cheque for Rs. 10,800, to be re-paid to him when £2,000 should have been paid to the plaintiffs on behalf of the French Company. On the 28th August, 1917, Oodayar from Pondicherry wrote to the plaintiffs at Madras informing them that "Mr. Marret had deposited with me Rs. 10,800 to be paid to him after the second remittance of 2,000 pounds credited in your account." In reply to that letter on the 29th August 1917, the plaintiffs from Madras wrote to Oodayar at Pondicherry as follows:—"We have noted that Mr. Marret has deposited Rs. 10,800 with you. You may spend those, and when £2,000 are received by us, we can send the money from here to be paid to Mr. Marret. Please do not draw upon us any further." The £2,000 was apparently credited to the plaintiffs' account on or by the 2nd September, 1917, as on that day Oodayar wrote to the plaintiffs: "As the second 2,000 pounds (is) credited to your account, Mr. Marret wants that 10,000 and odd rupees to pay freight for his goods, so please send the same to-morrow." On the 3rd September, 1917, the plaintiffs in reply wrote to Oodayar: "On hearing about the credit of £2,000 Mr. Marret wants his Rs. 10,000 and odd deposited with you. We have, therefore, herein enclosed a sum of Rs. 10,000 (ten thousand) half-notes, the receipt of which kindly acknowledge." In their Lordships' opinion no businessman having the contract of the 25th May, 1917, and those facts before him, could come to the conclusion that the plaintiffs had held out to Marret that Oodayar had the authority of the plaintiffs to receive payments on their account, and their Lordships find that the plaintiffs never did hold Oodayar out as having their authority to receive payments on their behalf. There was another similar transaction, but it would not alter their Lordships' opinion that the plaintiffs had never held Oodayar out to Marret as having their authority to receive payments on their account. Whether Oodayar ever re-paid to Marret any of the sums which Marret had advanced to him in order to get deliveries of skins their Lordships do not know. It is possible that they were applied by Marret and Oodayar in buying skins for their own business of curing and exporting skins, which began on the 1st July, 1917.

Their Lordships will now consider the contract of the 26th January, 1918, as to sheep skins. As introductory to that subject they will explain how that contract came to be made. It appears from a letter written by Oodayar to the plaintiffs on the 14th August, 1917, that Oodayar had been half-tanning sheep skins for the plaintiffs by Marret's process. These sheep skins were exported to Japan. There was at that time a prospect of securing a larger order for skins to be shipped to America. Marret had objected to his process being used except for goat skins required for the contract of the 25th May, 1917, and Oodayar in the letter of the 14th August, 1917, informed the plaintiffs that Marret would allow the process to be used on receiving a commission of 2-annas a skin, and that it would be advisable to agree with Marret to give him a commission of 1-anna for each goat and sheep skin half-tanned by his process. In that letter of the 14th August, 1917, Oodayar said:—

"I have written out my opinion, you may think over the matter and do as you please. Now I am half tanning on a small scale. But he is not fully aware of the same. I have been telling him that I am doing only 100 or 50 hides. If the thing is done on a large scale, he will come to know it somehow. He will give us trouble later on."

In reply to that letter the plaintiffs wrote to Oodayar on the 19th August, 1917, a letter in which the following passages occur:—

"I have received the letter written by you on the 14th and note the contents. In perusing it we find that you have written about very great matters. You have written that the gentleman (Marret) objects to the making of half-tan sheep (skins) and that the patent has been registered for sheep and goat (skins) and all. It can never be done. He can register only his mark. How can he register in respect of other goods? I simply wrote to you that we could do the work in secret without letting the other Lubbais (tanners) know...............In a small tannery, sheep half tan may be done. There is no fear. There need not be any fear that it is done without his knowledge."

Further correspondence between the plaintiffs and Oodayar took place on the subject of half-tanning sheep skins without the knowledge of Marret, Oodayar urging that an arrangement should be made with Marret to give him a commission on sheep skins half-tanned by his process, and the plaintiffs instructing Oodayar to use the process more extensively in half-tanning sheep skins for them to export to Japan.

It appears that about November, 1917, Marret saw some letters in Oodayar's office from which he ascertained that his process was being used in half tanning skins, and at some time between November, 1917, and the 26th January, 1918, Marret had induced Oodayar to hand over to him the shipping documents relating to a large consignment of skins which had been shipped and were then in transit to Japan on behalf of the plaintiffs, to whom they belonged. On the 26th January, 1918, there was an angry interview at Pondicherry between the plaintiffs and Marret about his process having been used in half-tanning sheep skins, and it was arranged that Marret should hand over to the plaintiffs those shipping documents belonging to the plaintiffs which Marret had obtained from Oodayar. With them this Board is not concerned, and it was agreed between the plaintiffs and Marret as and representing himself to be the agent of the French Company that the contract of the 25th May, 1917, should be extended so as to include sheep skins and other skins, and the following two letters in the handwriting of Marret were exchanged between them:—

"Pondicherry,
26th January, 1918.

To—
J. Marret, Esquire
(Tanneries Lyonnaises),
Pondicherry.

Dear Sir,

With reference to our understanding please instruct your Bankers to transfer to our account the following shipment:—

	Yens.
25 bales, 10,000 sheep skins (19,042 lbs.)	7·500
20 bales, 6,000 dry goat (9,900 lbs.)	5·579
40 bales, 12,000 dry sheep skins (23,620 lbs.) ...	9·240

which were shipped to Mr. M. A. Raza, Yokohama. All the pickled skins shipped to Japan at the same time remaining your property.

Yours faithfully,
MAHOMED KHALEEL SHIRAZI & SONS.

"Pondicherry,
26th January, 1918.

Messrs. Mahomed Khaleel Shirazi & Sons,
Pondicherry.

Dear Sirs,

I beg to acknowledge receipt of your letter of this day concerning the skins shipped to Japan, will instruct this day our Bankers to transfer or credit your account of all sums referred in the shipment of the following skins, made to Mr. M. A. Raza, Yokohama.

	Yens.
25 bales, 10,000 sheep skins (19,042 lbs.)	7·500
20 bales 6,000 dry goat (9,900 lbs.)	5·579
40 bales, 12,000 dry sheep skins (23,620 lbs.)	9.240

All pickled skins shipped to Japan, remaining my property.

Yours faithfully,
J. Marret."

Mr. Justice Phillips, who tried the suit, was rightly of opinion that if Marret made the contract of the 26th January, 1918, as the agent of the French Company the words "remaining my property" must be taken as meaning the property of his principals the French Company. It appears from the correspondence that Marret frequently referred to himself as meaning the French Company. Marret when cross-examined admitted that they had the same meaning as in the contract of the 25th May, 1917.

Mr. Justice Phillips found that the contract of the 26th January, 1918, was made between the plaintiffs and Marret as the agent of the French Company as a continuation of the contract of the 25th May, 1917, and their Lordships agree with that finding. He also correctly found that the price of the sheep skins at Rs. 45 per 100 skins with 10 per cent. commission and Rs. 17-8-0 per 100 skins for tanning charges amounted to Rs. 67,326, adding that Rs. 67,326 to the Rs. 81,737-0-9 with interest on those sums at 7 per cent. he, on 20th October, 1920, gave the plaintiffs a decree for Rs. 1,76,242-0-5 with interest thereon at the rate of 6 per cent. per annum from that date to the date of realization. Mr. Justice Phillips dismissed the suit as against Marret and Oodayar, but decreed that the French Company and Marret should pay to the plaintiffs the costs of the suit when taxed with interest thereon at the rate of 6 per cent. per annum from the date of taxation to the date of realization. On the 25th August, 1921, the plaintiffs' costs of the suit were taxed at Rs. 4,082-4 0.

Marret's defence to the sheep skins' claim was that the sheep skins belonged to Oodayar and that the plaintiffs had no interest in them. That in the opinion of their Lordships was an untrue defence, and rightly failed. But the finding of the High Court in Appeal was, as their Lordships understand it, that the plaintiffs had made a present to Marret of the sheep skins in question in the suit. That view their Lordships cannot accept. By the sale of those sheep skins in Japan, Marret, when cross-examined, admitted that he had made a profit of one lakh of rupees. It is not now disputed that the plaintiffs had paid the dealers in skins for those sheep skins.

As their Lordships have said, they cannot regard Marret's evidence as truthful. Mr. Justice Phillips did not consider that Marret's evidence could be relied upon. How the High Court in appeal came to a different conclusion their Lordships do not understand. They will now quote briefly from the judgment of Mr. Justice Coutts Trotter, from which Mr. Justice Ramesam did not dissent, a passage in that judgment which shows what a high opinion Mr. Justice Coutts Trotter entertained of the reliability of Marret as a witness. It may be observed that Mr. Justice Phillips saw Marret when he was being examined and cross-examined and the High Court in appeal had not that advantage. Mr. Justice Coutts-Trotter said in his Judgment: "I now come to the sheep skins and M. Marret's threats against the plaintiffs for infringing his process in respect of them. It seems from the arbitration account to be quite clear that these skins were in fact collected from the dealers and supplied by the plaintiffs. It is not in the least clear that M. Marret knew that at the material time. His evidence, I think, amounts to this: When he found himself confronted by a claim in respect of sheep skins which were not touched by the contract he took up an alternative attitude, 'Either these sheep skins do not belong to you, or if they belonged to you as you now say they formed no part of our contract and you had no business whatever to use my special process in treating them without my permission.' I see no reason why he should not take that line, and I do not think that his threats about infringement in any way militate against the view that he honestly believed that the plaintiffs had no concern with these goods whatever. I am, therefore, of opinion that the plaintiffs' case with regard to the sheep skins entirely fails.

Finally, with regard to the 85 bales of mixed dried sheep and goat skins. Though I think that M. Marret had no right whatever to take possession of the documents of title in regard to them, I am not prepared to reject his explanation that he believed however wrongly at the time, that the plaintiffs were endeavouring to divert to other markets goods which ought to have been delivered to him and that he took possession of them in order to strengthen his position in enforcing his claim in respect of the sheep skins. It was, no doubt, an arbitrary and high-handed action, but I see nothing whatever to lead me to suppose that it was a consciously dishonest one." In their Lordships' opinion it was a dishonest action, as Marret must well have known. He could not have believed that he was entitled to the shipping documents which belonged to the plaintiffs.

Their Lordships think that in fairness to the French Company they should state what the French Company allege was the position in which that Company found itself after this appeal to His Majesty in Council had been presented. The French Company say that they were first informed by the Solicitors in London appearing for Marret that this appeal had been presented, and as their Lordships understand the French Company's statement that Company had previously no knowledge that a suit against them and Marret had been brought. The French Company say that the proceedings in the suit in Madras were defended by Marret without the knowledge or consent of the French Company, and that on receiving that information from Marret's London Solicitors that this appeal had been presented, the French Company was advised that they should be separately represented in this appeal, and instructed their London agents that their case in the appeal should be settled and lodged with all due expedition. If facts could have been proved which would have justified application to amend the decree no such application was made.

There is one other question raised by the appellants in this appeal. It relates to the admission in evidence by the Court of Appeal of documents which were not in evidence before the Trial Judge. The High Court as a Court of Appeal in this suit had under s. 107 of the C. P. C., 1908, power to take additional evidence. In their Lordships' opinion it is a power which should be exercised by a Court of Appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised, and that such additional evidence when admitted will be evidence which, if produced at the trial, would have been admissible. The additional evidence admission of which is complained of on behalf of the appellants, however much it may have affected the judgments in the Court of Appeal, has not affected the judgment of their Lordships in the slightest degree.

Their Lordships will humbly advise His Majesty that the appeal, so far as it relates to Les Tanneries Lyonnaises, should be allowed, and the decree of the High Court in appeal should be set aside against both respondents, with costs payable by Les Tanneries Lyonnaises, and the decree of Mr. Justice Phillips should be restored and affirmed, and that the appeal, so far as it relates to Monsieur J. Marret, should, save as aforesaid, be dismissed without costs. The respondents, Les Tanneries Lyonnaises, should pay to the appellants their costs in the High Court and in this appeal.

R. L. *Appeal allowed.*

Solicitors for the Appellants:—Mr. *Douglas Grant.*

Solicitors for the Respondents:—Messrs. *Thompson Quarrell & Attneave, Joasselyn & Elwes.*

BOMBAY HIGH COURT.

CIVIL REVISION APPLICATION No. 118 OF 1925.

September 24, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

Lala PUNJUSHET AND OTHERS—DEFENDANTS—APPLICANTS

versus

MOTIRAM BUDHU—PLAINTIFF—OPPONENT.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (2), (*b*)—Withdrawal of suit—'Other sufficient ground,' construction of.*

The expression "other sufficient ground" in cl. (*b*) of r. 1 (2), O. XXIII, C. P. C., must be construed to be ground analogous to the ground mentioned in cl. (*a*) of the same rule, that is to say, it must be of the same nature as formal defect. [p. 778, col. 1.]

Kali Prasanna Sil v. *Panchanan Nandi*, 33 Ind. Cas. 670; 44 C. 367; 23 C. L. J. 489; 20 C. W. N. 1000, *Kharda Co. Ld.* v. *Durga Charan Chandra*, 5 Ind. Cas. 187; 11 C. L. J. 45, *Mabulla Sardar* v. *Hemangini Debi*, 6 Ind. Cas. 620; 11 C. L. J. 512 and *Chhajju Ram* v. *Neki*, 72 Ind. Cas. 566; 49 I. A. 144; 24 Bom. L. R. 1278; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. (P. C.) 1922; 3 P. L. T. 435; A. I. R. 1922 P. C. 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.), referred to and followed.

Mahipati Shamla v. *Nathu Vithoba*, 4 Ind. Cas. 252; 33 B. 722; 11 Bom. L. R. 1109, referred to.

Application against an order of the Subordinate Judge at Nandurbar, in Suit No. 132 of 1924.

Mr. *P. V. Kane*, for the Applicants.

JUDGMENT.

Macleod, C. J.—This is an application under s. 115 of the Code, asking the Court to revise an order passed by the Second Class Subordinate Judge of Nandurbar, in Suit No. 132 of 1923. After several adjournments, the hearing was fixed for December 15, 1924, on which date the plaintiff-opponent presented an application to withdraw the suit with liberty to bring a fresh suit on the grounds that the plaint was not explicit; that the averments about fraud were not clear, and that there was no explicit assertion that the sale-deed was in the nature of a mortgage; that though there was a prayer for accounts and instalments, proper stamp had not been paid and there was no issue about mortgage; and that, therefore, the suit was likely to be dismissed because the pleadings were vague and insufficient.

The applicants-defendants raised several objections to the withdrawal of the suit being allowed, *viz.*, the plaintiff had already once amended the plaint but never claimed redemption; that though the plaintiff had alleged before the *mamlatdar* that the sale was a mortgage, he had in the suit averred only fraud; that several adjournments had already been granted to the plaintiff; that the hearing had actually commenced, documents had been produced by the defendants and one witness had already been examined for the defendants; that the plaintiff's suit was not going to fail on a technical point; that the suit had been filed on April 7, 1923, more than a year before the application, but in spite of defendants' objection the Court allowed plaintiff to withdraw the suit with liberty to bring a fresh suit.

Under O. XXIII, r. 1 (2), where the Court is satisfied (*a*) that a suit must fail by reason of some formal defect, or (*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

The question is whether the words "other sufficient grounds" give the Court a wide discretion to decide whether it should give permission to a plaintiff to withdraw from his suit, or whether those words must be read with a restrictive meaning, so that any other ground set forward by a plaintiff must be analogous to a formal defect, before the Court can give the plaintiff leave to withdraw.

In *Kali Prasanna Sil* v. *Panchanan Nandi* (1) Sanderson, C. J., referring to the words, *viz.*, "that there are sufficient grounds for permitting him to withdraw from the suit", in s. 373 of the Code of 1882, which was the section applicable to the case before the Court, said (page 372*):—

"But there are decisions of this Court which, in my opinion, are binding upon us. It is quite true they are not upon the same section, but they are upon O. XXIII, r. 1 of the C. P. C. which is now in operation, but the learned Vakil, who argued the case for the appellant, admitted that there is no substantial difference between this Rule and s. 373 of the old Code. In the first case, *Kharda Co. Ltd.* v. *Durga Charan Chandra* (2), it was held by my learned brother Mr. Justice Mookerjee that cls. (*a*) and (*b*) of sub-r. (2) have to be read together and that the intention is that a ground included in clause (*b*) must be of the same nature as the ground specified in cl. (*a*), that is to say, it must be something of the same nature as *formal defect*, and, inasmuch as in that case the ground for allowing the suit to be started afresh was not because there was a formal defect but for some other reason, the order was illegal. Then again the learned Chief Justice Sir Lawrence Jenkins in *Mabulla Sardar* v. *Hemangini Debi* (3) says: 'The decision in *Kharda Co. Ltd.* v. *Durga Charan Chandra* (2) shows that cl. (*b*) of sub-r. (2) must be read in connection with cl. (*a*) and with the limitations cl. (*a*) suggests, and so reading it, it is clear that it is not within the jurisdiction of a Court of Appeal to grant the permission on the terms which have been approved by the Court in this case.'"

With due respect, we agree that the construction put upon O. XXIII, r. 1, by these decisions is correct. It is certainly undesirable that so wide a construction should be placed on O. XXIII, r. 1, that a plaintiff, if he thinks that he is not likely to succeed in his suit owing to insufficient evidence, or for some other reason of that character, may be allowed to withdraw his suit, with leave to bring another suit, thus leaving the question in dispute still open between himself and his opponent.

In *Mahipati Shamla* v. *Nathu Vithoba* (4) Scott, C. J., says (page 726)†:—

"It is impossible to lay down any exhaustive definition of what are sufficient grounds within the meaning of s. 373 but I think that the Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant."

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(1) 33 Ind. Cas. 670; 44 C. 367; 23 C. L. J. 489; 20 C. W. N. 1000.

(2) 5 Ind. Cas. 187; 11 C. L. J. 45.

(3) 6 Ind. Cas. 629; 11 C. L. J. 512.

(4) 4 Ind. Cas. 252; 33 B. 722; 11 Bom. L. R. 1109.

*Page of 44 C.—[*Ed.*]

†Page of 33 B.—[*Ed.*]

With due respect, that leaves open the door to a considerable amount of discussion whether in any particular case the defendant would or would not be injured by the leave being given. It seems to me far more advisable to place a restrictive meaning on the words "other sufficient grounds," since O. XXIII, r. 1, grants a concession in favour of a plaintiff, and such a concession should not be extended further than is necessary.

We may also refer to O. XLVII, r. 1, which deals with the powers of a Court to grant a review of a decree or order, since the similar phrase "or for any other sufficient reason" appearing therein has by the Privy Council been construed in *Chhajju Ram* v. *Neki* (5) to mean that a reason sufficient on grounds at least analogous to those specified in the rule must be shown.

The Rule will be made absolute in this case and the order of the lower Court set aside with costs.

Coyajee, J.—I agree.

R. L. *Rule made absolute.*

(5) 72 Ind. Cas. 566; 49 I. A. 144; 24 Bom. L. R. 1273; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. (P. C. 1922; 3 P. L. T. 435; A. I. R. 1922 P. C. 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.).

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 147 OF 1925.
March 22, 1926.
Present:—Mr. Justice Misra.
Syed AHMAD SHARIF—PLAINTIFF
—APPELLANT
versus
Mirza UMRAO BEG—DEFENDANT
—RESPONDENT.

Landlord and tenant—Suit for possession—Plaintiff's title established but not contract of tenancy—Defendant's possession permissive in inception—Adverse possession—Decree for possession—Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Finding of fact, when not binding.

Where the plaintiff's title to the property claimed has been established and also that the defendant has been in occupation of that property by permission of the plaintiff, the plaintiff would be entitled to a decree for possession in spite of the fact that he may have failed to establish the contract of tenancy set up by him as the basis of his claim. [p. 781, col. 2; p. 782, col. 1.]

Abdul Ghani v. *Babni*, 25 A. 256; A. W. N. (1903) 18, referred to.

The principle of law that possession *prima facie* may be considered adverse cannot apply to a case where the possession of the defendant in its inception is of a permissive nature. [p. 782, col. 1.]

A finding of fact arrived at on a mistaken view of the pleadings is not binding in second appeal. [p. 780, col. 1.]

Second appeal against a decree of the Sub-Judge, Sitapur, dated the 18th February 1925, reversing that of the Additional Munsif, Sitapur, dated the 27th November 1924.

Messrs. *Ali Mohammad* and *Mohammad Zahir*, for the Appellant.

Messrs. *Hyder Husain* and *R. N. Kauli*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal in a suit for possession. One Syed Ahmad Sharif, the plaintiff, brought a suit in the Court of Munsif, Sitapur, for possession of a house No. 970 situate in Mohalla Bangla of Sitapur town, against the defendant Mirza Umrao Beg on the ground that the defendant was his tenant at a monthly rental of Rs. 4, that the plaintiff gave the defendant a registered notice in January, 1924, asking him either to vacate the house or failing that to pay a monthly rental at Rs. 15 and that he having neither vacated the house nor paid the rent, the plaintiff was entitled to a decree for possession of the house as well as Rs. 121-8-0 for arrears of rent. The sum claimed as arrears was at the rate of Rs. 4 per month up to 31st January 1924 and at the rate of Rs. 15 per mensem from the 1st February 1924 the date of giving notice to 15th August 1924, the date of suit.

The defendant alleged in his written statement that relations between his father, Mirza Qudratullah Beg and the plaintiff's father, Hakim Mohammad Sharif, were very intimate and that when the house in suit had been mortgaged by the plaintiff's father to the Mahmudabad estate, his father lived in the house with the permission of the estate, being a servant of the estate. He contended that in the year 1906 after the death of his father, the plaintiff's father borrowed a sum of Rs. 400 from him and redeemed the house from the said estate and having done so made a gift of the same to him, after which date the defendant had remained continually in adverse proprietary possession of the said house.

It is not necessary for me to refer to various other allegations made in the oral pleadings because they are not relevant for the purpose of deciding this appeal.

The learned Munsif of Sitapur, who tried the case, held that the house belonged to the plaintiff, that he had on behalf of his father redeemed it from the Mahmudabad estate, and that the defendant had been living in the said house as his tenant originally at a rental of Rs. 4 per mensem and later on in the same capacity but subject to the liabilty of paying rent at the rate of Rs. 15 a month. On these findings he decreed the plaintiff's claim as brought.

In appeal the learned Subordinate Judge of Sitapur took a different view. He accepted the defendant's appeal and dismissed the plaintiff's suit.

The plaintiff has now come up to this Court in second appeal and the main contention put forward on behalf of the appellant is that the findings of the learned Subordinate Judge should not be considered as binding on this Court inasmuch as he has ignored the pleadings of the parties in the case in arriving at a decision of the case in appeal.

I have carefully gone through the judgment of the learned Subordinate Judge and it appears to me that the contention put forward by the learned Pleader for the appellant is well-founded. It is not necessary for me to take up all the points in detail but it is sufficient to state that in the written statement filed by the defendant it was admitted by him that the house in suit had been mortgaged by the plaintiff's father, Mohammad Sharif, to the Mahmudabad estate and that the defendant's father was living in the same being the servant of the said estate. On this state of pleadings it was not necessary for the learned Subordinate Judge to go into the question of mortgage or to declare that the defendant's possession of the house was not permissive but adverse. Under these circumstances, I am compelled to hold that the findings of the learned Subordinate Judge, which have been arrived at on a mistaken view of the pleadings, cannot be considered to be binding on this Court in second appeal. The learned Counsel for the respondent has frankly admitted that this is the correct view.

There are two courses open to me, either to send the case back to the Court below for fresh findings or to arrive at them myself under s. 102 of the C. P. C. (Act V of 1908); inasmuch as the material on the record is sufficient to come to proper findings in the case. I have chosen to take the latter course.

I now proceed to give my own findings on the three most important points in the case which are as under:—

(1). Whether the plaintiff is the owner of the house in suit?

(2) Whether the plaintiff's father after redeeming the house in suit from the Mahmudabad estate, let it to the defendant on a monthly rent of Rs. 4?

(3) Whether the plaintiff's father had, after getting the house redeemed from the Mahmudabad estate, made an oral gift of it in favour of the defendant.

Regarding the first point it appears to me to be clear beyond dispute, whatever view of the pleadings might be taken, that the plaintiff is now the owner of the house. If the house originally belonged to his father, Mohammad Sharif, it would after his death be inherited by the plaintiff as the only heir of his father. If the house be considered to be the property of his mother under a deed of gift which is alleged to have been executed in her favour by the plaintiff's father, then after her death one-fourth share in that house would be inherited by the plaintiff's father and three-fourths by the plaintiff himself and the said one-fourth inherited by his father would after his death again be inherited by the plaintiff himself. In either view of the case, therefore, the plaintiff is now the full owner of the house. I, therefore, find accordingly.

Regarding the second point that the house was let on rent by the plaintiff's father to the defendant after redemption in 1906, I am of opinion that the story as deposed to by the plaintiff himself in his evidence and supported by the other witnesses, has not been established in view of the fact that the plaintiff did not produce any documentary evidence in support of it. It is clear from the evidence on the record that the plaintiff and his agent have been keeping accounts of the income of the property in possession of the plaintiff, yet it is surprising to find that no account books have been produced to show that any rent was realized in respect of the said house by the plaintiff from the defendant. My finding, therefore, is to the effect that it is not established that the defendant took the house on rent at Rs. 4 per mensem from the plaintiff's father in the year 1906.

Regarding the third point, namely, the oral gift alleged by the defendant, I am of opinion that the said gift has not been established. The defendant himself went into the witness-box to give evidence in support of the alleged gift, but he being an interested person much reliance cannot be placed on his statement. The second witness examined in support of the alleged gift was one Imam Beg. This man is also an interested person because he says that he is a step-brother of the defendant. His statement in examination-in-chief is significant. At first he stated that the plaintiff's father had borrowed money from the defendant to redeem the mortgage and soon after the redemption the plaintiff said to the defendant "You may live in this house, I give it to you." Soon after he changed his statement and said that the plaintiff said to the defendant "I gift it to you, it is yours." He, therefore, gave two contradictory versions and the obvious meaning which I place upon his earlier statement is that the plaintiff, after redemption, allowed the defendant to live in the house in suit. I am not prepared to carry the evidence of this person further than this. The witness is a man of no substance; he pays no income-tax. At first he said that he was doing the business of a contractor but later on said that he had given up that business altogether. He stated that his income was only Rs. 15 a month. In my opinion the witness is a man of no substance and being a relation of the defendent was asked to depose about a story which was untrue. The third witness examined in the case was one Gauhar Khan. He is an unsummoned witness and apparently a man of no means. At first he said that the defendant had gone to live in the house with the permission of Hakim Sahib (plaintiff's father). Soon after he changed his statement and said that no permission had been given in his presence. Then when the witness was pressed very hard by the defendant's Pleader and many questions had been put to him he stated that the house had been gifted away by Hakim Saheb (plaintiff's father) to the defendant (Umrao Mirza). I am not prepared to place any reliance on his statement. The last witness examined by the defendant in support of the alleged oral gift was a man called Manawwar Khan. The man according to his own admission is a gambler and was challaned by the Police. He does not live upon his own earnings but is supported by his sons. The evidence of this man appears to me to be manufactured for the occasion. I am not prepared to place any reliance upon this witness also. All these witnesses were also disbelieved by the Trial Court which heard them, and I am in entire agreement with its view of the evidence. The story of the alleged oral gift also appears to me to be most improbable. It is said that the plaintiff on behalf of his father had borrowed a sum of Rs. 400 from the defendant and redeemed the property with the money so borrowed, and after redemption the house in suit was gifted straight off by the plaintiff in favour of the defendant. I fail to understand why if the object of the plaintiff or his father was to make a gift of the property in suit which was held in mortgage by the Mahmudabad estate they should have gone out of their way to borrow the money from the defendant to redeem the house from the Mahmudabad estate and then to make a gift of it in his favour. The easiest course would have been to make a gift of the equity of redemption in favour of the defendant or to execute a sale-deed of the said property in his favour giving him option to redeem the property from the said estate. I am, therefore, convinced that the story of the alleged oral gift has been manufactured by the defendant for the purpose of this case.

It, however, appears to me to be clear from the evidence produced by the defendant himself that he came to live in the house with the permission of the plaintiff or his father, (*vide* statement of Gauhar Khan—page 35).

The position, therefore, appears to me to be this: The house in suit belonged to the plaintiff's father and was held by the Mahmudabad estate in mortgage. Money was borrowed by the plaintiff's father to pay off that mortgage. The money was paid and the mortgage was redeemed. The plaintiff or the plaintiff's father allowed the defendant, from whom the money had been borrowed, to live in the house without payment of any rent. The defendant has continued since that time to live in that house.

I am, therefore, led to consider what should be the decision in a case where the facts, as stated above, have been proved. Where the plaintiff's title to the property claimed has been established and also that the defendant has been in occupation of that property by permission of the plaintiff, the plaintiff would, in my opinion, be entitled to a decree for possession in spite of the fact that he may have failed to establish the contract of tenancy set up by him as the basis of his claim. I am supported in this view by a decision of a Full Bench of the Allahabad High Court in *Abdul Ghani* v. *Babni* (1). In this case the plaintiff had come to Court alleging that the defendant had hired a house from him at a monthly rent of one rupee but had failed to pay the rent and that he had given the defendant notice to quit the house. The plaintiff claimed possession and damages but not arrears of rent. The defendant denied the tenancy alleged by the plaintiff and asserted that she had been in adverse possession for a period of more than 12 years. She asserted that she had purchased the land upon which the house stood and had herself built the house. The findings in the case were that the plaintiff was the owner of the house, that the defendant occupied the house as a friend with the permission of the plaintiff and that the defendant had never before asserted her title to the house. It was held that upon the facts found the plaintiff was entitled to a decree for possession notwithstanding that his case was that the defendant was his tenant. The facts of this case are similar to those of the present one. It was strenuously contended on behalf of the defendant-respondent that his possession was not permissive. I cannot, however, accede to that contention. The fact alleged by the defendant in his written statement that he was a servant of the Mahmudabad estate and was living in that house with the permission of the estate and also the fact that the plaintiff's father made a gift of the house in his favour, clearly show that the possession of the defendant was in its inception of a permissive character, and I have already stated above that this was also the evidence given by one of the defendant's witnesses. It is, therefore, clear that the possession of the defendant in its inception was of a permissive nature. Under these circumstances the principle of law that possession *prima facie* may be considered adverse, cannot apply to the facts of the present case. In my opinion the plaintiff's title to the house in suit having been established beyond any doubt and the defendant's possession having been proved to be of a permissive character, the plaintiff is entitled to a decree for possession of his house.

I, therefore, allow the plaintiff's appeal, set aside the decree of the learned Subordinate Judge, and pass a decree for ejectment in favour of the plaintiff, in respect of the house claimed by him. One month's time is allowed to the defendant for vacating the house from this date. The plaintiff's claim for arrears of rent will stand dismissed. In my opinion both the plaintiff and the defendant set up false stories in support of their respective cases, and bearing that consideration in mind it appears to me to be fair and proper that I should order that the parties bear their own costs in this Court and in both the Courts below, and I order accordingly.

R. L. *Appeal allowed.*

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(1) 25 A. 256; A. W. N. (1903) 18.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.
December 1, 1925.
Present:—Lord Shaw, Lord Phillimore,
Sir John Edge, Mr. Ameer Ali
and Lord Salvesen.

Kunwar CHIRANJIT SINGH—PLAINTIFF
—APPELLANT
versus
Rai Bahadur HAR SWARUP—DEFENDANT
—RESPONDENT.

Vendor and purchaser—Sale of immoveable property—Earnest-money—Breach of contract by purchaser—Earnest-money, whether can be recovered.

Under a contract of sale of immoveable property the earnest-money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.

Plaintiff agreed to purchase certain immoveable property from the defendant at the price of Rs. 4,76,000 and one of the conditions of the contract was that Rs. 20,000 was to be paid as earnest and the balance in two moieties, the first being payable on executing the conveyance and the last within six months thereof. Plaintiff did not pay the earnest-money as such but obtained a financial modification of the terms of the contract whereunder he paid the sum of Rs. 1,65,000 towards the sale price of Rs. 4,76,000. The plaintiff was subsequently unable to complete the contract even in its modified form and brought a suit to recover the part of the sale price paid by him:

Held, that the plaintiff having broken his contract must lose the earnest-money, *viz.*, Rs. 20,000 but must be re-paid Rs. 1,45,000 the balance of his payment to account.

Appeal from a judgment and decree of the Allahabad High Court reversing a decree of the Subordinate Judge's Court, Messrs. *A. M. Dunne, K. C.*, and *B. Dube*, for the Appellant.

Messrs. *De Gruyther, K. C.*, and *J. M. Parikh*, for the Respondent.

JUDGMENT.

Lord Shaw.—The main appeal has reference to a contract of sale of the Markham Grant Estate belonging to the defendant Jyotish Sarup. The contract was entered into with the plaintiff-appellant. The High Court, reversing the judgment of the Subordinate Judge held that there was a complete contract of sale. In the opinion of the Board the High Court, in this particular, as in the others after mentioned, was right.

One of the terms of this contract of sale was as follows:—28th July, 1914, from defendant to the plaintiff:—

"Willing on old terms, namely, earnest twenty thousand balance in two moieties, first payable on executing conveyance, last within six months net cash we receive Rs. 4,76,000."

On the 2nd August a reply was sent accepting the proposal.

From the point forward, however, the appellant appears to have encountered financial difficulties in carrying out the contract. He set about endeavouring to secure the property on modified and easier terms. He did not pay the earnest-money *eo nomine*, but on the 26th August, 1914, he sent two cheques, amounting *in cumulo* to Rs. 1,65,000. the receipt being granted for these sums 'towards the sale price of the Markham Grant Estate out of the consideration of Rs. 4,76,000."

It is contended that this formed a supersession of the former contract. The Board agrees with the opinion of the High Court that this is not so. It was merely a financial modification in the interests of the purchaser, who appeared to be unable or unwilling fully to meet the terms of the contract.

Then came, on 6th September, 1914, a letter from the purchaser's representative in these terms:—

In continuation of my telegram, dated the 3rd instant from Simla, I have to inform you that, owing to certain unavoidable circumstances Kunwar Chiranjit Singh of Kapurthala, is quite unable to purchase the Markham Grant in the Dehra Dun District. You are hence quite at liberty to settle your terms and make up the bargain with any other purchaser.

It is accordingly plain that the purchaser was unable or unwilling to complete the contract, even in its modified terms.

According to the judgment of the High Court, which again, in their Lordships' view, is correct, the purchaser must, having broken the contract, lose his earnest money of Rs 20,000, but must be re-paid Rs. 1,45,000, the balance of his payment to account. The appeal is brought with the object of his also obtaining re-payment of the earnest money.

In the opinion of the Board, as mentioned, the original contract of sale was not superseded. It was carried forward with the modifications alluded to and in particular there is nothing to suggest that the owner of the Estate agreed to sacrifice the stipulated earnest.

Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.

The application of this principle to the contract in question settles the case.

A cross-appeal was presented truly for the purpose of endeavouring to meet circumstances which have not arisen, namely, the Board's possibly coming to an opinion that the original contract of sale had been wiped out.

Their Lordships will humbly advise His Majesty that the main appeal fails with costs. As to the cross appeal there will be no order except that there be no costs to either side.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant :—Mr. *H. S. L. Polak.*

Solicitors for the Respondent :—Mr. *T. L. Wilson & Co.*

BOMBAY HIGH COURT.

CIVIL REVISIONAL APPLICATION No. 115 OF 1925.

December 16, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

SHANKAR GOVIND PATHAK—APPELLANT

versus

BALKRISHNA SHANKAR JOSHI—OPPONENT.

Civil Procedure Code (Act V of 1908), O VII, r. 10

—Plaint covering several causes of action—Some within jurisdiction of Court, others beyond it—Return of plaint—Procedure.

Where on presentation of plaint covering more than one cause of action, the Court is of opinion that it can deal only with some of the causes of action, the proper procedure to follow is to retain the plaint and strike out from the plaint that part of it which it thinks is beyond its jurisdiction leaving it to the plaintiff to file another suit with regard to the causes of action struck out from the plaint in the proper Court. It is not a proper procedure to return the plaint to be presented to proper Court for trial of causes of action beyond its jurisdiction and itself to proceed on a certified copy of the plaint for causes of action within its jurisdiction.

Civil revisional application against an order of the First Class Subordinate Judge, at Dhulia, in Suit No. 704 of 1924.

Mr. *V. D. Limaye*, for the Appellant.

Mr. *M. V. Bhat*, for the Opponent.

JUDGMENT.—We do not agree with the order of January 17, 1925, directing the suit to be struck off the file. The mistake which came in the plaintiff's way was due to the default of the Erandol Judge, who ought to have in the first instance returned the plaint with regard to the whole of the causes of action therein. Instead of doing that, he referred the plaintiff to the Dhulia Court in regard to a portion of the claim, thinking at that time that he could deal with the remainder. Thereafter, he changed his mind and found that he could not deal with the remainder of the claim. There is no reason why on that account the plaintiff should be debarred from prosecuting his claim in the Dhulia Court either on the original plaint, or on the certified copy which was continued to be used in the Erandol Court, till finally the Erandol Court declined to deal with any part of the suit.

We think the original procedure adopted by the Erandol Judge was wrong. If he decided that he could deal with only one of the causes of action in the plaint, then he should have retained the plaint himself, and struck out from the plaint that part of it which he held was beyond his jurisdiction, and then the plaintiff could file another suit in the Dhulia Court. We do not think it is provided for anywhere in the C. P. C. that the same suit could be going on in two different Courts on the same plaint.

Rule will be made absolute and the suit will be heard on the merits. Costs of this Rule will abide the result.

R. L. *Rule made absolute.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL NO. 13 OF 1926.

April 7, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Misra.

Pandit MOHAN LAL—APPELLANT

versus

MOHAN LAL AND OTHERS—RESPONDENTS.

Jurisdiction—Suit for redemption—Jurisdictional value—Suit challenging previous redemption—Nature of suit.

In redemption suits the jurisdiction is governed by the amount of the principal mortgage money and not by the value of the property mortgaged. [p. 785, col. 1.]

Kedar Singh v. *Matabadal Singh*, 1 Ind. Cas. 703; 31 A. 44; A. W. N. (1908) 276; 5 A. L. J. 713, followed.

A suit against the mortgagee for redemption on the ground that a redemption obtained by some of the defendants through Court under a compromise is a collusive transaction, is a suit for redemption and not a suit for possession by a mortgagor against his co-mortgagor for his share of the redeemed property. [p. 785, col. 2.]

Makhdum Khan v. *Jadi*, 9 O. C. 91, distinguished.

Shanker Baksh Singh v. *Ram Bahadur Singh*, 70 Ind. Cas. 311; 26 O. C. 297; A. I. R. 1922 Oudh 45, referred to and approved.

Appeal against a decree of the Subordinate Judge, Unao, dated the 9th April 1923.

Mr. *Hyder Husein*, for the Appellant.

Mr. *Radha Krishna*, for Respondent No. 9.

JUDGMENT.—This is an appeal arising out of a suit for redemption brought in the Court of the Subordinate Judge of Unao. The suit was brought against the mortgagee for redemption on the ground that the redemption obtained by some of the defendants through Court under a compromise was a collusive transaction. The principal money secured by the mortgage was stated in para. 2 of the plaint as Rs. 3,400 and the value of the property was stated to be Rs. 6,000.

The defendants resisted the plaintiff's suit for redemption on various grounds, which it is not necessary for us to state here. It will be sufficient for the purposes of the present appeal to state that the suit was ultimately dismissed by the Court of the Subordinate Judge on the 9th of April 1923.

The plaintiff carried the matter further in appeal to the Court of the District Judge of Lucknow sitting at Unao. It is unfortunate that the appeal against this decree which was filed on the 12th of May 1923 did not come up for hearing before the District Judge till the 23rd January 1926. On that date the case was argued on behalf of the appellant and the hearing of the appeal was adjourned to 31st of January 1926. On the 31st January a preliminary objection was taken on behalf of the respondent to the effect that the appeal did not lie in the Court of the District Judge but in this Court. Further arguments on this point on behalf of the appellant were heard on the 6th of February 1926, and on the 13th February 1926 the learned District Judge held that the appeal was not cognisable by his Court and on that finding he returned the memorandum of appeal to be presented to this Court. The memorandum of appeal was, therefore, presented by the appellant to this Court on the 15th of February 1926.

The appeal when presented to this Court was noticed as one which was rightly instituted in the Court of the District Judge and in order to avoid delay and expense to the parties, a notice was issued by this Court to them to get the question of jurisdiction settled before the case was fixed for hearing on the merits.

The parties have now appeared before us to-day and the question of jurisdiction has been argued at great length.

After hearing the arguments on both the sides we are of opinion that the order of the learned District Judge cannot be maintained and that the appeal did actually lie to his Court and that it is to be heard by that Court and that Court alone. It is a settled rule of law that in redemption suits the jurisdiction is governed by the amount of the principal mortgage money and not by the value of the property mortgaged [*vide Kedar Singh* v. *Matabadal Singh* (1)]. We have now to determine whether the suit as brought by the plaintiff in the Court of the Subordinate Judge of Unao can be reckoned as a suit for redemption. It has been contended before us, as it was before the learned District Judge, that the present suit was not a suit for redemption but a suit for possession brought by a co-mortgagor against another co-mortgagor who had redeemed the property and in support of this proposition reliance was placed on the case of *Makhdum Khan* v. *Jadi* (2). There is no doubt that it was held by the late Court of the Judicial Commissioner of Oudh in that case that the suit brought by a co-mortgagor against another co-mortgagor for recovery of possession of his share cannot be treated as a suit for redemption and that the appropriate Article of the Limitation Act applicable to the suits of this character was Art. 144 and not Art. 148. But what we have to see in this case is whether the suit as laid by the plaintiff in his plaint was really a suit of that character. The plaintiff did not admit the validity of the redemption effected by some of the mortgagors. He described in his plaint the proceedings taken by those mortgagors as collusive, and asked a decree for redemption of the entire property. In those circumstances it appears to us that his suit cannot be treated as a suit for recovery of his share of the property mortgaged as one brought against his co-mortgagor who had already redeemed the property. His suit was purely a suit for redemption of the entire mortgaged property. The learned District Judge has taken great pains in considering the nature of the suit brought by the plaintiff but in so doing he has taken this fact into consideration that in appeal the plaintiff relinquished the shares of the two mortgagors Kusher and Jugga. In our opinion this fact cannot in any way be considered to be of any importance in determining the real nature of the suit brought by the plaintiff-appellant. The suit of the plaintiff-appellant as stated above and as it appears from the plaint was suit for redemption and purely of redemption and for the purposes of determining its jurisdiction we must be guided by the usual rule of law that the allegations in the plaint must determine the jurisdiction of the Court. It appears to be clear on the allegations made in the plaint that the suit as brought was not a suit between co-mortgagors *inter se* but it was a suit brought for redemption against the mortgagee and the fact that the plaintiff while appealing from the decree of the Trial Court excluded in his appeal the share of the two mortgagors would not in any way alter the character of the suit. In suits of such a nature it appears to us to be clear that the jurisdiction must be the same as in the case of ordinary suits brought for redemption.

We are supported in this view by the decision of the late Court of the Judicial Commissioner of Oudh reported as *Shanker Baksh Singh* v. *Ram Bahadur Singh* (3) decided by Kanhaya Lal, J. C. It was held in that case that the suit between persons claiming mutually the exclusive right to redeem the mortgage, one of whom had succeeded in inducing the mortgagee to allow him to redeem it, must be considered as suit of the nature of a suit for redemption and the jurisdiction of the Court in such a case must be governed by the principal amount of the mortgage money and not by the value of the mortgaged property. We are in full agreement with the principle laid down in this case. In our opinion, therefore, the suit brought by the plaintiff in the Court of the Subordinate Judge of Unao was a suit for redemption and its value for the purposes of the jurisdiction must be guided by the value of the principal amount of the mortgage-money, namely, Rs. 3,400 and not by the value of the mortgaged property which was stated in the plaint to be Rs. 6,000.

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(1) 1 Ind. Cas. 703; 31 A. 44; A. W. N. (1908) 276; 5 A. L. J. 713.

(2) 9 O. C. 91.

(3) 70 Ind. Cas. 311; 26 O. C. 297; A. I. R. 1922 Oudh 45.

We, therefore, set aside the order of the learned District Judge passed on the 13th February 1926 and direct that the memorandum of appeal be returned again to the appellant for presentation to that Court.

As to costs our order is that the respondents should pay their own costs in this Court and also pay the costs of the appellants.

We have already indicated in the earlier portion of this judgment the great delay which has occurred in the hearing of this appeal. We have already stated that the appeal was filed in the year 1923 and was heard by the learned District Judge in the year 1926. We hope that the learned District Judge will fix an early date for the hearing of this appeal.

R. L. *Memo. of appeal returned.*

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 3, 4 AND 19 OF 1923.

November 14, 1924.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice B. B. Ghose.

MESSRS. H. V. LOW & Co.,—DEFENDANTS—APPELLANTS

versus

HAZARIMULL BABU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 56, 81—Mortgage of several properties—Mining leases granted by mortgagor in respect of some properties—Mortgage decree—Order of sale—Marshalling.

Some out of several mortgaged properties were leased out by the mortgagors on mining leases under which the mortgagors were entitled to recover rent and royalties from the lessees. The mortgagee subsequently obtained a decree on foot of his mortgage and in execution of the decree the mortgagors obtained an order that the properties which had been leased out should first be sold in satisfaction of the decree inasmuch as it was expected that the sale of those properties would satisfy the decree completely. The lessees contended that the properties other than those leased to them should first be sold in execution of the decree:

Held, (1) that inasmuch as the mortgagors had a valuable interest, *viz.*, the right to receive rent and royalties, in the properties leased, the principle of s. 56 of the Transfer of Property Act was not applicable to the case; [p. 787, col. 2.]

(2) that the lessees having taken with full notice of the mortgage the principle of marshalling of securities laid down in s. 81 of the Transfer of Property Act was not applicable to the case; [p. 788, col. 1.]

(3) that the order directing that the leased properties should be sold first was perfectly proper in the circumstances of the case. [*ibid.*]

Appeals against the decrees of the Subordinate Judge, Burdwan, dated the 11th of September 1922.

Dr. *Sarat Chandra Basak* and Babus *Nagendra Nath Ghosh*, *Manindra Nath Banerjee*, *Jitendra Nath Roy* and *Prafulla Chandra Chakravarti*, for the Appellants.

Babus *Sarat Chandra Roy Choudhury*, *Sisir Coomar Banerjee*, *Sashi Sekhar Bose*, *Jyotish Chandra Sarkar*, *Hemendra Nath Sen* and *Gopendra Nath Das*, for the Respondents.

JUDGMENT.

B. B. Ghose, J.—These three appeals arise out of three suits brought on different mortgages by the same plaintiff. In the suits out of which Appeals Nos. 3 and 4 arise, the defendants were the same. In the suit which has given rise to Appeal No. 19, the principal defendants were the co-sharers of the principal defendants in the other two suits who owned an eight-anna share of the mortgaged property. The appellants before us are Messrs. H. V. Low & Co., Ltd., who were added as defendant No. 3 in the suits from which Appeals Nos. 3 and 4 arise and who were the defendant No. 8 in the suit which has given rise to Appeal No. 19. The suits were decreed by the Subordinate Judge against all the defendants. The mortgage in Appeal No. 3 is dated the 3rd April 1917. In Appeal No. 4, the mortgage is dated the 23rd September 1913 and in Appeal No. 19, it is dated the 10th of January 1917. The appellants before us are the lessees of two *mouzahs* called Simsa and Barkola and they obtained a mining lease from the mortgagors in Appeals Nos. 3 and 4 on the 10th February 1919 with regard to a moiety share of those two *mouzahs*. They also obtained a similar lease from the mortgagors in Appeal No. 19 on the 25th August 1919. There is no question that the appellants are bound by the several mortgages and that the property in their hands is liable to be sold in execution of the mortgage-decrees along with the other properties mortgaged at the instance of the mortgagee. These defendants in the Court below made an application in each case praying that the two *mouzahs* of which they had taken leases should be put up to sale last of all. In answer to their petitions, the mortgagors contended that these two *mouzahs* should be put up to sale first as the whole of the mortgage-debt would then be paid off out of the purchase-money of these two *mouzahs;* they were the most valuable part of their property and something would remain in excess after satisfying the mortgages. The mortgagors also said that, if these two properties were sold first, it would be unnecessary to proceed with the sale of their other properties. The mortgagee was indifferent as to what direction the Court might make with regard to the order in which the mortgaged properties were to be put up to sale. In all the cases, the Subordinate Judge made an order to the effect that these two properties Simsa and Barkola should be put up to sale first as he considered that that was the most equitable order having regard to the fact that the defendant Company—the appellants before us—had taken their mining leases with full knowledge of the indebtedness of the mortgagors and on favourable terms and further that the agents of the Company who negotiated the transaction undertook to pay off the several mortgages.

In each of these suits there was another set of defendants who were the sons of the mortgagors and they pleaded that they were not bound by the leases granted by their fathers as the leases were not granted for the benefit of the joint Mitakshara family of which they were all members. This question the learned Subordinate Judge has left open, and it seems to me that it was unnecessary to decide that question which was an issue between defendant and defendant wholly unconnected with the main issues which arose in the mortgage suits.

The defendant Company have appealed against the decrees passed by the learned. Subordinate Judge and they attack the particular portion of the decree in each case in which the order in which the mortgaged properties should be sold is stated, that is to say, they object to the order that *Mouzahs* Simsa and Barkola should be put up to sale first in satisfaction of the mortgage-decree. Their contention, in the first place, is that the other properties which are not the subject of the lease to them should be sold first and that, if the mortgages are not satisfied out of the sale-proceeds, then the property leased to them should be sold; secondly, they urged that, if that contention of theirs be not accepted, the order with regard to the sale of the two properties Simsa and Barkola first should be expunged and the mortgagee should be allowed to proceed to execute his mortgages against any property he chooses. It is said on behalf of the appellants that the law as enacted in s. 56 of the Transfer of Property Act, namely, where two properties are subject to a common charge and one of the properties is sold the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property so far as such property will extend, should be applied to the present cases. It is next said that, if that provision is not applicable, then the general principle of marshalling of securities as laid down in s. 81 of the Transfer of Property Act should be applied as a rule of equity.

In my judgment, the answer to the contention that the principle of s. 56 should be applied is that here the mortgagors have a valuable interest in the property, that is, the right to receive rent and royalty from the lessees, the dead rent being fixed at Rs. 2,000 per annum in each case, the mortgagors may very well say that, if their interest which is still subsisting and which is superior to that of the lessees is sold, then the rest of their property would be preserved, and, in such a case, it seems to me that it will not be open to the lessees to say that the two properties in question should not be sold, because the sale might in the end affect their interest. When I asked the learned Vakil for the appellants whether this principle has ever been applied in any reported decision in favour of the lessee of a mortgagor his answer was that he had not been able to find any case. On that ground and the lessees having taken with full notice, in my judgment, the principle of marshalling of securities is not applicable to the present cases. The contention, therefore, of the learned Vakil for the appellants that properties other than those leased to the defendant Company should be sold first cannot be upheld.

It is next contended on behalf of the appellants that the learned Subordinate Judge is wrong in finding on the evidence that the persons who conducted the negotiations for the leases with the mortgagors agreed to pay off the mortgage-debts. It is urged that in the various petitions filed by the mortgagors before the learned Subordinate Judge they did not allege this as a ground for having the two *Mouzahs* Simsa and Barkola sold first and that the story of the agreement is absolutely an afterthought. In Appeal No. 19, it is said that there is absolutely no evidence of the alleged agreement. It seems to me, however, that the appellants when they invoked equity in their favour signally failed in their case; they have not, it appears, paid any rent or royalty to the mortgagors since the date of the lease and this sum would, it is said, amount to over Rs 12,000 with interest. The mortgage debt in this case would amount to about that sum and it can hardly be said to be equity that the other properties belonging to the mortgagors should be sold in order to pay off the mortgage debt while the appellant Company have in their hands money due to the mortgagors to the same extent. In my opinion, therefore, on that ground alone the order made by the learned Subordinate Judge should be held to be quite equitable and should stand.

With regard to the other two appeals, the Subordinate Judge has accepted the evidence given by the mortgagors that there was such an agreement by Mr. Samson who is now the general manager of the defendant Company. There was mention of one Jyotish Chandra Mukerjee in the evidence. Jyotish comes forward and denies the whole story in his evidence. But he goes too far because he says that he had no knowledge whatsoever of the indebtedness of the mortgagors. It is hardly necessary to point out that with regard to one branch of the mortgagors it was necessary to have the sanction of the Court for the lease and it was recited in the order that the estate of the mortgagors was heavily encumbered and it was, therefore, necessary to grant a mining lease, and, on the basis of that order, the lease was granted. Mr. Samson does not give his evidence. I am unable to hold that the Subordinate Judge was wrong in accepting the evidence given by the mortgagors in these two cases. But apart from that, having regard to the circumstances that the mortgagors are entitled to a large sum of money as royalty out of these properties and that the lease was taken subject to the encumbrance with full knowledge of the indebtedness of the lessors, I think we should not interfere with the order of the lower Court.

The result, therefore, is that all the three appeals are dismissed with costs. We allow only one set of hearing-fee in each appeal to be divided between the different sets of respondents who have appeared.

Walmsley, J.—I agree.

Z. K. *Appeals dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 404 OF 1925.

February 5, 1926.

Present:—Mr. Justice Hasan.

BISHWANATH PRASAD—DEFENDANT—APPELLANT

versus

ABDUS SAMAD KHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Nankar *rights reserved—Foreclosure decree*—Nankar, *whether charge on property.*

A usufructuary mortgage of a share in a village with a condition for foreclosure provided that the mortgagee would take possession of the mortgaged property with the exception of the 130 *bighas sir* lands and of Rs. 100 cash annually fixed for the maintenance of the executant and his descendants, etc. The mortgagor obtained a decree for redemption with a condition of foreclosure in the event of default. The default being made decree for foreclosure was made absolute. The annuity was treated as *nankar* by both the parties before as well as after the foreclosure decree:

Held, that the entire share in the village was mortgaged subject to the liability of Rs. 100 annually which was *nankar* and that *nankar* was a charge on the property by which the ex-mortgagee was bound.

Appeal from a decree of the Subordinate Judge, Rae Bareli, dated the 14th May 1925, affirming that of the Munsif, Rae Bareli, dated the 23rd December 1924.

Mr. *Ishwari Prasad*, for the Appellant.

Mr. *Hyder Husain*, for the Respondents.

JUDGMENT.—Appeal No. 404 arises out of Suit No. 251 of 1924 instituted in the Court of the Munsif, Rae Bareli, and Appeal No. 405 arises out of Suit No. 253 of the same year and instituted in the same Court. In both the suits there was only one defendant, Bishwanath Prasad, and he is the sole appellant in the two appeals before me. The plaintiffs in the two suits were different persons but the facts of the two cases are the same and the titles of the two sets of plaintiffs are also the same. The appeals may, therefore, be conveniently disposed of together.

The facts of the case are numerous but the point for decision lies in a nutshell. The question is one of interpretation of a deed of mortgage, dated the 15th of December 1867, executed by the predecessors-in-interest of the plaintiffs in the two suits in favour of the predecessors-in-interest of the defendant in both the suits. The mortgage of the 15th of December 1867 was a usufructuary mortgage with a condition for foreclosure in respect of an 8 annas share in village Bawan Buzurg in the District of Rae Bareli. Under certain circumstances, which it is not necessary to state, the mortgaged security was reduced by 7 pies in the year 1869 and since then the mortgage was in operation in respect of the remaining 7 annas 5 pies share only.

The position of the parties having been explained in the preceding paragraph of this judgment, it will now be convenient to refer to them as plaintiffs and the defendant.

It appears that the plaintiffs instituted a suit for redemption of the mortgage of the 15th of December 1867 and obtained a decree on the 30th of June 1890 with a condition of foreclosure in the event of default in the payment of the mortgage-money. Default was made and the decree for foreclosure was made absolute on the 18th of August 1895 in favour of the defendant. The plaintiffs in both the suits claim a certain amount of *nankar* from the defendant, who is now in possession of the 7 annas 5 pies share under the foreclosure decree, and they claim that the *nankar* is a charge on the property held by the defendant. The plaintiffs base their title on the deeds of mortgage of the 15th of December 1867. I now proceed to interpret that deed. The operative part is as follows :—

"In lieu of the sum of Rs. 14,000 carrying interest at the rate of Rs. 1-4-0 per cent. per mensem we, the executants, mortgage our 8 annas share out of the 16-annas share in village Bawan Buzurg, including *mal*, *sewai*, *jalkar* and *bankar* to Baldeo Das and Diwan Das for a period of 12 years." Then follow certain covenants. The first of these covenants is as follows:—"The mortgagees shall take possession of the mortgaged property with the exception of the 130 *bighas sir* lands and of Rs. 100 cash annually, which amount has been fixed for the maintenance of the executants and their dependants and adherants, etc." To my mind it is perfectly clear that the entire 8-annas were mortgaged subject to the liability of the payment of Rs. 100 per year out of the profits of the mortgaged-property for the benefit of the mortgagors and their descendants. Thus an existing fund was specified out of which the sum of Rs. 100 was to come every year. The annuity was a '*nankar*' and has been so treated by the parties for all time, both before and after the foreclosure decree. "When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *cuodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee" [*Spencer's case* (1)]. Thus the *nankar* is a charge on the property now in the possession of the defendant.

The foreclosure decree has not been produced but I am justified in presuming that it was in accordance with the covenants contained in the deed of mortgage. Assuming, however, that the foreclosure decree did no more than foreclose the mortgagors' right of redemption in the 7-annas 5-pies share and thereby had the effect of transferring that share in favour of the defendant, the defendant cannot escape the liability with which the property is charged.

The learned Pleader for the appellant contended that the liability for the annuity came to an end on the passing of the foreclosure decree. There is nothing on the record of the case to support this contention. On the contrary, as the lower Court has found, the parties have all along been, by their conduct, recognizing the continuance of the liability. The appeals fail and are dismissed with costs.

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(1) 1 Sm. L. C. (12th Ed.) 62; 5 Co. Rep. 16*a*; 77 E. R. 72.

R. L. *Appeals dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 93 OF 1925.
November 25, 1925.
Present :—Mr. Justice Mukerji.
DR. BANWARI LAL—PLAINTIFF—APPLICANT
versus
MESSRS. SHALIMAR PAINTS COLOUR AND VARNISH Co., LD.—DEFENDANTS—OPPOSITE PARTIES.

Provincial Small Cause Courts Act (IX of 1887), ss. 24, 25—Civil Procedure Code (Act V of 1908), s. 35 (A)—Small Cause Court—Costs, extraordinary, award of, power of—Appeal, right of—Revision, whether lies.

An officer who has been permitted to exercise the powers of a Small Cause Court Judge, under the Provincial Small Cause Courts Act, is not entitled to exercise the powers of granting costs under s. 35 (A) of the C. P. C., unless he is vested with a jurisdiction up to Rs. 250 or has been empowered by the High Court to award such costs.

Where an order awarding extraordinary costs under s. 35 (A) of the C. P. C. is made by a Small Cause Court an appeal lies from the order under s. 24 of the Provincial Small Cause Courts Act to the District Judge.

The exercise of the right of interference in revision under s. 25 of the Provincial Small Cause Courts Act does not depend upon the question whether an appeal lies or not, but it is a matter for consideration whether when there is a speedy remedy open to a party by way of appeal, he should be allowed to come up in revision and drag the opposite party to the High Court where the expense of engaging a Counsel must be greater than in the *Mofussil*.

Civil revision from an order of the Judge, Small Cause Court, Pilibhit, dated the 19th March 1925.

Mr. *N. P. Asthana*, for the Applicant.

Syed *Majid Ali*, for the Opposite Parties.

JUDGMENT.—This is an application in revision against a decree of a learned Munsif exercising the powers of a Judge, Small Cause Court at Pilibhit.

It appears that the applicant who was the plaintiff in the Court below ordered the defendants-respondents, a limited company, trading in Calcutta to send him some paint "per goods train at a cheaper rate." The defendants insisted on payment of a portion of the price beforehand and, according to the plaintiff's case, the money was sent to them on the 29th of April 1924. Goods, alleged to correspond to the goods ordered, were consigned at the Railway Station at Howrah on the 9th of May 1924. The Railway receipt which was in favour of the defendants themselves was endorsed in favour of the plaintiff. The goods arrived, it is said, rather late (we do not know the exact date) and the plaintiff refused to take delivery of the same on the ground that it reached too late to be of use to him. The plaintiff thereupon brought the suit for recovery of the price paid, *viz.*, Rs. 44 and for recovery of Rs. 20 damages. The suit was decided *ex parte*. But on the application of the defendants the *ex parte* decree was set aside and the suit was reheard. The learned Judge found that there was no substance in the claim, that the suit was a frivolous one and it accordingly dismissed the suit and awarded to the defendants a sum of Rs. 30 as extraordinary costs under s. 35 (A) of the C. P. C.

It is contended for the plaintiff that on the merits of the case the suit ought to have been decreed, that the learned Munsif had no jurisdiction to make an order for extra costs and that the *ex parte* decree should not have been set aside by the learned Munsif.

Taking the third point first, it appears that two applications had to be made for setting aside the *ex parte* decree. When the first application was made the decretal amount was not deposited forthwith and the application was dismissed on this very ground. A second application was made within the period of limitation with the request that the money already in Court should be treated as sufficiently good security. I think the learned Judge of the Small Cause Court was perfectly justified in treating the money in Court as good security and setting aside the *ex parte* decree.

On the merits of the case there is hardly much to be said. The plaintiff's orders were that the goods were to be sent per goods train. The defendants did all that lay in their power to enable the plaintiff to obtain delivery of the goods when they arrived at Pilibhit. Section 91 of the Contract Act is clear on the point and the illustration leaves no room to doubt that this rule of law was entirely applicable. There are, therefore, no merits in the main case.

The question of jurisdiction is based on s. 2, cl. (2) of Act IX of 1922. It is urged that an officer who has been permitted to exercise the powers of a Judge, Small Cause

Court, under the Provincial Small Cause Courts Act of 1887 is not entitled to exercise the powers of granting costs under s. 35 (A) of the C. P. C. unless he is vested with a jurisdiction up to Rs. 250. The High Court may, however, empower any such officer to award such costs. It is nobody's case that Mr. Aijaz Husain, the learned Judge, was so empowered by the High Court. I have ascertained from the office that he exercised jurisdiction as a Judge, Small Cause Court, up to Rs. 100 only. The parties are in the circumstances at one that he could not have granted extra costs under the Act IX of 1922.

The question, however, is raised whether this Court should interfere under the provisions of s. 25 of the Provincial Small Cause Courts Act, in view of the fact that the applicant could have appealed under s. 24 of the Act to the District Judge. It is true that the exercise of the right of interference under s. 25 of the Provincial Small Cause Courts Act does not depend on the question whether an appeal lies or not. Still it is a matter for consideration whether, when there is a speedy remedy open to a party, he should be allowed to come up in revision and drag the opposite party to the High Court where the expense of engaging a Counsel must be greater than in the *Mofussil.* On the merits, the applicant has no case. On a most frivolous suit, he dragged the defendants from Calcutta all the way to Pilibhit to answer a claim which had no basis either in morality or in law. The amount of compensation awarded to the defendants was hardly an adequate compensation for all the trouble and expenses undergone by them. In the circumstances I do not think that this Court is bound to exercise its jurisdiction under s. 25 of the Provincial Small Cause Courts Act, simply because the Judge may have been in error.

The result is that the application in revision fails and is hereby dismissed. The applicant must pay the costs of the respondents.

Z. K. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 103 OF 1924.
September 18, 1925.
Present:—Mr. Hallifax, A. J. C.
PADMAN SINGH AND ANOTHER—
DEFENDANTS Nos. 1 AND 2—APPELLANTS
versus
SUBRANSAI AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Hindu Law—Partition—Step-mother, whether entitled to share.

Under the Hindu Law a step-mother, with or without sons, is entitled to get a share on a partition amongst the sons. [p. 792, col. 1.]

Vithu v. *Devidas*, 51 Ind. Cas. 943; 15 N. L. R. 55, referred to.

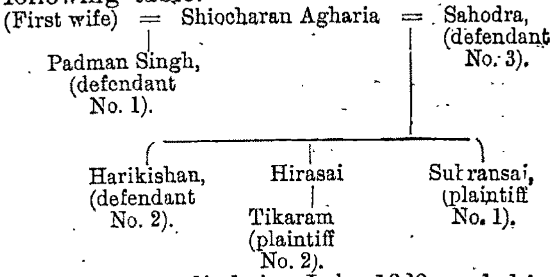
Damoodur Misser v. *Senabutty Misrain*, 8 C. 537; 6 Ind. Jur. 584; 10 C. L. R. 401; 4 Ind. Dec. (N. S.) 346, *Srinivasa Iyengar* v. *Thiruvengadathaiyangar*, 23 Ind. Cas. 261; 38 M. 556; (1913) M. W. N. 1034; 15 M. L. J. 307; (1914) M. W. N. 282, *Hoshanna Devanna Naik* v. *Devanna Banappa Naik*, 80 Ind. Cas. 468; 48 B. 468; 26 Bom. L. R. 424; A. I. R. 1924 Bom. 444, followed.

Appeal against a decree of the Sub-Judge, Bilaspur, dated the 23rd July 1924.

Mr. *M. R. Bobde*, for the Appellants.

Sir *B. K. Bose* and Mr. *P. N. Rudra*, for the Respondents.

JUDGMENT.—In this partition suit the parties are related as is shown in the following table:


(First wife) = Shiocharan Agharia = Sahodra, (defendant No. 3).
Padman Singh, (defendant No. 1).
Harikishan, (defendant No. 2).
Hirasai
Tikaram (plaintiff No. 2).
Subransai, (plaintiff No. 1).

Shiocharan died in July 1920 and his first wife and Hirasai both died before that. The lower Court has made a mistake in declaring in para. 14 of the judgment that only the fields mentioned in cl. (*e*) of para. 3 of Padman Singh's written statement are his separate property. According to the findings of that Court he is also separate tenant of the fields mentioned in cl. (*b*) of the same paragraph of his written statement, which include Nos. 527, 568 and 569 not mentioned in cl. (*e*). That this is a mistake is admitted by the respondents.

The first ground of appeal was that the lower Court was wrong in holding that there had already been a partition of the moveable property of the family, and that Padman Singh had been given his share of it. This was abandoned by the learned Pleader for the appellants, though with unaccountable hesitation and reluctance, on its being explained that the other side would be glad to agree to a finding that there had been no such division of moveables, as the inevitable result of it would be that all the tenancy land held by Padman Singh had been acquired out of joint family funds. It was also again given up on its being pointed out that a Court-fee is payable in the appeal on the value of the property claimed.

As to the special custom, alleged to exist among the members of the Agharia caste of the tract in which the parties live, whereby a mother is given no share at a partition among brothers, the evidence in proof of the allegation is too slight and feeble for serious discussion. As an alternative it is pleaded that according to the ordinary rules of Hindu Law, in a partition between brothers who are the sons of different mothers, the property is first divided into equal shares among all the brothers and then the shares of all the sons of each mother are put together and again equally divided between them and her. The result in this case would be that Padman Singh, whose mother is dead, would get a quarter share, and each of the three other sons of Shiocharan and their mother Sahodra, who is alive and a defendant in the case, would get a three-sixteenths share, or in the anna-pie notation Padman Singh would get four annas and each of the rest would get three annas.

The contention rests on the text of the Mitakshara which says that "in the case of sons who divide after the father (dies) the mother (*mata*) also takes an equal share," and the assertion that in most if not all other passages in the Mitakshara, the word *mata* does not include a step-mother. Only two texts have been cited here in which the word *mata* does not include a step-mother, those mentioned in *Ganno* v. *Beni* (1) and *Vithu* v. *Devidas* (2). But that it does include a step-mother, even one without sons, in the particular text with which we are concerned, is very clearly shown in the judgments of Mitter, J., in *Damoodur Misser* v. *Senabutty Misrain* (3) of Sundara Ayyar J. in *Srinivasa Iyengar* v. *Thiruvengadathaiyangar* (4) and of Macleod and Shah, JJ., in *Hoshanna Devanna Naik* v. *Devanna Banappa Naik* (5).

The suggested interpretation of the text in the case of a widow with sons and stepsons seems to me impossible for another reason which is intrinsic. That is that in most cases, as in this, it would break the undoubted and fundamental rule that each of the brothers is entitled to an equal share. Acceptance of the rule suggested means that each of Padman Singh's step-brothers, all sons of Shiocharan equally with him, would get a share less by 25 per cent. than his, and if his mother were alive he would get only two-thirds of what each of them would get. That being impossible, the interpretation of the rule urged by the appellants is also impossible.

The claim to the "*jethausi*" or eldest brother's extra share made by the second defendant Harikishan, is based on nothing but an expression of a wish by Shiocharan that, in a partition which was then proposed to be made by arbitrators but was not made, Harikishan should be given certain property as "*jethausi*"; he was at that time the eldest son still joint with Shiocharan, Padman Singh having already separated from him and the sons of the second wife. Harikishan has no legal claim to "*jethausi*" not being the eldest of the sons now in existence, and the wish of his father that he should be treated as the eldest son in the circumstances is perhaps natural and reasonable, but neither the existence nor the expression of the wish can give Harikishan that legal claim. This contention was, however, abandoned on its being pointed out that it could not be maintained without the payment of Court-fees.

The appellants contend that the finding as to the moveable property in the hands of the other party rests on a wrong placing of the burden of proof; it has been found that that party had only so much moveable property as it chose to admit, only because the appellants failed to prove that it had more. That is certainly wrong, as is explained in *Jailalsao* v. *Lal Fatehsingh* (6) and the case would probably have to go back for the taking of further evidence produced and examined with a proper understanding, by the Court and by the parties, of where the burden of proof lay, but for the fact that exactly the same has been done the other way about; the moveable property found to be in the hands of the appellants is found to be no more than what they admitted they had, only because the other party failed to prove that it was more. In these circumstances both findings must stand. It may be mentioned that the appellants did not look at this question from that point of view till it was suggested by the Court. Their attempt in the first place was to show that their evidence did establish that the other party had more moveable property than had been found by the lower Court. That it certainly failed to do.

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(1) 43 Ind. Cas. 943; 14 N. L. R. 82.

(2) 51 Ind. Cas. 943; 15 N. L. R. 55.

(3) 8 C. 537; 6 Ind. Jur. 584; 10 C. L. R. 401; 4 Ind. Dec. (N. S.) 346.

(4) 23 Ind. Cas. 264; 38 M. 556; (1913) M. W. N. 103 15 M. L. J. 307; (1914) M. W. N. 282.

(5) 80 Ind. Cas. 468; 48 B. 468; 26 Bom. L. R. A. I. R. 1924 Bom. 444.

(6) 75 Ind. Cas. 826; 20 N. L. R. 52; A. I. R. Nag. 117.

The contention in the eighth paragraph of the petition of appeal that it had been proved that the value of the ornaments held by Sahodra was Rs. 500 and not only Rs. 100 was abandoned on its being pointed out that it involved the payment of Court-fees.

The cross-objection filed in respect of the tenancy lands acquired by Padman Singh after his separation from the rest of the family was withdrawn when it was discovered that it could not be pressed without paying further Court-fees. Anyhow it could not possibly succeed. When Padman Singh separated from the others a partition was made of the moveable property only and he was given his share; he was also given a part of the property which was still the common property of all the members of the now disrupted family, and allowed to hold it separately. It seems that he was allowed to keep the income of the land in his possession as his share of the income of the whole common property, though it is just possible that the income of that and the rent was put together and he was given his share of it. But in either case his share of the income was his own separate property; he did not acquire the other tenancies out of the land he held, which was common property, but out of the income of that land, which was his separate property.

The decree of the lower Court will accordingly be modified by the addition of the numbers 527, 568 and 569 to the list of numbers of the fields which belong separately to Padman Singh. This is a relief which could have been obtained by application to the lower Court, and anyhow it is an inconsiderable part of the whole relief claimed in appeal. The appellants will, therefore, pay all the costs of both parties in appeal, but the respondents will pay all the costs incurred in connection with their cross-objection.

G. R. D.
Z. K.   *Decree modified.*

CALCUTTA HIGH COURT.

CIVIL APPEAL NO. 88 OF 1925.
April 23, 1925.
Present:—Mr. Justice Buckland.
In re GOPALDAS AURORA
—APPLICANT.

Presidency Towns Insolvency Act (III of 1909), s. 15—Insolvency Rules of Calcutta High Court, rr. 74, 150—Petition by debtor—Procedure—Petition by partner—Debts due by firm, whether can be entered in list—Debtor, whether bound to hand over books to Official Assignee before adjudication—Practice.

Rule 74 of the Insolvency Rules of the Calcutta High Court provides that where a petition for adjudication is filed by a debtor the Court shall forthwith make an adjudication order thereon. The rule contemplates that if the petition is in form in the sense that the Court has jurisdiction and the conditions prescribed by the Act have been fulfilled, the order shall go as a matter of course. [p. 794, col. 2.]

It is open to a partner in a firm to apply to be adjudicated an insolvent and in such a case he would be right in setting out in his petition the debts due by his firm, for the reason that under the ordinary law they would be debts for the full amount of which he would be personally liable. The mere fact, therefore, that such debts are entered in the petition would not mean that the petition is made on behalf of the firm. [p. 795, col. 1]

There is no rule requiring an unwilling debtor to hand over his books to the Official Assignee before he is adjudicated an insolvent. [p. 796, col. 1.]

A practice founded upon the willingness of debtors cannot be regarded as being a settled practice obligatory upon persons who do not wish to comply with it. [p. 795, col. 2.]

On a petition for adjudication it is open to the Court to make a reference to external matters, provided they are relevant, but if an order is to be founded upon them they should be duly brought to the notice of the parties and the parties given an opportunity of furnishing an explanation. [p. 796, col. 1.]

Appeal against an order of the Registrar in Insolvency, refusing the adjudication of the petitioner-insolvent.

Mr. *S. N. Bannerjee*, for the Applicant.

JUDGMENT.—This is an appeal under s. 8 of the Presidency Towns Insolvency Act against an order of the Registrar in Insolvency refusing to adjudicate the petitioner-insolvent upon his own petition. That the matter is one with which the

Registrar has been duly empowered to deal is not in question.

The petition is in form No. 7 to be found in the appendix of forms to the Insolvency Rules of this Court made under ss. 112 and 114 of the Act, and, as pointed out by learned Counsel, it contains averments which will bring the application within the relevant sections of the Act, and are, therefore, necessary for the purpose of obtaining the order.

Section 9 states that a debtor commits an act of insolvency:—"(*f*) if he petitions to be adjudged an insolvent." Section 10 provides that subject to the conditions specified in the Act if a debtor commits an act of insolvency, he may present an insolvency petition and the Court may on such petition make an order adjudging him an insolvent. Any difficulty that might arise in combining this with s. 9 (*f*) is avoided by the explanation to s. 10, which says that the presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of the section. Consequently provided certain other conditions are fulfilled, the mere fact of the presentation of a petition for adjudication is enough on which to make the order.

Section 11 contains certain restrictions upon jurisdiction. The only part of the section to which I need refer is sub-s. (*b*), under which the Court has no jurisdiction to make the order unless the debtor within a year before the date of the presentation of the insolvency petition has ordinarily resided or had a dwelling house or has carried on business either in person or through an agent within the limits of the Ordinary Original Jurisdiction of the Court. The petition in this case states that the petitioner lately carried on a co-parcenary business as a merchant under the name and style of Gopinath Pursottamdas at No. 113, Monahardas Katra, in Calcutta, and has for the greater part of the past six months ordinarily resided at 101, Harrison Road, Calcutta.

Further conditions which must be fulfilled are to be found in s. 14, and to entitle him to present a petition, the debtor must either owe Rs. 500 or have been arrested and imprisoned in execution of the decree of a Court for the payment of money or an order of attachment in execution of such a decree must have been made and be subsisting against his property. The first condition is that which this petitioner states has been fulfilled, for his petition says that he is unable to pay his debts, which exceed Rs. 500. That he must state under s. 15, which goes on to provide that if the debtor proves that he is entitled to present the petition, which means that the necessary conditions obtain, the Court may thereupon make an order of adjudication, subject, however, to another Court having insolvency jurisdiction being that to which the application should preferably be made.

Rule 74 of the Rules of this Court provides that where a petition is filed by a debtor, the Court shall forthwith make an adjudication order thereon, and the rule appears to contemplate that if the petition is in form in the sense that the Court has jurisdiction and the conditions prescribed by the Act have been fulfilled, the order shall go as a matter of course. This would appear to be in accordance with the view expressed by the Judicial Committee of the Privy Council in *Chhatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (1). That was a case under the Provincial Insolvency Act, but for the present purpose no distinction need be drawn between that and the Presidency Towns Insolvency Act. It is pointed out in the judgment of the Board, which was delivered by the late Chief Justice of this Court, that the Act entitles a debtor to an order of adjudication when its conditions are satisfied. His Lordship continued:—

"This does not depend on the Court's discretion, but is a statutory right; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an 'abuse of the process of the Court.' "

It appears that that was the ground upon which in that case the petition was refused both by the District Court of Murshidabad and by this Court on appeal. That is not the ground upon which the Registrar has dealt with this application, though he seems to have taken into consideration matters which, according to the judgment of their Lordships of the Judicial Committee, are not relevant to his decision.

The Registrar has referred to s. 99, which provides that any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against under this Act in the name of the firm, and contains a further provision for disclosure of the names of the members of the firm. This is only an enabling section akin to O. XXX, of the C. P. C., and does not purport to prescribe anything that is to be done or left undone in order to obtain an adjudication order where a debtor who is a member of a partnership firm or where the members of a partnership firm apply for an order of adjudication. But the Registrar, by his reference to r. 150 of the Rules of this Court seems to have regarded this as an insolvency petition filed on behalf of a firm of debtors. If that were the case, he would be correct in requiring under the rule that the petitioner should state the names of the partners. Apparently his reason for having regarded it as though it were a petition filed on behalf of a firm is because the lists annexed to the petition are admittedly those of debts due by and outstandings due to the firm. This does not necessarily mean that the petition is made on behalf of a firm. Learned Counsel has said that there is no partnership firm and drawn my attention to the statement in the petition that the debtor was carrying on a co parcenary business, and submitted that there is no evidence of the existence of a contractual partnership to which the Act and rules refer. In any event, he has submitted that it would be open to a partner to apply to be adjudicated an insolvent and that in such a case he would be right in setting out the debts due by his firm, for the reason that under the ordinary law they would be debts for the full amount of which he would be personally liable. When the case is that of a coparcenary business and not a contractual partnership, he contends that the position is even more favourable to his client, for which proposition he relies upon *Sat Narain* v. *Behari Lal* (2).

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(1) 39 Ind. Cas. 788; 44 I. A. 11; 44 C. 535; 21 C. W. N. 497; 21 M. L. T. 36; 15 A. L. J. 87; (1917) M. W. N. 100; 32 M. L. J. 1; 19 Bom. L. R. 174; 25 C. L. J. 215; 10 Bur. L. T. 25 (P. C.).

I am disposed to think that this contention is correct, but as this appeal, like the application, is *ex parte*, I have not had the advantage of hearing the matter argued from the standpoint of any person interested in placing the contrary view before me, which may occur at a later stage of this case or even in other proceedings. Should such occasion arise, it may be necessary to re-consider the opinion which I have expressed.

The Registrar has also stated that it is the settled practice of this Court since the year 1915 to insist upon the books of an insolvent who is a trader being made over to the Official Assignee before the adjudication order is passed, and in support of that proposition he has referred to the judgments of my learned brother Mr. Justice Rankin in *Re Bhuramull Banka* (No. 39 of 1919, dated the 16th May 1919 unreported) and in *Re Joseph Perry* (No. 32 of 1919, dated the 28th May 1919 unreported). If my learned brother's information in the latter case is correct and insolvency is regarded as a privilege in India, that may explain the readiness of persons desirous of availing themselves of the privilege to make over their books of account to the Official Assignee even before the privilege is conferred upon them. But where it is contended that there is no obligation to make over the books of account to the Official Assignee before the order is made, the matter assumes a different aspect. A practice founded upon the willingness of debtors cannot be regarded as being settled practice obligatory upon persons who do not wish to comply with it. There is no rule of the Court which so requires, and were such a rule made, it would be a matter for consideration whether such additional condition could be super-imposed upon the Act which does not demand it. The two judgments referred to by the Registrar do not, in my opinion, support the proposition for which they have been cited. Each case was one of a person who already had been adjudicated an insolvent. In *Re Joseph Perry* (No. 32 of 1919, dated the 28th May 1919 unreported) my learned brother merely referred to this matter incidentally, and I do not read his judgment as definitely holding that there is an obligation in law or practice on a debtor to hand over his books to the Official Assignee before the adjudication order is made. Both in that and in the other case cited, he was dealing with books withheld from the Official Assignee by an insolvent after adjudication which is a very different matter, and, in my opinion, there is nothing establishing that it is the duty of an unwilling debtor to hand over his books to the Official Assignee before he has been adjudicated an insolvent.

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(2) 84 Ind. Cas. 883; 52 I. A. 22; 29 C. W. N. 797; 47 M. L. J. 857; 10 O. & A. L. R. 1332; A. I. R. 1925 P. C. 18; (1925) M. W. N. 1; 23 A. L. J. 85; L. R. 6 A. (P. C.) 1; 26 P. L. R. 81; 27 Bom. L. R. 135; 21 L. W. 375; 1 L. C. 500; 1 O. W. N. 916; 6 L. 1 (P. C.).

Lastly, the Registrar has referred to Suit No. 2910 of 1924.

The Registrar may be perfectly right in the conclusions which he has drawn from the materials which he has examined in that case, or, on the other hand, it may be, as learned Counsel has stated, no doubt upon instructions, that the facts upon which the Registrar's observations are based are incorrect. It appears that the Registrar's knowledge was due to the circumstance that he happened to have settled an order of Mr. Justice Ghose in that suit in February last. It also appears to be purely fortuitous that the same officer was concerned with that order and this application, but so far as this application is concerned anything which the Registrar learnt in that connection must be regarded as extra-judicial and cannot be utilised as the foundation of his order. I must not, however, be taken as meaning that no reference whatever can be made to external matters, assuming, of course, that they are relevant, but if an order is to be founded upon them they should be duly brought to the notice of the parties and the parties given an opportunity of furnishing an explanation. I do not know whether that was done in this case; it may be that it was, but in any event the matters referred to have no relevancy upon this application, whatever use may be made of them by persons entitled to be heard at any subsequent stage of the proceedings.

The question of the adjudication of a debtor upon his own petition is a comparatively simple matter, and as has been pointed out by the Privy Council in the case cited, if the conditions of the Act are satisfied, the debtor is entitled to the order. All that need be done, therefore, upon a debtor's application is to see whether those conditions are fulfilled, and if so, to make the order. It may be that, in substance, though prematurely, the Registrar was perfectly correct in the view that he took of the matters to which he refers, but they can subsequently be brought to the notice of the Court, and if it should appear that the debtor had no right to apply for an order of adjudication, or that circumstances exist which would justify the Court in so doing, the Court has full power under s. 21 to annul the adjudication order.

For the foregoing reasons, I set aside the order of the Registrar, dated the 6th April 1925, and the usual order of adjudication will be made.

Z. K. *Appeal allowed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 462 OF 1924.
February 12, 1926.
Present:—Mr. Justice Ashworth.
GUR PRASAD—PLAINTIFF—APPELLANT
versus
Musammat SITLA DEI—DEFENDANT—RESPONDENT.

Will—Draft Will as evidence of oral Will.

A draft Will may be accepted as evidence of an oral, one where the facts show that the testator had expressed his final intention as to the property.

Appeal from a decree of the Second Additional Subordinate Judge, Lucknow, dated the 26th July 1924, reversing that of the Munsif, South Lucknow, dated the 15th August 1923.

Messrs. *Ganga Dayal* and *Hargovind Dayal*, for the Appellant.

Mr. *Ishwari Prasad*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for possession of a house in *Mohalla* Husainganj, City Lucknow, and for certain ornaments and cash. The property in question was the self-acquired property of Jawahir Lal, father of the plaintiff and father of the defendant's deceased husband. The defendant set up a Will by Jawahir Lal, which she alleged was acted on by both parties. The Court of first hearing decreed the suit, and decided that the defendant's plea of a Will was invalid. He held that a draft Will had been prepared but that this draft could not be regarded as the final expression of intention by the deceased, inasmuch as he left it unsigned, from which fact the Court inferred that he wished to reserve to himself further consideration of the matter. As regards the division of some cash and jewellery, the Court held that they did not amount to proper partition as there was no *panches*. In first appeal the Subordinate Judge decided that the deceased had made a valid oral Will which had been acted on.

In this appeal both findings are impugned. There is authority for holding that a draft Will may be accepted as evidence of an oral Will, where the facts show that the testator had expressed his final intention as to the property. I consider that the lower Appellate Court has given good reasons for holding that this was the case here, and in second appeal it is not open to me to go behind this conclusion. I also find that the lower Appellate Court has decided that the Will was actually acted upon by both the parties and has given good reasons for so holding. This again is a question of fact. It has been contended by the appellant that the defendant did not clearly set up an oral Will. There is no force in this contention. He set up a Will and gave the facts on which he relied. The lower Court was entitled to infer from those facts the execution of an oral Will.

For the above reasons I dismiss this appeal with costs.

R. L. *Appeal dismissed.*

RANGOON HIGH COURT.
FULL BENCH.

CIVIL REFERENCE No. 34 OF 1924.
April 1, 1925.

Present :—Sir Sydney Robinson, KT., Chief Justice, Mr. Justice Carr and Mr. Justice Maung Gyi.

O. T. P. V. CHETTY FIRM AND OTHERS—
APPELLANTS
versus
MAUNG THA HLAING AND OTHERS—
RESPONDENTS.

Buddhist Law, Burmese—Property inherited by husband after marriage, nature of—Share of wife—Property, whether liable for debts of husband.

Where a Burman Buddhist *eindounggyi* having two wives inherits immoveable property from his father after his second marriage, the property is *lettetpwa* of the marriages and is joint property of the husband and wives and not the separate property of the husband. The share of his two wives in such property jointly is one-third and both being of equal status the share of each is one-sixth. Each wife acquires a vested interest in one-sixth of such property from the date on which it is inherited, and that interest is not liable for any part of the debts incurred by the deceased husband alone. [p. 803, col. 2; p. 807, col. 2.]

Per *Maung Gyi, J.*—Under Burmese Buddhist Law as soon as a person dies his heirs immediately become entitled to his estate, and when a husband or a wife inherits property after marriage, the other spouse also becomes entitled at the same time to an undivided one-third share of such inherited portion. [p. 803, col. 2.]

Reference from the judgment and decree of the District Court, Hanthawaddy, in F. A No. 36 of 1922.

ORDER OF REFERENCE TO A FULL BENCH.

Robinson, C. J., and Cunliffe, J.—"The present appeal is concerned with the estate of one Po Ka who died on the 25th of December 1905. Po Ka was first married to Ma The Nu. The two were divorced in 1884; there was then a division of property between them. It is agreed that this marriage and divorce do not, in any way, affect the questions now to be decided.

"Shortly after the divorce, Po Ka married Ma Gyi, and some nine or ten years later, he married Ma Kin. He lived with Ma Gyi at Pazundaung, and she was undoubtedly his chief wife. Ma Kin lived at Thongwa, where Po Ka had large business interests, and, when there, he lived with Ma Kin openly as his wife.

"There is no reason to doubt that Ma Kin was a wife in the full sense of the term, and was endowed with what is described in *Maung Tha Dun* v. *Ma Thein Yin* (1) as proprietary as well as personal rights.

"Po Ka's father, U Tok Pyu, died in 1892, and from him Po Ka inherited certain immoveable property which formed the whole of his estate which is now in dispute. It has been urged that this property was inherited before his marriage to Ma Kin. The whole of this argument is based on certain vague and indeterminate facts.

"Ma Gyi in her evidence says that she was married at the age of 16. In 1911, when giving evidence, she gave her age as 44. She stated that Ma Kin was married nine or ten years after she was married, and it is sought to extract from calculations based on these vague assertions that the marriage to Ma Kin must have taken place later than 1892.

"There is no reason to suppose that Ma Gyi is any more certain of her age than the ordinary Burman Buddhist witness, and it is impossible to decide this question on statements such as that Ma Kin was married nine or ten years after the first marriage,

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(1) 73 Ind. Cas. 1044; 1 R. 1; A. I. R. 1924 Rang. 37.

Ma Gyi herself in her evidence states that the property was inherited after Po Ka had married Ma Kin; and we are satisfied that the questions that arise must be dealt with on the assumption that the property was inherited after his second marriage.

"After Po Ka's death Ma Gyi and her children filed a suit for the administration of the estate, and to set aside a certain award that had been made with reference to the division of property between her and Ma Kin. The matter came before the late Chief Court, and the award was set aside. A Receiver was appointed, and all the properties were sold.

"There was a house at Pazundaung where Ma Gyi had always lived, and which was built on part of the inherited land. Ma Gyi claimed that as being the *lettetpwa* property of herself and Po Ka. She purchased the house at auction, and on this ground only paid half the purchase price.

"Po Ka had a large number of creditors—both secured and unsecured. Several of the secured creditors brought suits, and obtained decrees, as also did several of the unsecured creditors. There are other creditors—both secured and unsecured—who did not sue, but who claimed to come in and get their share in the administration decree.

"The matters arising in the suit were referred to a Commissioner, and in the course of the proceedings before him, Messrs. Walker & Whyte obtained a decree against Ma Gyi, personally, and in executions thereof, purchased themselves her share in the estate. They now take her place.

"The questions that arise for decision are whether Ma Gyi's share is taken by succession, or whether she has a vested right in one-third or any other share in the estate, and if so, whether her share is liable for the debts incurred by Po Ka alone.

"For the creditors it is urged that she succeeds by inheritance only, and that she could not obtain anything until after all the debts had been paid. On the other side, it is urged that she has a vested share, which is not subject to the debts and liabilities of her deceased husband.

"Certain questions as to jewellery are also raised—whether they were gifts to her by her husband, or whether they are joint property of the marriage. But this matter is merely one of academic interest, seeing that the jewelleries had been sold, and the proceeds have disappeared.

"Further questions are raised with reference to the house, and whether Ma Gyi is liable to account to the estate for the rent of the house, and for interest on the half share of the purchase price that she has not as yet paid.

"It must also be mentioned that Po Ka was an *eindounggyi* while Ma Gyi was a spinster. It is argued that the same rule will apply as if neither of them had been previously married, and for this proposition, the case of *Ma E Nyun* v. *Maung Tok Pyu* (2) is quoted as authority.

"It will be noticed, however, that this is an authority relating to division of property on a divorce.

"The argument before us has shown how loosely the expressions *payin*, *thinthi*, *hnapazon* and *lettetpwa*—are used and the authorities, which are very numerous, also indicate a similar looseness of expression.

"The case has been argued before us on the strength of s 3, Ch. XII of the *Manugye*, and we have been asked to apply the rule there laid down for partition of property on a divorce by mutual consent, on the ground that there is no rule to be found in the *Dhammathats* exactly dealing with the questions now for decision.

"The fact that the rules for partition on a divorce by mutual consent are not to be applied to a partition on inheritance has been frequently laid down, but it is clear from a consideration of all the numerous authorities that the questions arising have been differently dealt with and that there is no clear and definite decision on a point on which one is undoubtedly required.

"The questions are discussed in Mr. May Oung's work on Buddhist Law from page 53 onwards, and also Mr. Tha Gywe's Conflict of Authority in Buddhist Law, Vol. 2, from page 73 onwards. We think it unnecessary to quote these authorities in this order of reference, but we are of opinion that the following questions should be referred to a Full Bench for authoritative decision; and they are accordingly referred:—

"(1) When *A*, a Burman Buddhist *eindounggyi* having two wives, *B* and *C*, after the second marriage inherits immoveable property from his father, is that property the *thinthi* or separate property of *A*, or is it the *lettetpwa* or joint property of the marriages?

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(2) 2 U. B. R. (1897-01) Bud. Law, Divorce, p. 39.

"(2) What, under these circumstances, would be the share of *B*, the chief wife, in this inherited property?

"(3) Will either or both wives acquire a vested right in one-third or any other share in the inherited property from the date on which it is inherited, and if so, is such share liable for all or any part of the debts incurred by the deceased husband alone?"

Messrs. *Burjorjee* and *E Maung* for the Appellants.

Mr. *Paget*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

Maung Gyi, J.—There are three points of reference, *viz.* :—

(1) When *A*, a Burman Buddhist *eindounggyi*, having two wives *B* and *C*, after the second marriage, inherits immoveable property from his father, is that property the *thinthi* or separate property of *A*, or is it the *lettetpwa* or joint property of the marriages?

(2) What, under the circumstances, would be the share of *B*, the chief wife, in this inherited property?

(3) Will either or both wives acquire a vested right in one-third or any other share in the inherited property from the date on which it is inherited, and if so, is such share liable for all or any part of the debts incurred by the deceased husband alone?

The answers to these points of reference are to be found in Book XII, s. 3 of the *Manugye Dhammathat* which their Lordships of the Privy Council hold to be a work of high authority. This section states the law of partition of property on separation between husband and wife in the following cases:—

(1) When the husband and wife have not previously been married, called by some a "virgin couple":—

(*a*) When both, without fault on either side, desire to separate mutually ;

(*b*) When only one desires to separate and the other does not, though there is no fault on either side ;

(*c*) And when one party is at fault.

(2) When the husband and wife are *eindounggyis*, *i. e.*, when both have been married previously :—

(*a*) When both, without fault on either side, desire to separate mutually ;

(*b*) When one only desires to separate and the other does not, there being no fault on either side;

(*c*) And when one party is at fault.

There is no mention of the partition on divorce when one party is an *eindounggyi* and the other is not.

In *Ma E Nyun* v. *Maung Tak Pyu* (2) and in *Ma Ngwe Hnit* v. *Maung Po Hmu* (3) it was held that the rule for partition on divorce by mutual consent where neither party was at fault between an *eindounggyi* and a husband or wife who had not been previously married was the rule which applied where neither party had been married before.

This is, I think, settled law.

Section 3 of Book XII of the *Manugye* begins by giving the rule of division of property on mutual divorce, where there is no fault on either side, between a couple that had not been previously married or a "virgin couple". The husband and wife each take the clothes and ornaments of his or her rank, and the remainder of the property "animate and inanimate" is thus divided:—

"If there is any property acquired by the husband alone, or by the wife alone, let that party who separately acquired it have two shares and the other one. Property acquired equally by both, or where both had an equal share in the capital, should be divided equally. If the clothes and ornaments of the man are many, and those of the wife few, let both be valued, and let the man make up the difference; if those of the woman are more valuable in the same way let her make up the difference to the man."

Here there is no reference to *thinthi*, *payin*, *kanwin*, *lettetpwa*, *hnapazon* or any particular kind of propery belonging to a husband or wife. The "remainder of the property animate and inanimate" is divided.

The text then describes the three kinds of property acquired by the husband and three by the wife.

The three kinds of property acquired by the husband are :—

(1) when the wife, at the time of marriage had no property from her parents, and the husband had ;

(2) property acquired during their cohabitation by his skill, science ; and

(3) property specially given to him by the King.

The three kinds of property acquired by the wife are :—

(1) when the husband at the time of marriage had no property from his parents and the wife had ;

(3) 64 Ind. Cas. 806; 11 L. B. R. 52.

(2) property acquired during their cohabitation by her skill; science and

(3) property given specially to her by the King.

In this classification of property, no reference is made to *kanwin* or property given at the time of marriage for the benefit of the couple, or to property given specially to both husband and wife by the King, or to property acquired jointly by the skill and science of the couple, or to property inherited by either party after marriage.

This classification though at first sight open to criticism is explained by the fact that in the case of a divorce where the "remainder of the property animate and inanimate" is divided the author of the text dispensed with a minute and scientific classification.

The word *thinthi* is sometimes used in the sense of *payin* property and at others as separately owned property which is not to be divided on partition.

To classify the property of a married couple broadly as *thinthi* and *hanapazon* or jointly acquired property seems to me to be defective because what is *thinthi* in one case may not be so in another. In the above rule of partition on divorce *thinthi* and *payin* are divided and in other cases of partition on divorce they are not. The use of the term *hnapazon* in the main classification of property of a married couple seems likewise defective as it excludes other kinds of property acquired after marriage.

In the case of *Shwe Ngon* v. *Ma Min Dwe* (4) on page 113, Jardine, J., refers to Major Sparks' definition of *lettetpwa* and *hnapazon* translated respectively as "obtained since marriage" and "jointly acquired." Reference is also made to the terms *thinthi* and *payin* which Major Sparks translates as "separate" and "originally belonging." Major Sparks considers that these words are used indiscriminately in the *Dhammathat* through the inaccuracy of the translator and are not so used in the original Sanscrit.

With this I am not prepared to agree. Although we have borrowed many things from India, it does not follow that we should slavishly adhere to the meanings of the Sanscrit terms in the Manu of the Hindus. The English word "fluke" which means a lucky accidental stroke is used by Burmans to mean an "outsider" or a dark horse in a race and is not used by them in any other connection except in billiards.

Major Sparks in his Code of Burmese Law, s. 14, defines *thinthi* as separate property of a husband or wife consisting of—

(1) what belonged to either before marriage;

(2) what has been given specially to either since marriage;

(3) what has come into the possession of either by inheritance from his or her own family since marriage; and

(4) clothes, jewels and ornaments.

He makes reference to Book X, s. 81, of the *Manugye*.

He restricts *hnapazon* to—

(1) all profits or interests arising since marriage from the employment or investment of the separate property of either; and

(2) all property acquired by their mutual skill and industry.

If the word *thinthi* has a hard and fast meaning that the property it represents cannot be divided, then it will be inconsistent with the rules for partition on divorce laid down in s. 3, Book XII *Manugye*.

Hnapazon and *lettetpwa* are used in the same section of the *Manugye* as one term, and I do not consider that because it is so used by the author of the text it has been used by him indiscriminately as a translator from the Sanscrit.

On page 315 of Richardson's *Manugye* twelve kinds of *thinthi* of children are given and on page 317 the term *thinthi* is qualified by the addition of *apaing*. The text says "of the twelve kinds of *thinthi* the four last are called *thinthi-apaing*, *i. e.*, in which the right is perfect." I take it that, the term *thinthi* does not always mean separate property which is never divided. *Thinthi* is separate property. But it is subject to partition in some cases. To my mind the proper main classification of the property belonging to a husband and wife is into *payin* what is brought to the marriage by either or both and *lettetpwa* property acquired after the marriage in any way. The other terms used are merely sub-divisions of these two main classes.

When one party only desires divorce and the other does not and there is no fault on either side, each party is entitled to keep whatever property the King has given him or her. All the other property goes to the party who does not wish to separate and the party wishing to separate pays all the law expenses. But if there be fault on one side he or she forfeits all the property to the other.

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(4) S. J. L. B. 110.

Section 3 then proceeds to lay down the rules for partition on divorce between *eindounggyis* or those who have been married before. If the divorce is mutual and there is no fault on either side each takes the property brought at the time of the marriage and each pays his or her debts up to that time. The *hnapazon* or jointly acquired property animate and inanimate, and the joint debts are divided equally.

Here the use of the term *hnapazon* is meant for *hnapazon lettetpwa* that is property acquired after marriage. As this property has been ascertained the section defines it. It says:—

"There are two kinds of property acquired during marriage (*hnapazon lettetpwa*) which are these: property or debts inherited by either party from their parents, and property acquired or debts incurred by them mutually and conjointly. Of these if the husband has inherited property or debts from his parents it is more immediately his; let him have two shares of the property, or bear two shares of the debts; if it be on the wife's side, let her in the same manner receive and pay."

We see that the doctrine of *nissaya* and *nissita* (supporter and defendant) is applied here also. The supporter takes double that of the defendant.

If the husband wishes to separate and the wife does not, or the wife wishes to separate and the husband does not, and there is no fault on either side, let each take back the *payin* they brought at marriage; but of the two kinds of property acquired since marriage (*lettetpwa*) which is the common property of both, the person not wishing to separate shall have the whole, and the person who does shall pay all the debts.

Immediately following this paragraph is the last paragraph of this section in *Manugye* (Book XII, s. 3) which has been the subject of much discussion. Richardson's translation is as follows: "Property obtained by the royal bounty, property in possession at the time of marriage, property that either may have inherited from their parents after marriage, these and the profits on them shall be considered as property acquired during the time they were together, and in accordance with this let the property be divided."

The Burmese text as given by Richardson is as follows:—

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The same passage is given in the Digest, Volume II, s. 264, extract from *Manugye*. The only important difference between these two texts is that the passage in the Digest has the preposition (from) inserted after ရင်း in ရင်းပွါးသည်ကို တက်ထက် ပွါးလှ မှတ်ရေချေ။ thus making the meaning very clear. The published rendering of this extract on page 190, Vol. II of the Digest in English is:—"Let each take the property given him or her alone by the King, that brought by each to the marriage, and that inherited by each from his or her parents subsequent to the marriage. The profits which accrue from the different kinds of property shall be treated as *lettetpwa* or jointly acquired property, and partition of it shall be made according to the rules already laid down."

Jardine, J., in his Notes on Buddhist Law Essay 2, page 31—translates this passage as "Property given by the King being property brought at the time of marriage and property inherited by either party from their parents after marriage, having become the separate capital (*ahyin*) the increase on profits from them, shall be considered as *lettetpwa* and let it be divided as laid down above."

Shaw, J. C., in *Mi Myin* v. *Nga Twe* (5) being dissatisfied with Richardson's translation which is not quite correct and also with the published English translation because it is inconsistent with the extract from the *Manugye* in the Digest, Vol. II, s. 257, ninth line from the bottom of the page which says: "Property acquired and debts contracted by the husband and wife are of two kinds, namely, property and debts inherited after marriage by either from his or her parents and property acquired and debts contracted while they are working jointly for their mutual benefit," and also inconsistent with the passage in *Manugye*, Book XII, s. 3, page 344 of Richardson's text, gives his own translation. It runs thus:—

"Property obtained by gift from the King (*payin*) at the time of marriage, property inherited by either from parents during marriage, having been (as before explained) placed (*i.e.*, classified and dealt with) according to its origin (အရင်းအတိုင်း) profits accruing from such property should be regarded as *lettetpwa.* Let the parties divide between them in accordance with what has been said before."

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(5) 2 U. B. R. (1904-06) Bud, Law, Divorce p. 19.

Richardson's translation of this passage is incorrect. Jardine, J.'s translation is not quite correct, because he has "property given by the King being property brought at time of marriage," and Shaw, J. C.'s translation does violence to the ordinary meaning of the Burmese words and the construction of the sentence.

The correct translation is that given by the translator of the Digest.

Relying on this passage the learned Advocate for the appellants contends that property inherited after marriage is not *lettetpwa,* but only the profits derived from it.

I am unable to agree with him.

Book XII, s. 3, of the *Manugye* gives the rules for partition between husband and wife on mutual divorce according as they are previously unmarried couples or *eindounggyis.* When necessary the *Dhammathat* gives the definition of property in issue. In the case of "virgin couples" the property to be divided comes under three classes roughly and no mention is made of any other kind of property because the whole of the property, after taking away the ornaments and clothes, has to be divided.

The rule for partition on divorce by mutual consent between *eindounggyis* when neither party is at fault differs from those of the partition of a virgin couple. For this purpose the *Dhammathat* defines what is property acquired during marriage. It consists of property or debts inherited by either party from their parents during marriage and property acquired or debts incurred by them mutually and conjointly.

It will be seen that the *Dhammathats* favour a "virgin couple" and gives them preferential treatment. They marry young. They are unsophisticated and do not know what life is at the time of their marriage, whereas *eindounggyis* are men and women of the world and have seen life. In the same way a Buddhist monk who is a *ngepyu* (innocent from infancy) that is who became a monk as a *vir intactus* is much more honoured than a *taw-twet* or previously married man.

Towards the end of s. 3 is given the rule of partition between *eindounggyis* on divorce when there is no fault on either side and one only desires to separate and the other does not. Each is allowed to take his or her *payin* and the whole of the property acquired after marriage. It is for the purpose of determining what is the whole of the property acquired after marriage in this case that the last paragraph of s. 3 defines what is *lettetpwa,* and the property acquired after marriage other than jointly acquired property is strictly limited to the profits derived from their *payin, minbe,* or gifts made by the King and property inherited after marriage.

If the section be read in this way there is no inconsistency in the *Dhammathat* and the words of the passage are given their natural meaning.

This is supported by the fact that the last paragraph of s. 3 follows immediately the passage which refers to the partition of property between *eindounggyis* where there is no fault on either side and only one party desires to separate.

Section 264, Digest, Vol. II, which gives the extract from the *Manugye,* s. 3, last paragraph in the Burmese text has s. 258 (ခ) against it, while s. 228, *Manugye,* extract has (က) against it.

The heading of s. 264 is "Distinction between *payin* and jointly acquired property" and that of s. 258 "Divorce between a husband and wife who have both been previously married when only one party desires it."

In s. 3 of Digest, Vol. II, headed "Instructions to readers" (of the original) sub-section (*j*) we have this direction:—"In the original extracts containing two or more similar cases, the first of the similar cases is distinguished by a (က), the second by a (ခ), the third by a (ဂ) and so on, using the letters of the Burmese alphabet in their order, so as to facilitate reference when any of them is taken up again in other parts of the Digest."

From this it is clear that the *lettetpwa* defined in s. 264 of the Digest is the *lettetpwa* that applies only to *eindounggyis* on divorce when there is no fault on either side and only one party desires to separate, and the *lettetpwa* of "virgin couples" or of *eindounggyis* on mutual divorce, where there is no fault on either side, includes property inherited by either from their parents after marriage. In *Maung Lo* v. *Maung Pyaung* (6) and in *Tola Ram* v. *Ma Kaing* (7) it was held by Twomey, J., that property inherited after marriage is *lettet-*

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(6) 8 Ind. Cas. 992; 3 Bur. L. T. 149.

(7) 15 Ind. Cas. 380; 5 Bur. L. T. 98.

pwa. In *Ma Ngwe Bwin* v. *Maung Lun Maung* (8) it was held that property inherited during coverture is *lettetpwa.*

In s. 264 of the Digest, Vol. II, the extract from Manu supports the *Manugye.* My answer to the first point of reference is that the property inherited by *A* is the *lettetpwa* or joint property of the marriages.

In s. 3, Book XII of the *Manugye*, we have seen that the division of *lettetpwa* property is in the proportion of 2 to 1 according as the husband or the wife is the *nissaya* (supporter) or *nissita* (dependant). As the property referred to in the reference was inherited by *A* from his father he would be the *nissaya* and *B* and *C* would be *nissitas.* *A*'s share would be two-thirds and *B*'s and *C*'s share would be one-third. As *B* and *C* are of equal status, the share of each would be half of one-third or one-sixth of the whole. In *Maung Lo* v. *Maung Pyaung* (6) and *Tola Ram* v. *Ma Kaing* (7) it was correctly held that the *Nissita's* share was one-third.

My answer to the second point of reference is that the chief wife *B*'s share is one-sixth of the inherited immoveable property.

The third point of reference is "will either or both wives acquire a vested right in one-third or any other share in the inherited property from the date on which it in inherited, and, if so, is such share liable for all or any part of the debts incurred by the deceased husband alone ?"

In *Maung Po Sein* v. *Ma Pwa* (9) the extent of the power of the husband of alienating property inherited by him after marriage was considered. It was held that the Court should be guided by the rules applicable to a partition upon divorce when neither party is in fault. It was also held that it was settled law that the wife or husband has an interest in property acquired by the other by inheritance, after marriage, when they are living together and helping each other.

In the case of *Maung Lo* v. *Maung Pyaung* (6) it was held that a durian garden inherited by Maung Pyaung after his marriage with Ma Aing was *lettetpwa*; that Ma Aing had a vested interest in it and that the extent of her interest is one-third. On this point *Mi Myin* v. *Nga Twe* (5) was followed. It was held further that although a wife cannot alienate her share in joint property without her husband's consent, her interest in joint property is attachable. On this point *Ma Thaing* v. *Maung Tha Gywe* (10) and *Maung Hmon* v. *Maung Meik* (11) were followed. It was also held that although Ma Aing had not "a disposing power which she may exercise for her own benefit" over the one-third share in the durian garden, that one-third share, nevertheless, belongs to her and that this was sufficient for the purposes of s. 60, C. P. C. of 1908.

As soon as a person dies his heirs at the time under Burmese Buddhist Law immediately become entitled to his estate and when a husband or wife inherits property after marriage, the other party also becomes entitled at the same time to an undivided one-third share of such inherited portion.

In *Ma Shwe* v. *Ma Kyu* (12) a Full Bench of the Chief Court of Lower Burma held that "a sale by a Burman Buddhist husband of the *hnapazon* property of himself and his wife made without her consent constitutes a valid transfer of his share and interest in the property sold." It has been shown that s. 3, Book XII of *Manugye* uses the two terms *hnapazon* and *lettetpwa* together.

I think it is settled law that a wife's share in *lettetpwa* property is not subject to the debts of the husband where they were contracted by him without her knowledge and consent and where she was not a party.

My answer to the third point of reference is that both wives acquired a vested right in one-third of the inherited property from the date on which it was inherited and that such share is not liable for all or any part of the debts incurred by the deceased husband alone.

Carr, J.—In order to answer the questions referred it is necessary to determine the respective interests in property, during the continuance of the marriage of a Burmese Buddhist husband and wife. This matter is not directly dealt with in the *Dhammathats* and we can deal with it only by inference from certain provisions among which those of s. 3 of Book XII of the *Munugye Dhammathat* are dominant. This *Dhammathat*, besides being accepted as the leading authority, appears to deal with the subject more fully than any other.

This section sets out the rules for partition on divorce, and it has been urged that we should not apply to a question of inheritance the rules applicable to divorce. This argument seems to me to involve a misapprehension. If the wife has a vested interest in the property during the life of the husband that interest will not be affected by his death and cannot be considered as passing to her by inheritance, but on the husband's death she will take either the whole or a part of his interest as his heir. The part so received by her by way of inheritance will, of course, be chargeable with the husband's separate debts while the interest which she has all along held in her own right must be separately considered. The question, therefore, for decision is whether the property in question in the suit has come to her by inheritance or otherwise.

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(8) P. J. L. B. 295.
(9) P. J. L. B. 403.
(10) 2 U. B. R. (1902-03), Exs. p. 1.
(11) 2 U. B. R. (1904-06) Bud. Law, Divorce p. 1.
(12) 3 L. B. R. 66.

The *Dhammathats* frequently make use of the following terms:—

Payin—property possessed by either party before marriage.

Lettetpwa—property acquired during the continuance of the marriage.

Hanpazon—joint property.

Thinthi—separate property.

These terms are loosely used and are nowhere exhaustively defined. I shall come to some partial definitions later, but there seems to be no definition whatever of the *thinthi* of a husband or wife as between themselves. There are provisions regarding *thinthi* in *Manugye* X, 22, 23, 24 and 81, and in ss. 119 to 136 of Volume I of the Kinwun Mingyi's Digest of Buddhist Law but these relate to the *thinthi* of children as between them and their parents and lay down, generally speaking, that such *thinthi* is not to be included in the estate of the parents when that estate comes to be partitioned.

In view of the looseness of their use and the absence of precise definition too much weight should not be attached to the use of these terms in any particular context.

I come now to s. 3 of Book XII of *Manugye*. This section first sets out the rule for partition on divorce between a husband and wife, neither of whom has previously been married when both desire the divorce and no fault is attributable to either. Each party takes his own clothes and personal ornaments but, if these are materially more valuable than those of the other, one must compensate the other for the difference. Property acquired jointly is equally divided, but if there is property acquired separately by or through one party that party takes two shares and the other party one share.

There follow provisions regarding the children and the right of re-marriage, which need not be discussed.

Then comes a statement of the three kinds of property acquired separately by or through one party. This is first given generally—"property originally in possession *(payin)*; property acquired by skill or science; and property given by the King." This is then slightly elaborated:—

(1) Property inherited before marriage from parents by the husband (or wife) when the wife (or husband) had no such property.

(2) Property acquired during the marriage by the skill or science of the husband (or wife).

(3) Property specially given to the one party by the King.

Two points may be noted here. The general classification refers to *payin* generally, that is all property possessed before marriage by the one party, but the more detailed statement would seem to limit this to inherited *payin*. This, however, is probably due to the fact that the marriage contemplated would probably take place at an age when neither party was likely to have acquired any property of importance by his own exertions. I think the most reasonable interpretation is that all *payin* is considered as acquired by the party possessing it before marriage.

Again, though property inherited before marriage is expressly included nothing is said about property inherited after marriage. It may be, in view of the following rules, that the omission was intentional and that property inherited after marriage, that is, after the couple had become one, was to be shared equally. But the *Dhammathats* are neither precise nor entirely consistent and I think that the safer interpretation would include this class of property among the property acquired by or through the one party.

It is noticeable that so far the word *lettetpwa* has not been used. The rules cover all property, whether acquired before or after marriage, of both parties. They thus disclose a very strong community of interest in the case of a first marriage and indicate that all property is joint, though the respective interests may vary in amount. This is entirely in accord with present day Burmese sentiment, which regards the union of a couple neither of whom has been married before (*nge lin nge maya*) as much more perfect and intimate than any other marriage.

The divorce being by mutual consent and without fault on either side it is equitable that neither party should suffer any material loss by the divorce. It reasonable, therefore, to presume that the mode of division is based on the relative interests of the parties during the continuance of the marriage.

We have next the rule when one party wishes to separate and the other does not, there still being no fault on either side. The party wishing to separate forfeits all the property except that specially given to him by the King and one set of wearing apparel, and must pay all the debts.

This rule strongly emphasises the community of interest and the closeness of the union. The party wishing to separate can only do so on forfeiting all the property, including his own *payin*, except the very limited class of royal gifts, and sufficient clothing to satisfy the requirements of decency.

Passing over the rule for a case in which one party is in fault we come to the rules for a husband and wife both of whom have been married before and to neither of whom is any fault attributable. If both wish to separate each party takes his own *payin* and the joint property is equally divided. But if one wishes to separate and the other does not, then the party not wishing* to separate takes all the joint property and the party who does wish to separate pays all the joint debts, while each party takes his own *payin*.

We are told that there are two kinds of "*hnapzon lettetpwa* (this being the first time that the word *lettetpwa* has been used), namely, (*i*) property or debts inherited during the marriage by one party from his parents, and (*ii*) property acquired by their joint exertions. And it is said "If the husband has inherited property from his parents it is more immediately his; let him have two shares of the property" and similarly for the wife.

Here we have it very clearly laid down that property inherited after marriage is joint property and that the inheriting party takes two shares to one for the other party.

The last paragraph of the section has given rise to much discussion. It refers again to three classes of property—royal gifts, *payin* and property inherited by either party during marriage and it says clearly that the profits from these are *lettetpwa* and to be divided accordingly.

There is some obscurity in this passage in regard to the three classes of property mentioned, and we have conflicting translations. Richardson makes it mean that these three classes of property themselves are also *lettetpwa*. This is undoubtedly wrong. The text cannot bear that meaning, which would also involve a contradiction of the preceding paragraph, which distinguishes *payin* from *lettetwa*.

The translator of the Digest (s. 264, Vol. II) renders it "Let each take the property given to him or her alone by the King, that brought by each to the marriage, and that inherited by each from his or her parents subsequent to the marriage." That, in my view, is also wrong. I do not think that the text bears that meaning, which also contradicts the preceding paragraph, which says that of property inherited during marriage the inheriting party takes two shares.

There are two other translations—in Jardine's Notes on Buddhist Law, II, Marriage, page 31, and by Sir G. Shaw in *Mi Myin* v. *Nga Twe* (5). Neither of these is entirely satisfactory and I am unable myself to suggest a correct translation for the obscure words "*ayin ataing ti byi ywe*." But both of these translations, I think, support the view that I take of the paragraph which is that it is meant only to explain that the profits from the three classes of property specified are *lettetpwa* and does not deal with the disposition of the original properties themselves—that having already been done.

In any case I should not be prepared to accept a passage of such obscurity as sufficient to override the very clear provisions by which it is immediately preceded.

It is to be noticed that these rules indicate a much lower degree of community of interest than in the case of a previously unmarried couple. This may be accounted for in part by the sentiment already mentioned, but there are other obvious reasons for the difference. In the case of a first marriage there are no interests to be considered other than those of the husband and wife and of their children. But when either or both have been married before, it is likely that there will be children of the first marriage and their interest also have to be considered. That is a very good reason for not giving to each spouse the same rights in the *payin* property of the other as are given on a first marriage.

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* There is a misprint here in Richardson's translation, the "not" being omitted.

The rules in other *Dhammathats* given in the Digest differ sometimes from those of the *Manugye*, but I am unable to find anything to throw doubt on these rules in regard to the kind of property in question in this case, that is, property inherited during marriage.

In my view it is clearly shown that such property becomes *lettetpwa* or joint property immediately it accrues and that the interest of the inheriting party is two-thirds and that of the other party one-third. The interest is the same whether neither party has been married before or both have been married.

The intermediate case, in which one has been married before and the other has not, is not dealt with in the *Dhammathats*; but where the rule in the two extreme cases is the same, there is no difficulty in holding that it applies also to the middle case. It is not necessary, therefore, to decide which of two different rules is to be followed, but I wish to say that I am not satisfied that where the rules differ the one to be applied to the intermediate case is that for the case where neither party has been previously married. That has been held in *Ma E Nyün* v. *Maung Tok Pyu* (2) but the reasoning of Sir H. Thirkell White in that case seems to me to be based on a misconception of the reason for the differences in the rules. This decision was followed in *Ma Ngwe Hnit* v. *Maung Po Hmu* (3) but there were special circumstances in that case which rendered the decision at least equitable.

It has also been argued that what is joint property for the purposes of partition on divorce is not necessarily joint for the purposes of partition of inheritance. It is difficult to see any reason why there should be any such distinction; but cases have been cited in favour of this proposition. The first and most important of these is *Shwe Ngon Ma* v. *Min Dwe* (4) in which Sir J. Jardine said :—"My opinion as to the application of the definition in page 344 (*Manugye* XII, 3) to the present case is as follows :—

"The definition of jointly acquired property in that section is not made for the purpose of inheritance; it appears to me to relate only to the law of divorce and partition following divorce. The rules about partition and inheritance on the death of a relation make frequent and plain distinctions between ordinary joint acquisitions made by skill, science, thrift or trade, and the succession of the husband or wife to his or her relations' property. I instance s. 6 at page 272, s. 8 at page 273, mentioned by Mr. Sen, ss. 16 and 15 at page 276, as to children of surviving parents, which children have not received a share, s. 38 at page 286, where the ancestral property inherited by a husband is expressly said to be his and thus liable to equal division among wives, and s. 66, where the distinction is most plainly drawn." The sections quoted are all in Book X of the *Manugye*.

With the greatest respect for the high authority of Sir J. Jardine, whose judgments and whose Notes on Buddhist Law still stand in the front rank of authorities on that law, I am unable to follow this proposition, or to find in the sections mentioned anything entirely inconsistent with s. 3 of Book XII.

Section 6 deals with the case of a man marrying a second time, having a son by the first marriage. On the death of the father and step-mother the son takes all their property. But if the step-mother's parents have died and their property *undivided* is in her hands, the son takes only one-half of that property, the step-mother's relations taking the other half. But again, if the step-mother has died first the son takes all the inherited property which has been divided and has come into his father's hands. Of the undivided part he takes two shares and the step-mother's relations take one.

The main thing to be deduced from this would seem to be that inheritance was not regarded as vesting completely until partition, but I can see nothing to contradict the proposition that the husband acquires a vested interest as soon as the inheritance accrues to the wife.

Section 8 deals with partition between a step-father and his step-sons on the death of their mother. The step-father takes one-fourth of the mother's property and her sons three-fourths. But if the mother has inherited property during her second marriage, then the step father takes one-half of that property and the sons the other half.

This seems to me definitely to support the rule in Book XII, 3. Assuming that, under that rule as I have interpreted it, he had acquired a vested one-third interet in the inherited property, then he would keep that on his wife's death. On her two-thirds interest he would, under the rule in the first part of s. 8, take one-fourth, or one-sixth of the whole. This together with his own one-third makes the one-half allotted to him. The division is, therefore, arithmetically consistent with s. 3 of Book XII. See also *Ma Nyein* v. *Ma Tha Gaung* (13).

Sections 15 and 16 do not seem to have any bearing at all on the question. They deal with partition between the children and grandchildren of a single couple and make no distinction whatever between joint and separate property.

Section 38 deals with a husband having many wives of equal status. It says that property inherited by the husband after the marriages is his property and shall be divided equally among the wives. This is not inconsistent with the rules under discussion. The statement that it is the husband's property is made merely in disallowing a claim by any one wife that it was a gift to her by the husband, and does not justify an inference that the wives had no interest during the husband's lifetime.

In one respect this section does conflict with Book XII, 3. It says that each wife is to keep her own *payin* and the property inherited by her during marriage. But it is very likely that this was a measure of practical convenience only.

Section 66 deals with a man who has had either two or three wives and on his death leaves children by each. It says that the rule for division of property inherited by him in the time of his first wife is—

(1) where there have been two wives the children of the first wife take two shares and those of the second wife one share;

(2) where there have been three wives the children of the first wife take two shares and those of the other two wives take one share each.

It is also explained that if the property has come into possession of the husband during the time of the second or the third wife the division shall be similarly made. This can only mean that the children of the wife in whose time the inheritance accrued take the larger share.

This again seems to me definitely to corroborate the rules in XII, 3. I can imagine no reason for giving a larger share to the children in the time of whose mother the property accrued other than the fact that their mother acquired a vested interest in it. Moreover, in the case of the two families the division is again arithmetically consistent with the view that the wife's interest is one-third. Her children take that one-third as their mother's property and share the father's two-thirds equally with the children by the other wife. In the case of three marriages the division is not exactly correct arithmetically being in the proportion of 4 : 2: 3, whereas under the one-third rule it should be in the proportion of 5: 2: 2. The difference, however, is not great.

There is one part of the section which may be in conflict with the one-third rule. It is laid down that the children of each wife shall take their mother's separate hereditary property. Nothing is said as to the time of accrual of the inheritance, but it is probably intended to include all her inherited property.

Taking all these sections together I think that they tend rather to support than to contradict the rules in Book XII, 3. The inconsistencies are slight and may be attributed to considerations of practical convenience.

In my view, therefore, the definition of *lettetpwa* in Book XII, 3, is applicable to questions of inheritance as much as to questions of divorce.

There is no very direct authority for the case where there are two wives to justify us in allotting a larger share to two wives than to one, but *Manugye* X, 38 indicates that the two wives should share equally in the one-third interest, when both are of equal status.

The question of the liability of the interest of the wife for the separate debts of the husband is one rather of contract than of Buddhist Law and I can find no reason for holding that the wife's interest is so liable.

My answers to the questions referred are, therefore:—

(1) The property is the *lettetpwa* of the marriages and is joint property of the husband and wives and not the property of the husband.

(2) The share of the two wives jointly is one-third and since they are of equal status the share of each is one-sixth.

(3) Each wife acquires a vested interest

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(13) 60 Ind. Cas. 7; 3 U. B. R. (1920) 237 at p. 238.

in one-sixth of the property from the date on which it is inherited, and that interest is not liable for any part of the debts incurred by the deceased husband alone.

Robinson, C. J.—The questions have been so thoroughly discussed by my learned brothers and as the results arrived at agree with the result at which I had arrived after discussion, I do not think I need do more than express my concurrence.

I am of the same opinion.

Z. K. *Order accordingly.*

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 3, 5 AND 7 OF 1923.

July 8, 1924.

Present:—Mr. Justice Adami and Mr. Justice Sen.

MONOMOHINI DASI—APPELLANT

versus

HARI PRASAD BOSE—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 17—Guardianship of adopted son—Matters to be considered—Natural father, whether proper person to be guardian—Guardian, whether must live with minor.

In appointing a guardian to the adopted son of a deceased Hindu the first consideration of the Court must be with regard to the interest and the welfare of the minor and the Court must next see how far the intentions of the adoptive father can be best carried out. [p. 808, col. 2.]

The object of an adoption by a Hindu is to affiliate the adopted boy into his family, to disassociate him completely from his natural father and family. The adopted boy is to become a member of the adoptive family to own the adoptive father and the adoptive mother as his parents and the relations of the adoptive family as his own relations; all traces of relationship with the natural parents or their relations have to be effaced. The adopted boy must, therefore, be reared up in sentiments such as the adoptive father wants him to imbibe. Care must, therefore, be taken in appointing the guardian of an adopted son after the death of the adoptive father, that the intentions of the adoptive father should not be frustrated, and if a suitable person is forthcoming from among the members of the adoptive father's family to act as the guardian of the minor, the natural father of the minor should not be appointed his guardian. [p. 809, col. 2.]

In the absence of the adoptive mother, the adoptive grandmother of the minor should be appointed as guardian in preference to the natural father. [p. 811, col. 1.]

It is desirable that the person who is appointed the guardian of a minor should live with him and look after him and attend to his daily needs. [p. 810, col. 2.]

Appeals from a decision of the District Judge, Cuttack, dated the 4th June 1923.

FACTS.—One Nand Kumar Bose died in 1902 leaving behind him his widow Sarojini Dasi, his mother Monomohini Dasi and a sister and one or two other relatives. By his Will he gave an authority to his wife to adopt a son to him, and in case of her failure to adopt, he authorised his mother to adopt a son to him; if no adoption was made, or if made, the adoptee did not survive, he empowered his executors, also named in the Will, to dedicate all his assets to certain defined charitable purposes. In 1915, the widow adopted one of the sons of the respondent, Hari Prasad Bose, a child at that time only 6 months of age, without objection from the executors one of whom was Jagat Ballav Ghose, her father. The adopted son was re-named Krishna Kumar at the time of adoption. The widow died in 1922 and the natural father of the minor adoptee applied to be appointed guardian of his person and property. This application was opposed among others, by Monomohini, Jagat Ballav, and by the executors as such, all of whom put in separate applications for the guardianship of the person and properties of the minor.

The learned District Judge rejected the applications of all but the natural father of the minor whom he appointed as guardian of his person and the executors who were appointed guardians of his property.

The application of Monomohini was rejected on the ground that the minor was of the age of receiving education and that the applicant was too old to look after him properly. He gave preference to the claim of the natural father stating that he was bound to the minor by the ties of natural affection and that the interests of the other applicants were more or less adverse to the minor. The paternal grandmother and maternal grandfather of the adoptee, and the executors filed separate appeals.

Messrs. *Susil Madhab Mullick, Siva Narain Bose* and *Satya N. Sen Gupta*, for the Appellant.

Messrs. *J. N. Bose* and *Durga Prosanna Das Gupta*, for the Respondent.

JUDGMENT.

Adami, J.—[His Lordship, after stating the facts, proceeded:—]Our first consideration must be with regard to the interest and the welfare of the minor, and, after that, we have to see how far the intentions of the adoptive father can be best carried out.

With regard to the welfare of the minor, it seems to me that there is not much difference between the various applicants if they do their duty. It is important that the boy should be given an education to fit him for his position as a member of the family of Nand Kumar who was a man of some wealth, leaving property valued at five lakhs. It is important then that he should be sent to a good school at Cuttack, and, as a matter of fact, since his appointment as guardian, Hari Prasad has kept the boy at the Ravenshaw College with a tutor guardian appointed by the District Judge. But Monomohini or Jagat Ballav or the executors would have been able to do, and probably would have done, exactly the same, and as a matter of fact, Jagat Ballav lives in Cuttack and has a house where the boy could be kept, while Hari Prasad lives at Bahukud and a house has to be engaged for the minor.

The next question is whether by the appointment of Hari Prasad as guardian of the minor, the full intentions of Nand Kumar are being carried out. The learned District Judge has relied on the case of *Ganga Prasad Bhattacharyya* v. *Hara Kanta Chowdhury* (1). There one Brojo Mohan Roy died leaving a widow, a minor son and two daughters; the son died and the widow adopted the minor son of Hara Kanta. On the widow's death, Hara Kanta, the natural father, applied to be appointed guardian of the person and property of the minor. An executor appointed under Brojo Mohan Roy's Will opposed the application with regard to the property and two brothers of the widow and one of her two daughters opposed the application with regard to the guardianship of the person. It was argued that the natural father of the minor adopted boy was not fit to be appointed as guardian of his person since by adoption the minor was cut off from all relationship with his natural family and by leaving him in the custody of his natural father the ties with his adoptive family would be severed. Sharfuddin, J., in that case held that the natural father was properly appointed guardian of the person of the adopted boy: but that case is distinguishable from the present one, for there the two daughters who applied were both married into other families, while the brothers of the widow were not members of the family of the adoptive father, so that there was no member of the adoptive father's family alive. In the present case the paternal grandmother Monomohini is alive and ordinarily she would be the proper guardian of the boy. It appears too that in that case the learned Judge considered that the words, in cl. (2) of s. 17 of the Guardians and Wards Act, VIII of 1890

"Any existing or previous relations of the proposed guardian with the minor or his property" would cover the case of a natural father with regard to his son who had been adopted. It is clear, I think, that in that clause relation does not mean relationship. It seems that if the adopted boy is again put in charge of his natural father all the objects of the adoption are lost; he will not be likely to keep the traditions of the family of his adoption and he will be brought up in the traditions of his natural father's family and will be likely, when, he grows up, to repudiate all relationship with the adoptive father's family. Thus the intention of the adoptive parents would be frustrated.

In Miscellaneous Judicial Case No. 24 of 1924*, which came before Jwala Prasad and Kulwant Sahay, JJ., in connection with the present dispute, subsequent to the order passed by the District Judge from which these appeals have been lodged, Jwala Prasad, J., said:—

"The boy was six months old when he was adopted and had been living in the adoptive family up to the death of his adoptive mother in the year 1922 for a period of about 8 or 9 years. The boy had developed affection for the adoptive grandmother to such an extent that it was difficult for the District Judge to enforce his order to hand over the boy to the natural father.................The object of adoption by Nand Kumar Bose was to affiliate the boy into his family and to disassociate himself completely from his natural father and family. The boy is to become a member of the adoptive family and to own the adoptive father and the adoptive mother as his parents and the relations of the adoptive family as his own relations. All traces of relationship with the natural parents or their relations had to be effaced."

Speaking of the tutor who happened to be appointed, Jwala Prasad, J., said—

"He should have reared up sentiments such as the adoptive father wanted to imbibe him with. The District Judge should not encourage any foreign tendencies being developed in the boy; and when such matters are brought to his notice he should see that such sentiments are soon destroyed and not allowed to grow.................If the boy is not shaped from now to take his proper position in the adoptive family, after he comes of age he will be totally lost to the family and perhaps he would like to go back to the natural father and that might be the game which the natural father is perhaps now trying to play."

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(1) 7 Ind. Cas. 234; 15 C. W. N. 558.

*See *Manmohini Dasi* v. *Hari Prasad Bose*; 81 Ind. Cas. 1045.—[*Ed*].

In my opinion, in this case, the intentions of the adoptive father would be frustrated if the boy is allowed to remain in charge of Hari Prasad.

The evidence of the letters on the record show clearly that Hari Prasad had been even before the birth of this boy turning his attention to the property of Nand Kumar. We find that sometime before the birth of the boy, Hari Prasad had procured, through his servant, a copy of Nand Kumar's Will: the date of the delivery of the copy shows this fact. The letters too show that between 1913 and 1917, Hari Prasad was in communication with Sarojini and advising her behind the back of Jagat Ballav Ghose how to deal with her father and to persuade him to do what Sarojini and he himself wished. His application to be made the guardian of the person and property of the minor also points in the same direction. In the letter (Ex. C) it is quite evident that Hari Prasad was trying to get Sarojini to force her father to comply with her demands by threats; he advised her to tell her father that if he and Benode Lal remained guardians he Hari Babu would get the estate put under the Court of Wards and would have all his accounts examined from the date when the estate came into his hands. The letter shows too that Hari Prasad was trying to put Jagat Ballav on the horns of a dilemma. It is unnecessary to quote from all the letters; many of them especially those from Kali Shankar Roy are quite irrelevant; but they do show that there was a good deal of scheming going on with the object of getting the property out of the hands of the executors. It is true that Hari Prasad has a certain amount of property paying Government revenue of Rs. 1,700 a year, but there is suspicion in my mind that his desire to become guardian of the person of the minor is prompted not so much by natural affection as by a desire to intermeddle with the property and obtain a profit therefrom.

When the executors required an *ekrarnamah* to be executed at the time of the adoption, Hari Prasad appears to have altered or objected to some of the wording, and it is doubtful whether he really had power to execute the *ekrarnamah* on behalf of his minor son. It is useless to speak of natural affection on the part of the father who allows a son to be adopted into another family six months after that son's birth. I am, therefore, of opinion that Hari Prasad was not a proper person to be appointed guardian of the person of the son he had given in adoption to another.

It remains to consider the claims of the three other applicants, namely, Monmohini Jagat Ballav Ghose and the two executors.

With regard to the application of the two executors jointly, I do not think that it is proper that it should be granted. It is necessary that the person who is appointed guardian of the minor should live with him and look after him and attend to his daily needs. The two executors could not do this properly; besides there is the objection, which has been considered by the District Judge and accepted, that the two executors under the Will would have the disposing power over the properties of Nand Kumar on the death of the minor. It seems that these executors, under the terms of Will, could not be said to be the presumptive heirs. There is no reasonable ground before us for suspicion or fear that men of the age of Jagat Ballav and Benode Lal, who have up to the present managed the property carefully and well, would have any thought of bringing an end to the life of the minor or of doing anything disadvantageous to him. Jagat Ballav Ghose is an old man of about 75 and it is not likely that he would covet in any way the property of the minor.

With regard to the application by Jagat Ballav alone, the remarks I have made with regard to the two executors apply. It may be that there is little likelihood that Jagat Ballav would be moved by any interest adverse to the minor, but he is not a member of Nand Kumar's family though he is the father of the minor's adoptive mother. In my opinion it is preferable that in a case like this the same person should not be guardian both of the property and person of the minor.

We come next to the application of Monomohini and this application, I think, should have been granted by the District Judge. The objections put forward against her are merely to the effect that she is old, somewhat weak-minded, and has lost all interest in wordly affairs. That she has been fond of the minor is not denied, and that he was fond of her. He had lived with her ever since Sarojini's death and had been in the house with her previous to that. The evidence as to the state of Monomohini's mind is very vague; it is merely said that she is crazy; but the chief witness who gives evidence as to this is a Sub-Inspector of Schools who has never been posted in the Bhukud Circle and seems to have little opportunity of forming an opinion. From the manner in which she has applied to be made guardian and her subsequent applications to be allowed to see the boy, it would appear that she is by no means of weak intellect. As I have said before, she would ordinarily be the proper person to be appointed guardian of the person of the minor, being the paternal grandmother. Furthermore, it is quite evident from the Will by which she was empowered to adopt a son to Nand Kumar on the failure of adoption by Sarojini, that Nand Kumar placed full confidence and trust in her and would have liked her to act as the mother of a boy adopted to him. She will live in Cuttack and be able to look after the boy and will have the advice and help of competent advisers. It is true that she is old but she may have many years to live yet, and I have no doubt as to her competence. In my mind she is the right person to be appointed the guardian of the person of Krishna Kumar Bose, the minor.

To ensure the welfare of the minor and his interest, it will be necessary that the boy be kept at school and be properly educated at the Ravenshaw College or some other good school and that he be put in the care of a tutor-guardian for this purpose. If in the opinion of the District Judge the present tutor-guardian is no longer suitable owing to his want of sympathy with Monomohini Dasi, it will be necessary to dismiss him and appointed another tutor.

I would set aside the order of the learned District Judge and allow the appeal of Monomohini Dasi, and direct that she be appointed the guardian of the person of the boy. The appeals of the other appellants will be dismissed.

The District Judge will call upon Hari Prasad Bose to make over the boy to Srimati Monomohini Dasi.

Srimati Monomohini Dasi will get her costs in both the Courts.

Sen, J.—I agree.

Z. K. *Appeal No. 3 of 1923 decreed.*
Appeals Nos. 5 and 7 of 1923 dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1927 OF 1923.

December 11, 1925.

Present :—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

Srimati SARAJUBALA ROY CHAUDHURANI—DEFENDANT No. 1—APPELLANT

versus

KAMINI KUMAR CHAUDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 69—Mortgage—Decree for sale—Decree obtained by landlord for arrears of rent, paid off by mortgagee—Sale of property by mortgagor—Mortgagee, whether entitled to recover money paid by him.

Section 69 of the Contract Act includes cases not only of personal liability but all liabilities to payment for which owners of land are indirectly liable, when such liabilities are imposed on lands held by them. [p. 812, col. 2.]

Where a mortgagee who has obtained a decree for sale of the mortgaged property pays off a decree obtained by the landlord in respect of such property in order to save the property from sale under the landlord's decree, he is entitled to maintain a simple suit for money against a subsequent purchaser from the mortgagor for the purpose of recovering the amount paid by him under the landlord's decree. [p. 813, col. 1.]

Appeal against a decree of the District Judge, Chittagong, dated the 16th March 1923, affirming that of the Munsif, Third Court at that place, dated the 25th of July 1921.

Babu *Chandra Sekhar Sen*, for the Appellant.

Babu *Narendra Kumar Das*, for the Respondents.

JUDGMENT.—The plaintiffs who were mortgagees in respect of a certain *taluk* sued on their mortgages and obtained a preliminary mortgage-decree on the 17th January 1916, and a final decree on the 9th June 1917. On the 26th April 1916 the landlords instituted a suit for rent in respect of the *taluk* and obtained a rent-decree on the 1st September 1916, and in execution of the said decree purchased the *taluk* on the 11th August 1917 and the plaintiffs deposited the decretal amount on the 11th September 1917 under O. XXI, r. 89, C. P. C., and got the sale set aside. On the 24th October 1916, the defendant No. 1 purchased the *taluk* from the mortgagors, the defendants Nos. 2 to 5, and on the 8th February 1918 the defendant No. 1 paid up the sum due on the final mortgage-decree. On the 14th September 1920 the plaintiff instituted the present suit for recovery of the amount deposited by him to set aside the sale of the 11th August 1917. The plaintiff has been successful in both the Courts below. The defendant No. 1 has appealed to this Court.

The principal contention urged on behalf of the appellant is that s. 69 of the Indian Contract Act is not applicable and, therefore, the plaintiff is not entitled to be re-imbursed. The basis of this contention is the argument that defendant No. 1 was not bound by law to pay the back rents for which the decree had been obtained by the landlords in execution of which the landlords had purchased, and to set aside which sale the plaintiff had made the deposit. It is urged that although rent forms the first charge on the tenure the defendant No. 1 who was a subsequent purchaser at a private sale was not bound to pay the rent which was due for a period antecedent to his purchase, firstly in law, and, secondly, according to the terms of his purchase; and if that be so s. 69 will not apply as the expression 'bound by law' implies a personal liability. In support of this contention as to the interpretation of the expression 'bound by law' reliance has been placed upon the decision in the case of *Gangadas Bhattar* v. *Jogendra Nath Mitter* (1), wherein at page 412* the following observations were made: "It is not also disputed, that the mortgage under which the plaintiffs claim has been saved by this payment quite as much as the mortgage under which the defendants claim. But it is not sufficient to impose a liability upon the plaintiffs, as they are not the persons who were bound by law to pay the money within the meaning of s. 69 of the Indian Contract Act. The rent was due for a period, when the mortgagors and the purchasers from them were in possession and the plaintiffs as 1st mortgagees were not under any liability to pay the rent due to the superior landlord any more than the second mortgagees". All that that case means to lay down is that payments made by a 2nd mortgagee to save the mortgaged property from sale in execution of a decree for rent obtained by that *zemindar* against the mortgagor cannot be recovered from the 1st mortgagee as the latter is not bound under s. 69 of the Bengal Tenancy Act to pay the rent due by the mortgagor to the *zemindar*. Reliance has also been placed upon the decisions in the cases of *Boja Sellappa Reddy* v. *Vridhachala Reddy* (2), and *Subramania Chetty* v. *Mahalingaswami Sivan* (3), where an unregistered owner of a land was held not bound to pay the revenue due on the land under the Madras Revenue Recovery Act II of 1864. The meaning of the expression has been explained in a decision of this Court in the case of *Mothooranath Chuttopadhya* v. *Kristokumar Ghose* (4) and it was held that s. 69 of Act IX of 1872 was intended to include cases not only of personal liability but all liabilities to payment for which owners of lands are indirectly liable, when such liabilities are imposed on lands held by them. That was a case where two persons, on different dates, purchased different portions of a property on which there was a mortgage, and on the mortgagee obtaining a decree against the property, one of them paid off the entire debt and brought a suit against the other for contribution, and it was held that he was entitled to recover notwithstanding that in the deed of sale the person who had made the payment had given an undertaking that he would discharge all the liabilities of the mortgagor including the mortgage on the property. In this case reference was made to the illustration to the section as militating against the contention that the section was limited to the case of a personal liability of the person against whom re-imbursement was claimed. In the case of *Chandradaya Sen* v. *Bhagaban Chandra Sen* (5) the above decision was followed and it was held that s. 69 was intended to include the cases not only of personal liability, but all liabilities for payments for which owners were indirectly liable, those liabilities being imposed upon by the lands held by them. This was a case in which a purchaser in execution of a mortgage-decree was held bound to pay the arrears of rent for which a decree had been obtained by the landlord prior to his purchase. On principle there does not appear to be anything differentiating this case from that of a purchaser at a private sale, and it must accordingly be held that the defendant No. 1 was bound by law to pay off the decretal debt. The appellant's contention that his purchase, upon the terms of his *kobala*, was free from liability for the back rents cannot help him as his liability for the rent remained, notwithstanding this stipulation, even if there was any such stipulation—though such a stipulation will perhaps enable him to recover the amount from his vendor.

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(1) 11 C. W. N. 403; 5 C. L. J. 315.

*Page of 11 C. W. N.—[*Ed.*]

(2) 30 M. 35; 1 M. L. T. 323; 16 M. L. J. 569.

(3) 3 Ind. Cas. 624; 33 M. 41; 19 M. L. T. 627; 6 M. L. T. 198.

(4) 4 C. 369; 2 Ind. Dec. (N. S.) 234.

(5) 32 Ind. Cas. 200, 23 C. L. J. 125.

It is next contended that the plaintiff should have added the amount which he had paid to his mortgage-debt and not having done so he is precluded from recovering it in a separate suit. For this proposition reference has been made to certain decisions, which, however, do not prohibit the institution of a separate suit for the purpose. On the other hand there is abundant authority for the proposition that a mortgagee who has given up his mortgage lien, might bring a simple suit for money for the purpose of recovering the money paid by him to save the property : *Lachman Singh* v. *Salig Ram* (6) and *Anandi Ram* v. *Dur Najaf Ali Begum* (7) and the same view receives support from the decision of the Privy Council in *Nagenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (8).

The appellant's last objection relates to the form of the decree that has been passed in the suit. The decree runs thus:—"That the suit be decreed in part. The plaintiffs shall get Rs. 127 for the lands of Schedule No. 2; Rs. 211 for the lands of Schedule No. 4 and Rs. 227-10 for those of Schedule No. 5 of the plaint, and proportionate costs of this suit. These sums must be paid by the defendants within one month, failing which these properties or sufficient parts thereof shall be sold". It is conceded on behalf of the respondent that in view of the facts of the case the directions in the latter part of the above decretal order cannot stand. They will accordingly be expunged and a simple decree for money for a sum of Rs. 565-10 should be recorded instead.

The appeal, therefore, fails subject to the modification noted above, but in the circumstances each party should pay his own costs.

Z. K. *Appeal dismissed.*

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(6) 8 A. 384; A. W. N. (1886) 134; 5 Ind. Dec. (N. S.) 194.

(7) 13 A. 195; A. W. N. (1890) 228; 7 Ind. Dec. (N. S.) 122.

(8) 11 M. I. A. 241; 8 W. R. P. C. 17; 2 Suth. P. C. 77; 2 Sar. P. C. J. 275; 20 E. R. 92.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.
February 16, 1926.
Present:—Viscount Dunedin, Lord Blanesburgh and Sir John Edge.

SOURENDRA MOHAN SINHA AND OTHERS—APPELLANTS
versus
HARI PRASAD SINHA AND OTHERS—RESPONDENTS.

Privy Council—Variation of its own orders—Practice—Civil Procedure Code (Act V of 1908), O. XLV, r. 15 (1)—Failure of party entrusted with order to lodge it—Remedy.

It is only in exceptional circumstances that Privy Council varies its own orders.

If the party to whom an order of the Privy Council is entrusted delays or refuses to lodge it in the High Court concerned, the remedy of the person desiring execution of the order is an application under r. 15 (1), O. XLV, C. P. C., to the High Court for a summary order on the defaulting party to lodge the order and not a petition to the Privy Council for variation of the previous order.

Mr. *S. Hyam*, for the Appellants.

Messrs. *G. R. Lowndes* and *E. B. Raikes*, for the Respondents.

JUDGMENT.

Viscount Dunedin.—This is an application to vary the order in Council. The order has been already passed and it could only be under exceptional circumstances that their Lordships could humbly advise that another order should be passed.

In the suit judgment was given for the plaintiffs against the defendants for a certain sum.

On appeal to the King in Council their Lordships humbly advised His Majesty to reduce substantially the sum for which judgment had been given, and to make the sum still decreed payable eight months after the date of the receipt of the order by the High Court.

The defendants having been substantially successful in the appeal, the order in Council in accordance with the ordinary practice was issued to them: and in ordinary course ought to have been lodged by them in the High Court. They have not, however, done so, and the plaintiffs cannot, therefore, so far get execution. Hence this application. The plaintiffs and petitioners have not sufficiently adverted to O. XLV, r. 15 (1) of the First Schedule to the C. P. C. When they found that the defendants were delaying or refusing to lodge the order they could have applied to the High Court with a certified copy of the order and asked for a summary order on the defendants to lodge the order which had been entrusted to them so that execution might follow in terms of the judgment of this Board. This they can still do. Their Lordships, therefore, cannot advise His Majesty to grant the prayer of the petitioners: but as they are clearly of opinion that it was the duty of the defendants in ordinary course to lodge the order there will be no costs allowed on the petition.

S. D. *Application dismissed.*
F. Q.

Solicitors for the Appellants:—Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondents:—Messrs. *Watkins & Hunter.*

PATNA HIGH COURT.

IN THE MATTER OF PAUPER MISCELLANEOUS CASE No. 3 OF 1923.
June 25, 1924.
Present:—Mr. Justice Adami and
Mr. Justice Sen.
RAJENDRA PRASAD BOSE—PLAINTIFF—APPLICANT
versus
GOPAL PRASAD BOSE—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLIV, r. 1—Application for leave to appeal as pauper—Application, when can be entertained—Evidence Act (I of 1872), s. 90—Document deposited with Collector—Production after 30 years—Presumption.

An Appellate Court is entirely precluded from admitting an application for leave to appeal as pauper unless it is satisfied that the decree sought to be appealed against is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. The direction contained in the proviso to r. 1 of O. XLIV of the C. P. C. to that effect is mandatory. [p. 814, col. 2.]

The mere fact of a certain document having been produced from a Court where it had been filed, does not necessarily bring that document within the requirements of s. 90 of the Evidence Act. The application of this proposition, however, depends upon the circumstances of each particular case. [p. 815, cols. 1 & 2.]

A Hindu who died suddenly of cholera was alleged to have left an *anumatipatra* authorising his widow to make an adoption to him and also a Will. His father who arrived at the place where the death had taken place ten days after the date of the death, obtained the two documents from a servant of the deceased and deposited them with the Collector of the District with a request that the estate of the deceased may be taken under the management of the Court of Wards. The documents remained in the custody of the Collector for 54 years, and were then produced in Court in the course of a litigation between the reversioners of the deceased and a person who had been adopted by the widow of the deceased under the authority contained in the *anumatipatra*:

Held, that under the circumstances the Court was entitled to accept the documents as presumably genuine under the provisions of s. 90 of the Evidence Act. [p. 815, col. 2.]

FACTS.—Plaintiffs were allowed to sue *in forma pauperis*. Their suit having been dismissed, they filed an application for leave to appeal as paupers.

Mr. *S. C. Chatterji*, for the Applicants.

Mr. *J. N. Bose* (with him Mr. *G. C. Ray*), for the Opposite Party.

JUDGMENT.

Sen, J.—[After stating facts, the judgment proceeded:—] The judgment was passed on the 6th August 1923. In the ordinary course of things the application which was to have been made within thirty days from the date of the decree should have been made on the 5th of November, that is, the date of the opening of the High Court. But under a certain misapprehension the application could not be submitted before the 12th of November. There are, therefore, two points for consideration in this case. The first is whether the case satisfies the requirements of the proviso to O. XLIV, r. 1, of the C. P. C., and, secondly, whether extension of time can be allowed under s. 5 of the Limitation Act.

As regards the first point, it seems to us that we are entirely precluded from admitting the application unless we are satisfied that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. Those being the express words of the section, it seems to us that the direction is mandatory.

Three points have been urged by the learned Vakil for the applicants, Mr. S. C. Chatterji, in order to support his contention that the case satisfies the requirements of the proviso to r. 1 of O. XLIV.

Before I enter upon a consideration of those points, it is necessary to state in brief the nature of the suit and the points of contention between the parties.

The suit was instituted by the plaintiffs for the recovery of possession of extensive properties of the value of over two lakhs as reversioners upon the death of one Allahadini Dasi in September 1920. One Ram Prasad Bose died on the 16th of February 1869, leaving, as it is alleged by the defendants, a deed of *anumatipatra* duly executed as also a Will. He died rather suddenly on the day aforementioned having been stricken with cholera. It is said that as he was very anxious to see that his line was continued after his death, he took particular care to have a deed of *anumatipatra* executed on that date. After his death, on the 26th of February, his father Golak Prasad Bose, who had been in the interior of the district, hurried to Balasore, the place where his son had suddenly died, and obtained from an old and faithful servant of his son the deed of *anumatipatra* and the Will and on that date, namely, the 26th February 1869, he deposited these two documents with the Collector of the District together with an application praying that the Court of Wards might take over charge of the whole of the estate. Thereupon, it is said, an order was passed by the Collector on that very day in the following terms:

"Two documents filed along with a petition; not to be given to anybody until further orders."

These two documents lay in the Collector's office all these years and it was after repeated applications by the defendants that they succeeded in obtaining a production of these documents from the Collector's office at the trial of the suit.

It was contended by the plaintiffs at the trial that both these documents were forged and fabricated, that in point of fact Ram Prasad Bose was too ill on that day to be able to execute them, that he had no sound disposing capacity, that no adoption ever took place in pursuance of the instrument of *anumatipatra*, and that the contention that the adopted son, and since his death his son the present defendant, had been in possession of the estate was entirely a myth, the person who had been in possession being Sreemati Allahadini Dasi the widow of Ram Prasad, deceased.

Mr. Chatterji has raised three points before us: the first is that the instrument of *anumatipatra* has not been produced from proper custody and, therefore, should not have been admitted as evidence under the provisions of s. 90 of the Evidence Act. In support of this contention he cites the ruling in *Gadadhur Paul Chowdkry* v. *Bhyrub Chunder Bhuttacharji* (1) where there is an observation that the mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of s. 90. As a general proposition we have no doubt that it is perfectly correct but it depends upon the circumstances of each particular case. In the present instance we find that this document was submitted to the Magistrate and Collector with the express purpose that he might take the necessary steps in order to bring the estate under the management of the Court of Wards. It cannot be doubted that it is the Collector who is the person to be approached in the first instance for any such proceeding. The Collector records an order which on the face of it does not at all appear to throw any doubt upon the genuineness of the document. It is contended by Mr. Chatterji that the very fact that such an order was passed would show that the Collector doubted the genuineness of the document; but it seems to us that unless there is some evidence to that effect it is difficult to construe the order in that sense. In the above circumstances, the Court below was apparently entitled to accept the document, 54 years old, as presumably genuine under the provisions of s. 90 of the Evidence Act.

The second point that is raised by Mr. Chatterji is that the *anumatipatra* is a forged document. Now there are two grounds that he advances in support of this proposition. The first ground is that when a man is stricken down with a fell disease like cholera, it is impossible for him to think rationally or to act rationally, and that it would, therefore, be unnatural if not impossible for him to execute a document of this character.

Now it is clear that for a Hindu at the moment of his death to realize that there is no one who can continue his line after him, is a very strong incentive for making due provision for adoption, and although it cannot be doubted that cholera is a disease which would very greatly impede a person's action in a serious matter such as this, it is also important to remember that in the circumstances of this case it would not be at all unnatural or improbable that he would strain all his nerves and take all the necessary steps to continue his line. The instrument of *anumatipatra* runs as follows:

"In the present situation I find it absolutely necessary that some one should be taken as an adopted son or *snehaputra*, so I, of my free-will and in a sound state of mind, authorize you, my wife Allahadini Dasi, to adopt a son, that is to say, my father's youngest son nick-named Chemo should be adopted for enjoyment and possession of my following properties after my death. Should there be any legal bar to take him as an adopted son, in that case you are to make him a *snehaputra* otherwise (or else) you are to adopt some other boy according to your liking or choice but with the opinion (or approval) of my father."

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(1) 5 C. 918; 2 Ind. Dec. (N. S.) 1193.

From the terms of the *anumatipatra* it will be seen that there was an anxiety on his part to have a son adopted. There were, no doubt, certain restrictions laid down in the *anumatipatra* with which I shall have occasion to deal later with reference to another objection raised by Mr. Chatterji. We are not in a position to come to a conclusion that the determination of this point by the learned Subordinate Judge was wrong. We are inclined to think that there is nothing in the judgment of the learned Subordinate Judge, so far as it respects this issue, which can be open to the charge of being manifestly wrong or unjust. The learned Subordinate Judge has taken great pains to show that the charge of forgery has been, for the first time, seriously brought forward now There was a suit in the year 1894 by Sananda Prasad, the full brother of the present plaintiff, and there is also a statement of plaintiff No. 2 Sananda Prasad, otherwise called Chemo, that he and his other full brothers really litigated their claim through Sananda in that suit. That being so, it is very striking that in that suit there was no charge of forgery brought forward against this instrument of *anumatipatra*. Upon these and other considerations the learned Subordinate Judge, after having carefully surveyed the evidence, has come to the conclusion that he would not be justified in declaring the instrument of *anumatipatra* to be a forgery, and we do not think that we can take exception to that finding at this stage.

The last objection which the learned Vakil has put forward is that even conceding that the instrument was genuine, the actual adoption of Krishna Prasad Bose was not in accordance with the *anumatipatra*, and that, on the contrary, it was in direct violation of the terms of the *anumatipatra*.

The authority to adopt distinctly states that the plaintiff No. 2 known as Chemo should have the first chance of being adopted provided that there was nothing illegal in such adoption, and failing him some other boy according to the liking or choice of Allahadini Dasi might be adopted but with the opinion or approval of the father, Golak Prasad.

Now it so happened that Golak Prasad died four years after the death of Ram Prasad, that is to say, in 1873, and it was not till the year 1884 that the adoption took place. It is also proved in the case that Allahadini Dasi was a mere girl, a minor of tender years, at the time when Golak Prasad died. Subsequently she found that there were troubles with regard to the estate and there were conflicting claims set up by other parties and with a view to set at rest all these disputes she thought that she would exercise the power given to her under the instrument to adopt. At that time the condition which was laid down in the *anumatipatra* that the approval and the opinion of the father should be obtained was impossible of performance. The question is whether in the circumstances the power to adopt failed altogether. The learned Subordinate Judge has held to the contrary and he has given his reasons which appear to be quite cogent and we do not see any reason to dissent from his view, unless and until all the evidence is placed before us at the time of the hearing of the appeal.

All that we are concerned with at the present moment is whether on the face of them the judgment and decree are erroneous or unjust. We feel constrained to say that we are not in a position to take that view. If the appeal is heard as an ordinary appeal it will be for the Court, before which it comes, to form its own conclusions upon all the evidence placed before it. In the view that we take, the application must be dismissed on this ground, and, therefore, we do not think it necessary at all to deal with the other matter, namely, as to the extension of time under s. 5 of the Limitation Act.

Adami, J.—I agree.

Z. K. *Application dismissed.*

BOMBAY HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 109 OF 1924.
April 3, 1925.
Present:—Sir Norman Macleod, KT., Chief Justice, Justice Sir Lallubhai Shah, KT., and Mr. Justice Coyajee.

SĀKHARAM NARAYAN PATVARDHAN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
BĀLKRISHNA SADASHIV MODAK—DEFENDANT—RESPONDENT.

Hindu Law—Succession—Father's sister's son and maternal uncle, preference between.

Under the Hindu Law prevailing in the Bombay Presidency the father's sister's son is a preferential heir to the maternal uncle of the deceased. [p. 820, col. 1; p. 823, col. 2.]

Second appeal from the decision of the Joint Judge at Thana, in Appeal No. 52 of 1922, reversing that of the Subordinate Judge at Panvel, in Civil Suit No. 270 of 1921.

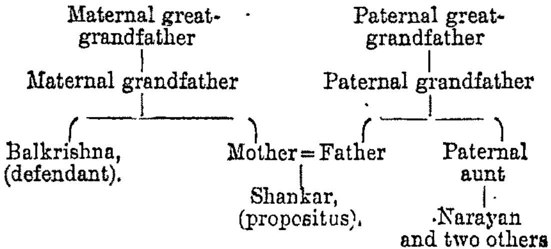
Mr. *G. S. Rao*, for the Appellants.

Mr. *P. B. Shingne*, for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs in this suit sued for the possession and income of certain property, claiming to be the heirs as the paternal aunt's sons of one Shankar Balkrishna who died in 1918 unmarried; the defendant resisted the claim on the ground that as the maternal uncle of the deceased, he was the nearest heir.

The following pedigree shows the relationship of the parties and their ancestors:



The Trial Judge without giving any reasons said that the plaintiffs were the preferential heirs of the deceased and passed a decree in their favour.

The defendant appealed.

The Joint Judge said "The appellant as well as the respondents are *sapindas* to the deceased Shankar. Unquestionably the maternal uncle stands nearer to Shankar by *sapinda* relationship than the respondents. This is one of the grounds on which the maternal uncle should be preferred to the respondents. The other ground, *viz.*, the doctrine of spiritual benefit proceeds upon the right to perform the *parvana shraddha*." He then considered, as the maternal uncle offered the *pinda* to the maternal grandfather and great-grandfather of Shankar, while the plaintiff offered the *pinda* to the paternal grandfather and great-grandfather of Shankar, and as Shankar was bound to offer the *pinda* to both his paternal and maternal ancestors that it would be difficult to determine the question who would confer the greater spiritual benefit on the deceased Shankar. He decided in favaur of the maternal uncle as Shankar would be under the obligation to offer the *pinda* to his maternal uncle while there was no obligation to offer the *pinda* to the paternal aunt's sons.

Accordingly the appeal was allowed and the plaintiffs' suit dismissed with costs throughout.

The plaintiffs have appealed to this Court.

The plaintiffs and defendant are *atma-bandhus* of the deceased. The question to which of two contesting *atma-bandhus* preference should be given is always arising, and though there is no dispute as to the texts which are applicable it has been found impossible by the Courts to lay down any common rules of inheritance which would enable the dispute between any possible pair of claimants to be decided.

Mr. Mulla in his Principles of Hindu Law gives a list of forty-two male *atma-bandhus* besides female *bandhus* and has endeavoured to state the rules which govern succession amongst them, but these rules, as he points out in his latest edition, are subject to alterations as the result of judicial decisions.

In *Saguna* v. *Sadashiv* (1) there was a contest between the father's half-sister and the maternal brother. The case came from Ratnagiri where the Mitakshara prevails.

According to the Vyavahara Mayukha the father's sister is a *gotraja sapinda* but it is not clear whether under the Mitakshara as interpreted in the Bombay Presidency she is a *gotraja sapinda* or a *bandhu*. Sir Lawrence Jenkins considered it unnecessary to decide this question as it was sufficient to say she was not more remote than a *bandhu*. He then dealt with the argument based on the decision in *Narasimma* v. *Mangammal* (2) that except where females were specially mentioned priority was given to male heir. It was conceded that as between heirs of the same line preference was given to males but that as between different lines of heirs sex had no place as a determining factor. The fact that the mother was given preference to the father in heirship to the son was not considered as influencing succession where the contest lay between those claiming through the father and those claiming through the mother. If there had to be a choice between the analogy furnished by the order of succession as between father and mother directly on the one hand, and by the order of succession as between *pitru bandhus* and *matru-bandhus* on the other, the choice would fall on the latter as being the closer, and for what it was worth the conclusion to which that led was in correspondence with the orders on which those internal lines were enumerated in the text cited by Vijnanesvara: "The sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle must be considered as his own cognate kindred." That was supported by the opinion attributed to Balambhatta who contended that the father should have precedence over the mother "upon the analogy of more distant kindred, where the paternal line has invariably the preference before maternal kindred." It was, therefore, held that as between the deceased's own *bandhus*, those connected through the father were to be preferred to those connected through the mother. It will be noted that no mention was made of the question whether the spiritual benefit conferred upon the propositus by rival *bandhus* was to be considered as a ground of preference.

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(1) 26 B. 710; 4 Bom. L. R. 527.
(2) 13 M. 10; 4 Ind. Dec. (N. S.) 717

In *Veeachela Mudaliar* v. *Subramania Mudaliar* (3) the contest was between the maternal uncle and the paternal aunt's grandson. The appeal came from the Madras High Court and their Lordships reviewed in an exhaustive manner the whole question of the order of succession amongst *bandhus*. The head-note* to the report does not seem to be absolutely correct as it can only be inferred from their Lordships' judgment that they disapproved of the decisions in *Sundrammal* v. *Rangasami Mudaliyar* (4) and *Balusami Pandithar* v. *Narayana Rau* (5) so far as they held that among *bandhus* of the same class those *ex parte paterna* are to be preferred to those *ex parte materna*. Their lordships said (p. 359*): "Recent writers on Hindu Law have divided each class of *bandhus* into two sub-classes respectively designated as cognates *ex parte paterna*, and cognates *ex parte materna*. This sub-division is evidently based on an inference from the order in which the several *bandhus* are mentioned in the illustrative enumeration. For instance, among the *atma-bandhus* enumerated, the name of the father's sister's son is first given; then comes the mother's sister's son; and after him, the son of the mother's brother...From this it has been inferred that the expounder of the rule in question intended that each class should be divided into two sub-classes according to the side of relationship, and that in every case preference should be given to the father's side. Their Lordships, again, in the view they take of the rights of the parties in the present case, do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that in each class propinquity should be the governing factor." Their Lordships then considered various Madras decisions: *Narasimma* v. *Mangammal* (2), where the maternal uncle was preferred to the father's sister; *Chinnammal* v. *Venkatachala* (6), where the maternal grandfather was preferred to the father's sister: *Muthusami* v. *Muthukumarasami* (7), where the mother's half-brother was preferred to the father's paternal aunt; *Sundrammal* v. *Rangasami Mudaliyar* (4) where the paternal uncle's daughter's son was preferred to the sister's daughter and the mother's sister's sons and *Balusami Pandithar* v. *Narayana Rau* (5) where the sister's son's son was preferred to the maternal uncle's son. Among other reasons for the conclusion in that case it was stated at the end of the judgment (page 349†): "Another fundamental principle of the law in favour of the third defendant's preferable right is that among *bandhus* of a class those who are *ex parte paterna* take before *bandhus* *ex parte materna*." The learned Judges relied on this division of *atma-bandhus* into those two sub classes in para. 593 of the Sarasvati Vilasa (Setlur's Collection of Hindu Law Books on Inheritance, page 184): "Nor could it be urged here that the mother being nearer than the father, the *matru-bandhus* take the wealth before the *pitru-bandhus*. From the text, 'of these the mother is more important than the father,' (2) the mother's precedence alone is stated and not that of the mother's *bandhus*. Therefore, we think it sound that the *matru-bandhus* should take the wealth only after the *pitru-bandhus*." Their Lordships of the Privy Council remarked that a very small consideration would show that that passage had nothing to do with the members of the same class *inter se*. It only explained why *pitru-bandhus* were to be preferred to *matru-bandhus*, the mother's position being special to herself under an express rule.

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(3) 64 Ind. Cas. 402; 48 I. A. 349; 24 Bom. L. R. 649; 44 M. 753; 14 L. W. 402; (1921) M. W. N. 669; 2 P. L. T. 707; 26 C. W. N. 159; 41 M. L. J. 676; 30 M. L. T. 198; 4 U. P. L. R. (P. C.) 13; A. I. R. 1922 P. C. 33 (P. C.).

*Head-Note of 48 I. A.—[*Ed.*]

(4) 18 M. 193; 4 M. L. J. 275; 6 Ind. Dec. (N. S.) 484.

(5) 20 M. 342; 7 M. L. J. 207; 7 Ind. Dec. (N. S.) 243.

(6) 15 M. 421; 2 M. L. J. 86; 5 Ind. Dec. (N. S.) 645.

(7) 16 M. 23; 2 M. L. J. 296; 5 Ind. Dec. (N. S.) 724.

*Page of 48 I. A.—[*Ed.*]

†Page of 20 M.—[*Ed.*]

In the end their Lordships, after considering the texts, the commentaries, the judicial decisions and the view of modern writers, fell back on the four propositions in *Muthusami* v. *Muthukumarasami* (7), which, as a matter of fact, give one very little assistance in deciding in a particular case which of two rival *atma-bandhus* is to be preferred. The third proposition is as follows: "The examples given in the text of Virdha Satatapa or Boudhayana are intended to show the mode in which nearness of affinity is to be ascertained." That proposition was useful in the case before the Court as showing that the maternal uncle's son was an *atma-bandhu* while the father's paternal aunt's son was a *pitru-bandhu*; but it does not help to decide whether the maternal uncle is to be preferred to the father's sister's son. The fourth proposition was as follows: "That as between *bandhus* of the same class, the spiritual benefit they confer upon the propositus is, as stated in the Viramitrodaya, a ground of preference." But how is spiritual benefit to be measured, and how far as a ground of preference will it prevail against propinquity? There would certainly appear to be some foundation for the opinion expressed by Sadasiva Ayyar, J., though their Lordships were not prepared to accept it that the introduction of such questions as spiritual benefit or of death pollution, or of the right of performance of obsequial ceremonies would only lead to inextricable confusion. In many cases who is the nearest heir can easily be decided without any consideration of such questions, but when the rival merits of the claimants are fairly equally balanced we have no guide as to the extent to which the answer to these questions can avail as a ground of preference. Their Lordships approved the express rule that in succession amongst *bandhus* to the nearest *sapinda* the inheritance belonged, and so far that would appear to conflict with the rule laid down in *Saguna* v. *Sadashiv* (1) but the test of nearness of affinity to the deceased had also to be regulated by the test of spiritual benefit. To what extent spiritual benefit is to be considered a ground of preference so as to overcome nearness of affinity still remains to be decided in each contest amongst *bandhus*. In the contest between the maternal uncle and the paternal aunt's grandson there was no difficulty, the former was the nearer heir and offered oblations to the maternal grandfather and great-grandfather of the propositus, while the latter offered no oblations to the ancestors of the propositus.

In *Balkrishna Bhimaji* v. *Ramkrishna Gangadhar* (8) it was held by this Court following *Narasimma* v. *Mangammal* (2) and *Raja Venkata Narasimha Appa Rao Bahadur* v. *Raja Surenani Vehkata Purushothama Jogannadha Gopala Row Bahadur* (9) that male *bandhus* should be preferred to females so that a mother's sister's son was preferred to a brother's daughter, but, as pointed out in *Kenchava* v. *Girimallappa Channappa* (10), *Saguna* v. *Sadashiv* (1) was not cited, so that whenever the two conflicting principles of preference of the paternal over the maternal line, and preference of the male over the female sex in the Presidency of Bombay, had to be weighed, the Court which weighed them would have to choose between the two decisions.

Now, if the *bandhus* on the father's side had to be preferred to those on the mother's side the paternal aunt's grandson would have been preferred to the maternal uncle in *Vedachela* v. *Subramania Mudaliar* (3) and the decision of the Privy Council in that case must, no doubt, be treated as preventing the rule in *Saguna* v. *Sadashiv* (1) being considered as a rule of universal application.

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(8) 59 Ind. Cas. 771; 45 B. 353; 22 Bom. L. R. 1442.

(9) 31 M. 321; 4 M. L. T. 5; 18 M. L. J. 409.

(10) 82 Ind. Cas. 966; 51 I. A. 368; 26 Bom. L. L. R. 779; A. I. R. 1924 P. C. 209; 20 L. W. 417; 47 M. L. J. 401; (1924) M. W. N. 719; 48 Bom. 569; 22 A. L. J. 962; 40 C. L. J. 447; 35 M. L. T. 241; 29 C. W. N. 271; 1 O. W. N. 505; 3 Pat. L. R. 9; L. R. 5 A. (P. C.) 182 (P. C.),

In the present case if we follow *Saguna* v. *Sadashiv* (1) undoubtedly the plaintiffs succeed. If we consider propinquity, together with the doctrine of spiritual benefit, the defendant is nearer to the propositus while the oblations offered by the plaintiffs to the paternal ancestors are more efficacious, since we cannot agree with the Joint Judge that the oblations offered to maternal ancestors are of equal value. Nor can we agree with the final test suggested by him with regard to the *pindas* to be offered by the propositus to the rival claimants. We are then confronted with the impossible task of expressing an uncertain measure of superiority of spiritual benefit in terms of propinquity or *vice versa.* Propinquity can be expressed in degrees of relationship to the propositus. Spiritual benefit can only be said to be greater, equal or less. Can the greater efficacy of the oblations offered by the plaintiffs to the paternal ancestors of the propositus overcome the fact that the defendant is one degree nearer the propositus than the plaintiff, and can the patneral relationship of the plaintiffs be counted in their favour? Perhaps it will be sufficient to say that in my opinion weighing all these considerations preference should be given to the plaintiffs.

The appeal is allowed and the decree of the Trial Court restored. The plaintiffs will get their costs in this Court and in the lower Appellate Court.

Shah, J.—The question of Hindu Law that arises in this second appeal is as to who is the preferential heir between the father's sister's son and the maternal uncle of the deceased. The plaintiffs are the sons of the sister of the father of the deceased and the defendant is the maternal uncle of the deceased. The Trial Court found in favour of the plaintiffs without giving any reasons and apparently without any doubt or difficulty about the point.

The learned Joint Judge who heard the appeal held in favour of the maternal uncle and dismissed the plaintiff's suit The reasoning of the learned Judge briefly is that applying the test of religious efficacy the maternal uncle is nearer than the father's sister's son.

It is urged on behalf of the plaintiffs-appellants before us that in the text relating to *bandhus* the father's sister's son is mentioned while the maternal uncle is not mentioned and that, therefore, he should be preferred. Further, it is urged that both being *atma-bandhus* the *bandhu ex parte paterna*, should be preferred to the *bandhu ex parte materna* among *bandhus* of the same class, that on the ground of propinquity the father's sister's son is nearer than the maternal uncle, and that the mere calculation of degrees in the case of one on the father's side and in the case of the other on the mother's side cannot help the Court in deciding the question of propinquity as the consideration of degrees from two different sides involves an element of difference which renders the mere number of degrees an unsafe guide. It is also urged that even if the test of religious efficacy be applied, the father's sister's son, who can offer oblations, to his three maternal ancestors, who would include the paternal grandfather and great-grand-father of the deceased, should be preferred to the maternal uncle, who can offer oblations to his father, paternal grandfather and great-grand-father who would be the three maternal ancestors of the deceased.

On the other hand on behalf of the defendant-respondent it is urged that propinquity is the only test for determining the question of preference among *bandhus* of the same class, that the maternal uncle being nearer from the mother's side than the father's sister's sons from the father's side the former should be preferred to the latter on the ground of nearer affinity. It is urged that in *Vedachela Mudaliar* v. *Subramania Mudaliar* (3) the test really adopted is one of propinquity and that the test of spiritual benefit to the propositus cannot be considered as affording any safe guide in a case where one *bandhu* can offer oblations to the maternal ancestors of the deceased and the other can offer oblations to two paternal ancestors to whom the deceased could have offered oblations. Mr. Shingne did not argue—at least I did not understand him to argue—that the spiritual benefit conferred by the maternal uncle is greater than that conferred by the father's sister's son. Several decisions have been referred to in the course of the argument: but there is none directly bearing on the competition between the two particular *bandhus*, whose claims we have to consider.

On a careful consideration of the arguments I am of opinion that the father's sister's son should be preferred to the maternal uncle as a nearer *bandhu*. I shall briefly state my reasons for this conclusion.

At the outset it may be mentioned that both are *atma-bandhus*, both are males and one is expressly mentioned in the well-known text relating to *bandhus* referred to in the Mitakshara and the Vyavahara Mayukha. It is expressly pointed out in the Mitakshara and the Vyavahara Mayukha that the *atma-bandhus* exclude the *pitru-bandhus* and that the *pitru-bandhus* are to be preferred to *matru-bandhus* on account of their near affinity. It has also been held that the particular *bandhus* expressly mentioned in each class in the text are illustrative of the class and that the enumeration is not exhaustive. It has also been held that those expressly mentioned are not necessary to be preferred to those not mentioned simply because they are mentioned. This position was accepted by this Court in *Mohandas* v. *Krishnabai* (11) where the maternal uncle not expressly mentioned, was preferred to mother's sisters's son expressly mentioned, and in *Rajeppa Ranappa Kundagal* v. *Gangappa Jotappa Maudwe* (12) where the question of the relative rights of two male *atma-bandhus* related on the mother's side and expressly mentioned was considered independently of this consideration. In spite of the argument of Diwan Bahadur Rao based upon the foot note No. 3 in Mandlik's Hindu Law at page 82 of the translation which in its terms is based upon the rule quoted in the foot-note (No. 7) in the Sanskrit text of the Vyavahara Mayukha at page 54 of the same book, the preference of the father's sister's son to the maternal uncle cannot be based on that ground.

I also desire to point out that in this case there is no question of a nearer female *bandhu* being preferred or postponed to a more distant male *bandhu* : and there is no question here of weighing any conflicting principles of preference of the paternal over the maternal line and the preference of the male over the female sex in this Presidency. That conflict will have to be settled when it arises for consideration, as pointed out by their Lordships of the Privy Council in *Kenchava* v. *Girimallappa Channappa* (10).

The test of preference is propinquity. The word used in the Mitakshara is *antarangatva*. In the case of *bandhus* we have to consider the blood relationship. The method of determining the nearness by calculating the number of degrees from the common ancestor cannot apply to *bandhus* so effectively as to *sapinda sagotras*. The maternal uncle, taking the common ancestor on the mother's side, may appear one degree nearer than father's sister's son as taken from the common paternal ancestor. But where there is not one common ancestor either paternal or maternal for the purpose of determining the relative position of the two *bandhus*, this way of determining the nearness cannot be decisive and the element of differences between the paternal and maternal line necessarily comes in.

In this Presidency the preference of the paternal over the maternal line among the same class of *bandhus* was approved in *Saguna* v. *Sadashiv* (1). That preference has not been totally negatived in any case. It is perfectly true that the universal preference given to the paternal over the maternal line has been definitely negatived by their Lordships in *Vedachela Mudaliar's case* (2); but in that case their Lordships do not go so far as to say that there is no scope for any preference whatever on that ground. Its application as a conclusive test with reference to the consideration of near affinity, has been negatived but its consideration as an element in determining the propinquity or affinity is not excluded. In fact it could not be excluded for in that very case their Lordships expressly approve of the test of religious benefit laid down by Muttusami Ayyar, J., in *Muthusami* v. *Muthukumarasami* (7) and in applying the test of spiritual benefit the possible superiority of the *pindas* offered to the paternal ancestors of the deceased over *pindas* offered to the maternal ancestor does come in for consideration in an apparently different form. But in substance it is the same thing as the preference of the paternal over the maternal line.

In applying the test of affinity unencumbered by any considerations of spiritual benefit, it must be remembered that the daughter and the daughter's son occupy a very high place in the list of specified heirs. Then the sister (*i. e.*, the father's daughter) is mentioned as an heir in the Vyavahara Mayukha after the specified heirs before the agnates and in this Presidency under the Mitakshara also the sister, though not expressly mentioned, has got an equally high place. The cases with reference to the position of the sister in this Presidency are referred to at page 554* of the report in *Dattatraya Bhimrao Subris* v. *Gangabai Ganeshbhat* (13). In the Madras Presidency the sister would occupy a much lower place even among *bandhus.*

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(11) 5 B. 597; 3 Ind. Dec. (N. S.) 393.

(12) 77 Ind. Cas. 219; 47 B. 48; 24 Bom. L. R. 789; A. I. R. 1922 Bom. 420.

Then when we come to the sister's son though he is not mentioned as a *bandhu* he would occupy a high place among the *atma-bandhus*, in this Presidency; and certainly he would not be preferred to the sister as in Madras. It is sufficient to refer to the decision in *Ichharam Shumbhoodas* v. *Prumanund Bhaeechund* (14).

Then we come to the father's sister, that is the grand-father's daughter. According to the decision in *Saguna* v. *Sadashiv* (1), she would be preferred to the maternal uncle. I am willing to treat it as an open question whether on account of her being a female she will be able to retain the place which has been assigned to her by Jenkins, C. J., with reference to the maternal uncle, in view of the later decisions in *Balkrishna Bhimaji* v. *Ramkrishna Gangadhar* (8) and *Kenchava* v. *Girimallappa Channappa* (10) I do not desire to lay any emphasis on the decision in *Saguna's case* (1), beyond indicating that after consideration the paternal line was given preference over the maternal line, and that if that preference is not to be altogether excluded her son who is mentioned as an *atma-bandhu* would be considered a nearer relation on account of his connection with the paternal line of the propositus. As regards the maternal uncle while he is a very close blood relation on the mother's side, the idea of preference of the paternal over the maternal affinity cannot be altogether excluded. Without, therefore, attempting to generalise beyond the necessity of the case, in my opinion, the father's sister's son has closer affinity with the propositus on account of his connection through the paternal grandfather than the maternal uncle who is connected with the deceased through his maternal grandfather.

I have dealt with the question so far without reference to the test of spiritual benefit to the propositus. That test is difficult of application generally speaking as regards *bandhus* when one is connected through the paternal line and the other through the maternal line. It brings into operation the difference between the oblations which it is the duty of a person to offer at different kinds of Shraddhas. I shall refer briefly to Dharmasindhu and Nirnayasindhu as to the obligations to offer oblations to the maternal ancestors. Parvana Shradhas are of three types which are described as Ekaparvanaka, Dwiparvanaka and Triparvanaka in the Dharmasindhu. (The Nirnaya Sagar Press—2nd edition, page 285) (1). In the latter two kinds of Parvana Shraddhas the deceased in his lifetime would offer oblations to his three paternal ancestors as well as three maternal ancestors, while in the first type of Parvana Shraddha he would offer oblations to his three paternal ancestors. In the case of the father's sister's son he would offer oblations to his three maternal

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(13) 77 Ind. Cas. 17; 46 B. 541; 24 Bom. L. R. 69; A. I. R. 1922 Bom. 321.

(14) (1923) 2 Borr. 515.

*Page of 46 B.—[*Ed.*]

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(1) Note No. 1.

धर्मसिंधुः १

विद्वद्वर्यकाशीनाथोपाध्यायविरचितः

अथश्राद्धभेदाः तत्रश्राद्धंचतुर्विधम् पार्वणश्राद्धमेकोद्दिष्टश्राद्धंनान्दीश्राद्धं सपिण्डीकरणश्राद्धंचेतिभेदात् पित्रादित्रयोद्देशेनविहितंपिण्डत्रययुतंपार्वणम् तच्चैकपार्वणकद्विपार्वणक त्रिपार्वणकमितित्रिविधम् तत्रपित्रादेर्मृततिथौक्रियमाणंप्रतिसांवत्सरिकमेकपार्वणकम् अमावास्यादिषण्णवतिश्राद्धनित्यश्राद्धानि महालयान्वष्टक्यभिन्नानिद्विपार्वणकानि एतेषुसपत्नीकपित्रादित्रयसपत्नीकमातामहादित्रययोरेवोद्देशात् अन्वष्टकाश्राद्धंत्रिपार्वणकं पित्रादित्रयमात्रादित्रयसपत्नीकमातामहादित्रयाणामुद्देशात् महालयश्राद्धंतीर्थश्राद्धंचपार्वणैकोद्दिष्टरूपम् पित्रादिपार्वणत्रयस्यपत्न्याद्येकोद्दिष्टगणस्यचोद्देशात् केचिदतद्वयंमातामहमातामह्योः पार्वणभेदेन पार्वणचतुष्टययुतंकुर्वन्ति केषांचित्सूत्रेदर्शोऽपित्रिपार्वणकश्चतुः पार्वणकोवेतिहेमाद्रिः ॥

ancestors who would include the paternal grandfather and the great-grandfather of the deceased when he performs Shraddha of the Dwiparvana and Triparvana types. In the case of the maternal uncle he would be offering *pindas* to the paternal ancestors in all the three kinds of Parvana Shraddhas, to whom the propositus would be offering oblations under the Dwiparvanaka and Triparvanaka Shraddhas. And there is a fourth class of Parvana Shraddha in which Mahalaya and Tirtha Shraddhas for maternal ancestors can be performed as a Parvana. It is not without some reluctance that I have referred to these distinctions referred to in Dharmasindhu in the passage an extract wherefrom I have attached as note No. 1 to this judgment for ready reference. In the Nirnayasidhu the obligation to offer oblations to the maternal ancestors is referred to at page 279, Nirnaya Sagar Press, 2nd edition. I have put up this extract as note No. 2 (2). These references incidentally illustrate the difficulty of applying the test of spiritual benefit.

But in the present case, to put it in a simple form in which it has been referred to in the decided cases it would be accurate to say that the father's sister's son could offer oblations among others to his three maternal ancestors who could include the paternal grandfather and great-grandfather of the deceased, while the maternal uncle would offer oblations to his three paternal ancestors who would be the three maternal ancestors of the deceased. The religious benefit to the propositus would be greater on account of his participation in the offerings to his two paternal ancestors than from his participation in the offerings to his three maternal ancestors. There is no decision so far as I am aware which says that no preference is to be given to offerings to paternal ancestors over those to maternal ancestors: and without pausing to weigh with nicety the relative efficacy of the oblations, which may be or should be offered in different types of Shraddhas and to ancestors in different lines, I feel no difficulty in saying that judged by the test of religious benefit to the propositus resulting from oblations offered by the two *bandhus* in question the father's sister's son should be preferred to the maternal uncle.

I desire to make it clear that though I have considered the question of spiritual benefit to the propositus with reference to the two particular *bandhus* whose relative rights we have to decide, I rely largely upon the test of propinquity which is to be applied with due regard to the preference of the paternal over the maternal line within certain limits as indicated by the broad fact that all *pitru-bandhus* are to be preferred to *matru-bandhus* and that in this Presidency the sister is assigned a high place among the heirs.

I need hardly add that I accept *Vedachala Mudaliar's case* (3) as a conclusive authority for the proposition that the maternal uncle is to be preferred to the father's sister's son's son. But there is nothing in the judgment to show that the father's sister's son cannot be preferred to the maternal uncle.

I, therefore, concur in the order proposed by my Lord the Chief Justice.

Coyajee, J.—I concur in the order proposed by my Lord the Chief Justice.

Z. K. *Appeal allowed.*

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(2) Note No. 2.

निर्णयसिंधुः

श्रीकमलाकरभट्टप्रणीतः

(द्वितीयावृत्तिः) निर्णयसागर प्रेस. पृष्ठ २७९ ।

हेमाद्रौ ब्राह्मे—'पार्वणं कुरुते यस्तु केवलं पितृहेतुकम् । मातामहं न कुरुते पितृहा स प्रजायते' ॥ धौम्यः–'पितरो यत्र पूज्यन्ते तत्र मातामहा ध्रुवम् । अविशेषेण कर्तव्यं विशेषान्नरकं व्रजेत् ॥' अस्यापवादमाह कात्यायनः–'कर्षूसमन्वितं मुक्त्वा तथाद्यं श्राद्धषोडशम् । प्रत्याब्दिकं तु शेषेषु पिण्डाः स्युः षडिति स्थितिः ॥' कर्षूसमन्वितं सपिण्डीकरणम् ॥

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.
March 1, 1926.
Present:—Viscount Dunedin, Lord Shaw, Lord Sumner, Sir John Edge and Lord Salvesen.

MANECKJI PESTONJI BHARUCHA
AND ANOTHER—APPELLANTS
versus
WADILAL SARABHAI & COMPANY
AND ANOTHER—RESPONDENTS.

Contract Act (IX of 1872), s. 121—Sale of shares of Company by delivery of certificates and blank transfers—Cheque for price dishonoured—Title in shares—Vendee transferring certificates and transfers to third party—Plaintiff vendor's suit for recovery of certificates and transfers—Proper remedy of plaintiff.

Plaintiff sold certain shares of Company to defendant No. 1. He took from various brokers blank transfers signed by the registered holders along with corresponding certificates and handed them over to the defendant No. 1. The defendant No. 1 gave the plaintiff a cheque which was dishonoured. The defendant No 1 made certain propositions as to the raising of money with defendant No. 2 and handed the certificates and transfers to him. Defendant No. 2 did likewise with defendant No. 3. In an action by the plaintiff against all the three defendants asking for return of the certificates and blank transfers or otherwise for damages:

Held, that as soon as the plaintiff handed over the certificates and transfers and the defendant accepted them and gave a cheque, property in the shares passed to the defendant No. 1 and the plaintiff had neither any *jus in re* of the certificates and transfers nor had he any statutory lien on them. The plaintiff could only sue the defendant No 1 on the cheque or on the price of the shares unpaid in respect that the cheque had not been honoured and could not sue defendants Nos. 2 and 3 for delivery of shares. [p. 826, col. 1.]

Messrs. *A. C. Clauson, E. B. Raikes* and *H. Johnston*, for the Appellants.

Messrs *J. Simon, G. R. Lowndes* and *B. Dube*, for the Respondents.

JUDGMENT.

Viscount Dunedin.—In March 1920 the 2nd plaintiff in this case, Arajania, who is not a certified share-broker, and who describes himself as the sub-broker of the 1st plaintiff Bharucha, who is a certified share-broker, sold on the Bombay Stock Exchange to 1st defendant, Gora, 129 shares of a Company called Alcock, Ashdown & Co., Ltd., for delivery on the 14th April, 1920. Neither of the two plaintiffs was the registered holder of any such shares. In order to make good the delivery the 1st plaintiff acquired the requisite number of shares in the market from various brokers, and took from these brokers blank transfers signed by the registered holders along with the corresponding certificates. These certificates and blank transfers were handed by the 2nd plaintiff to the 1st defendant at 6 P. M. on the 14th April. At 8 P. M. a cheque for the sum due under the contract in favour of the 1st plaintiff was handed to the 2nd plaintiff. This cheque was dishonoured on the next day.

The 1st defendant, having had the blank transfers and certificates thus delivered to him, made certain propositions as to the raising of money to Manilal, a partner in the firm of Wadilal & Co., the 2nd defendants, and handed the certificates and transfers to him. The 2nd defendant in turn handed them to the 3rd defendant, Ghia, again on certain propositions as to raising money.

The cheque was never honoured, and the 1st defendant absconded. The present action is brought by the 1st and 2nd plaintiffs against all the three defendants, asking for return of the certificates and blank transfers or otherwise for damages.

Proof was led before the Trial Judge, who held in fact (1) that plaintiff No. 2 acted as sub-broker to plaintiff No 1, and that, accordingly, plaintiff No. 1 had a direct title to sue the other defendants; (2) that Manilal, the defendant No. 2, knew when he took the certificates and shares that the cheque of Gora, defendant No. 1, was not likely to be honoured. He gave a decree in favour of plaintiff No. 1 against all defendants. The ratio of his judgment is to be found in the following passage:—

"Gora was only an ostensible owner and the plaintiffs, who were the unpaid vendors, had equity in them, and they could have stopped Gora from getting these shares transferred in his name in the books of the Company, but if Gora had passed on these shares either by way of sale or by way of pledge to any third person who acted *bona fide* and without notice, then I certainly think that such a person would have a better title to these shares than the plaintiffs. But in this case it is abundantly clear that Gora himself felt that he was not the owner ....Manilal had notice that these shares were not paid for, and Ghia, being a mere nominee of Manilal, Ghia was in no better position than Manilal himself. They took these shares with the infirmity from Gora, and, therefore, they cannot claim these shares in priority to the plaintiffs."

He had previously pointed out that in a question with the Company the owners of the shares were the old owners who had signed the blank transfers.

On appeal by the 2nd and 3rd defendants the learned Judges of the Appellate Division of the High Court reversed the judgment of the Trial Judge and dismissed the action as against them. They held on the facts that plaintiff No 2 had acted as agent for plaintiff No. 1, and that consequently, as plaintiff No. 2 was not a certified broker, the buyer was not affected by the rules of the Stock Exchange. This is only of importance as regards a certain Rule C, with which their Lordships will afterwards deal. On the merits of the case they held that, under the Indian Contract Act, the property of the shares as sold passed on the delivery of the certificates and blank transfers to Gora; that, after that plaintiff No. 1 had no claim against Gora except upon the cheque; that consequently he had no claim against defendants Nos. 2 and 3, and could not have a judgment against defendant No. 3 for delivery of the certificates and transfers. They held further that s. 121 of the Contract Act, which is in these terms—

121. "When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed unless it was stipulated by the contract that he should be so entitled," prevented the plaintiff from rescinding the sale, there having been no stipulation provided in the contract for sale that he should be so entitled. Appeal was then taken by the plaintiffs to the King in Council.

Their Lordships agree that the stipulation referred to in the section must be an express stipulation and that, as nothing was proved to the contrary, it must be presumed that the contract here was an ordinary contract for the sale of shares effected by bought and sold notes.

On the hearing of the appeal to their Lordships, the view expressed by the Trial Judge that Gora was only an ostensible owner of the shares and the plaintiff, who was the unpaid vendor, had the equity in them, was elaborated into an argument that, according to the law of England, there would be an equitable lien in favour of the unpaid purchaser and that that law applied. Such a view would be so far-reaching in ordinary Stock Exchange transactions that their Lordships think it necessary to emphasise their view of its unsoundness. In the first place, so far as lien is concerned, the law as to lien is statutory and is contained in the 95th and following sections of the Indian Contract Act. Section 95 applies to this case; unless there is possession there is no lien. But, further, there seems to their Lordships a good deal of confusion arising from the prominence given to the fact that the full property in shares in a Company is only in the registered holder. That is quite true. It is true that what Bharucha had was not the perfected right of property, which he would have had if he had been the registered holder of the shares which he was selling. The Company is entitled to deal with the share-holder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. But the title to get on the register consists in the possession of a certificate, together with a transfer signed by the registered holder. This is what Bharucha had. He had the certificates and blank transfers, signed by the registered holders. It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with certificates and blank transfers, signed by the registered holders of the shares described. Bharucha sold what he had got. He could sell no more. He sold what in England would have been choses in action, and he delivered choses in action. But in India, by the terms of the Contract Act, these choses in action are goods. By the definition of goods as every kind of moveable property it is clear that, not only registered shares, but also this class of choses in action are goods. Hence equitable considerations not applicable to goods do not apply to shares in India.

Now s. 78 is as follows:—

"78. Sale is effected by offer and acceptance of ascertained goods for a price, or of a price for ascertained goods, together with payment of the price or delivery of the goods."

Here the goods were not ascertained goods at the time of the contract, for the contract was only for so many shares of Alcocks', not of any particular shares, but then s. 83 provides:

"83. Where the goods are not ascertained at the time of making the agreement for sale but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete."

So soon, therefore, as Arajania, acting for Bharucha, handed Gora the certificates and transfers and Gora accepted them and gave the cheque, the goods became ascertained goods, the sale was complete and the property passed. From that time onward Bharucha and Arajania could only sue Gora on the cheque, or for the price of the shares unpaid in respect that the cheque had not been honoured. They had no longer any *jus in re* of the certificates and transfers. They had no statutory lien, for they had parted with possession, and, consequently, as they had no contract with defendants Nos. 2 and 3, they could not sue them for delivery of the shares, whether the defendants had got good title as against Gora or had not.

Their Lordships have already mentioned that the Trial Judge held that the sale was between brokers, and was, therefore, under the Rules of the Stock Exchange, from which finding the Court of Appeal dissented. In their Lordships' view it is not necessary to decide this question of fact. They will assume, for the purpose of the argument, that the sale was as between brokers. That brings in Rule C of the Bombay Stock Exchange, which is as follows:

" C. If the cheque given for the monies of the shares will not be honoured at the Bank on the day following the day when the cheque is given, the shares shall have to be returned immediately to the person selling (them), and the person purchasing (them) shall have to take away those shares having paid the rupees in cash before 2 o'clock on that very day. And if the person purchasing shall fail to do so, those shares will be sold off by auction before 3 o'clock.

* * * *"

It was argued that the effect of this rule was to make the delivery not actual but conditional, with the result that the property did not really pass till the cheque was honoured. Their Lordships consider this argument quite unsound. The Contract Act settles that property is to pass on delivery. Delivery is a fact, and the statutory result must follow. Further, the rule cannot be read as an express stipulation in the sense of s. 121 because it does not say what s. 121 provides must be said. But in truth, in their Lordships' view, the rule in question had nothing to do with the perfection of contracts or the passing of property. It is for quite another purpose. The buyer may be unable, from temporary embarrassment, to meet his cheque on an exact day. Time is of the essence of this ordinary contract of sale of shares, therefore, he is enjoined by the rule to hand back the shares; he is given the latitude of paying up till 2 o'clock, but if he does not do so then they are sold by the authorities, so as to fix, without further ado, the damages which are become due for breach of contract.

Their Lordships will accordingly humbly advise His Majesty to dismiss the appeal with costs.

R. L. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *T. L. Wilsan & Co.*

Solicitors for the Respondents:—Messrs. *Hore, Pattisson & Bathurst.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 625 OF 1923.

November 6, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Sri Sri BAIDYANATH JIU THROUGH SURESH CHANDRA CHAUDHURY—
DEFENDANT—APPELLANT
versus
HAR DUTT DAWARI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Suit to recover remuneration for services in temple—Limitation—Recurring right.

There is a vast distinction between a suit brought to establish a periodically recurring right and a suit brought to enforce payments due as remuneration for the performance of services arising out of that right. [p. 828, col. 1.]

A suit by the *dwaris* of a temple to recover dues which they claim to be payable to them as remuneration in respect of their services in connection with the temple is governed by Art. 120 of Sch. I to the Limitation Act and a claim relating to a period more than 6 years prior to the date of the institution of the suit would be barred by time. [p. 828, col. 2.]

Second appeal against a decision of the District Judge, Santal Parganas, dated the 7th May 1923, affirming that of the Subordinate Judge, Deoghar, dated the 29th December 1922.

Messrs. *N. C. Sinha* and *B. B. Ghose*, for the Appellant.

Messrs. *A. B. Mukherjee* and *B. B. Mukherjee*, for the Respondents.

JUDGMENT.

Miller, C. J.—The plaintiffs who are respondents in this case are three *dwaris* of the celebrated temple of Baidyanath at Deoghar. They have instituted this suit to recover certain dues which they claim to be payable to them as remuneration in respect of their services in connection with the temple. The remuneration consists of payments for the greater part in kind which are said to be due for special services in connection with the performance of the *hom puja* and to a small extent in cash in respect of other services. The suit was instituted originally against Sadhupadhya Umesha Nand Jha who was the high priest in charge of the temple of Sri Sri Baidyanath but pending the suit, sometime in 1920, the high priest died and as there was a dispute about the succession a Receiver was appointed to take charge of the properties of the temple and he (the Receiver, Babu Suresh Chandra Chaudhury) has been substituted in place of the original defendant.

Amongst other defences to the suit it was contended on behalf of the defendant that the claim which covers a period of 13 years before the institution of the suit was barred or partly barred by limitation. On the other hand, the plaintiffs contended that s. 10 of the Limitation Act applied to a suit of this nature and consequently that no period of limitation applied in the case. This view was accepted by the learned District Judge whose judgment is the subject of this appeal. The contention apparently is that the suit is one for the purpose of recovering part of the trust property or the proceeds thereof from the hands of those who are responsible for its distribution. It seems to me that it is impossible to regard a suit of this nature as coming within the purview of s. 10. The plaintiffs, although no doubt they are entitled out of the proceeds of the property belonging to the temple to certain payments in the nature of wages and to certain remuneration, cannot, in my opinion, be said to be bringing this suit for the purpose of following the trust property in the hands of the trustee. Their claim is not one which has been shown to be in any way charged upon the trust property although no doubt the payments made to them must come out of the proceeds of the endowment, but if one were to hold that this is a suit coming within s. 10 then it seems to me that it would equally follow that any claim by a servant or other person who had a right to be paid remuneration even for wages would equally be bringing a suit within the meaning of s. 10. It is sufficient to say that, in my opinion, s. 10 has no application to the present suit.

It was contended by the appellant, in the first place, that the claim was one for wages and was covered by Art. 102 of the Limitation Act which provides for a suit for wages not otherwise expressly provided for by the Schedule, the period being three years from the date when the wages accrued due. Alternatively he relied on Art. 120 which provides a 6 years' period of limitation. The respondents who sue on behalf of themselves and the other *dwaris* attached to the temple although they are in a sense servants of that institution hold in fact an hereditary office. They are bound to perform certain services and by way of emolument they are entitled to certain specific payments. Although the services, on the occasions when they officiate, are performed only by a few of them the fees to which they are entitled are distributed amongst the whole body of the *dwaris*. They are not paid a regular recurring wage but certain fees as emoluments attaching to the hereditary office. It does not appear to me that a case like this is one which is governed by Art. 102 of the Limitation Act. I do not consider that the payments made in this case which were almost entirely payments made in kind, so much *ghee* per year, can come under the head of wages.

It was contended by the respondents that if s. 10 had no application then Art. 131 applied to the case. That Article provides for a suit to establish a periodically recurring right and the period of limitation is 12 years from the time the plaintiff is first refused the enjoyment of the right. There have been conflicting decisions in the High Courts in India as to the applicability of that Article in cases where claim is not for the establishment of a periodically recurring right but for the remuneration arising by reason of the right itself. The High Court at Madras has taken the view that Art. 131 of the Schedule applies to a suit to recover sums due under such a right whether there is a prayer for declaration of the plaintiff's right or not and in the case of *Manavaikrama Zamorin Raja Avergal of*

Calicut v. *Achutha Menon* (1), a Full Bench of the Madras High Court after expressing some doubt as to the propriety of earlier decisions of the same Court eventually arrived at the conclusion that those decisions should not be interfered with. In fact the Chief Justice states his opinion thus:—"If this matter had been *res integra* I should have been disposed to hold that Art. 131 should be construed as applying to a suit brought for the purpose of obtaining an adjudication as to the existence of an alleged periodically recurring right, and not to a suit in which it was sought to recover moneys alleged to be due by reason of the alleged right." He felt, however, that the earlier decisions of the same Court ought not to be overruled and Mr. Justice Sankaran Nair who agreed with him admitted that the question was not free from doubt. Mr. Justice Oldfield also agreed with the learned Chief Justice for the reasons stated by him. That decision undoubtedly finds some support also from a decision of the Bombay High Court, *Sakharam Hari* v. *Lakmipriya Tirtha Swami* (2). After expressing the opinion that a cash allowance due from one temple to another was in the nature of *nibandha* or immoveable property, the Court there held that where it was annually payable the right to payment gave to the person entitled a periodically recurring right as against the person liable to pay, and the right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and also those which have become actually due. As against these decisions we have a different view taken by the High Court at Allahabad. In the case of *Lachmi Narain* v. *Turab un-nissa* (3), it was held that the words of Art. 131 are altogether inapplicable to a suit to recover arrears of payments due under a registered contract and an earlier case of the Chief Court of the Punjab was followed in preference to the view held by the Madras High Court.

It seems to me that there is a vast distinction between a suit brought to establish a periodically recurring right and a suit brought to enforce payment due as remuneration for the performance of services arising out of that right. In the present instance a suit has been brought and went on appeal to the High Court and was finally decided in July 1920 in which the present plaintiffs sued the present defendant for a declaration of the very right in respect of which the remuneration is now claimed. Having had their right declared in that suit they then brought the present suit claiming not to establish their right, which is already established by the decree of the High Court, but to recover the remuneration due to them for the hereditary services for which they had not been paid, and which in fact they had not been allowed to perform, pending the dispute between the parties. I think that some light can be thrown upon this matter by reference to Arts. 128 and 129 which almost immediately precede the Article in question. It is quite clear from a perusal of those Articles, one of for which applies to a suit by a Hindu for arrears of maintenance and the other by a Hindu for a declaration of his right to maintenance, that the framers of this Act had clearly in mind the distinction between a suit for declaration of a right and a suit claiming arrears of remuneration arising out of the exercise of that right and had it been the intention to include both classes of suit under Art. 131 I think that we should have found words appropriate to that effect. It seems to me that Art. 131 was intentionally drafted so as to include merely a suit to establish a right.

In these circumstances as none of these Articles appear to be applicable to the facts of the present case one must look to the general Art. 120 which the appellant relied on, if Art. 102 should not apply; and this appears to me to be the Article applicable to the present case. It provides for a suit for which no period of limitation is provided elsewhere in the Schedule and the period of limitation is 6 years from the date when the right to sue arises. If that Article is applicable, as I think it is, it follows that the claim of the plaintiffs in this case is barred beyond 6 years back from the period when the suit was brought.

The result is that the decree of the learned District Judge will be varied by limiting the amount recoverable to the dues falling within 6 years from the date when the suit was instituted. I think that the appellant is entitled to his proportionate costs of this appeal.

Foster, J.—I agree.

Z. K. *Decree varied.*

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(1) 23 Ind. Cas. 806; 38 M. 916; (1914) M. W. N. 228; 15 M. L. T. [illegible]28; 26 M. L. J. 377.

(2) 5 Ind. Cas. 869; 34 B. 349; 12 Bom. L. R. 157.

(3) 14 Ind. Cas. 505; 34 A. 246; 9 A. L. J. 297.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 10 OF 1925.
October 13, 1925.
Present: —Mr. Hallifax, A. J. C.
PREM NARAYAN—PLAINTIFF—APPELLANT
versus
MAN SINGH—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (I of 1920), ss. 49, 50, 109—Sir land—Cultivating rights—Transfer—Permission in general words, scope of—Sanction for sale, whether sufficient for mortgage of portion—Sanction of Sub-Divisional Officer—Confirmation by Deputy Commissioner, whether necessary—Endorsement on transfer deed, whether sufficient proof of sanction—Civil Courts, whether have power to question propriety of sanction.

A permission by the proper Revenue Officer to transfer cultivating rights in *sir* lands must be taken to be a permission to transfer them in any way, for any consideration, to any person, at any time the owner pleases unless the permission is limited in any of these ways. A permission for the sale of such rights would, therefore, suffice for validating a transfer by mortgage of those rights. [p. 829, col. 1.]

If a sanction is granted for the sale of the cultivating rights in the entire *sir* land in the village, it will be available for the transfer of such rights in a part of the land. [p. 830, col. 1.]

The sanction required under ss. 49 and 50 of the C. P. Tenancy Act or by any of the rules made on the subject under s. 109 of the Act is the sanction of the Revenue Officer, *i.e.*, Sub-Divisional Officer, and though under the rules under s. 109 the Revenue Officer dealing with an application of this kind must in certain cases forward it to the Deputy Commissioner if he does not reject it, the sanction of the Deputy Commissioner is not necessary under the Act for the validity of the transfer. The sanction of the Revenue Officer, *i.e.*, Sub-Divisional Officer, being all that is required for the purpose of validating the transfer. [p. 830, col. 1.]

The endorsement by the Revenue Officer relating to the grant of the sanction by him for the transfer is complete proof of such sanction and the Civil Courts cannot enquire whether the Revenue Officer ought to have granted the sanction or not. [*ibid.*]

Appeal against a decree of the Second Subordinate Judge, First Class, Raipur, dated the 24th November 1924, in Civil Suit No. 41 of 1924.

Sir *B. K. Bose* and Mr. *V. Bose*, for the Appellant.

Mr. *A. C. Roy*, for the Respondent.

JUDGMENT.—The plaintiff-appellant sued on a mortgage by the defendant of a share in a village including the cultivating rights in the 36·44 acres of *sir* appertaining to it. The order of the Financial Commissioner on the application to transfer the cultivating rights in the *sir* sanctions "the transfer by sale" of the share in the village "without reservation of cultivating rights in 41·18 acres of *sir* land". It has been stated in this Court that there were never more than 36·44 acres of *sir* belonging to the mortgagor, but the mistake has never been noticed. It is, however, clear that the present extent of the *sir* is only 36·44 acres. The endorsement of the Sub-Divisional Officer on the mortgage-bond is as follows. "I certify that the transfer without reservation of *sir* right of 36·44 acres out of 41·18 acres of *sir* land in *Mouza* Tarra Tahsil and District Raipur which is effected by this document has been duly sanctioned. *Vide* Financial Commissioner's Order No. 375 dated 18th September 1920 in Revenue Case No. 47·11/10 of 1919-20."

It was pleaded for the defendant that, as the Financial Commissioner's sanction was for a transfer by sale, the transfer by mortgage was not sanctioned and is, therefore, invalid. The judgment of the lower Court on this point, against which the plaintiff appeals, is to the following effect. The rules made under s. 50 of the Tenancy Act, 1920, provide that "the nature of and the reasons for the intended transfer should be stated in the application for sanction", and both the Financial Commissioner and the Revenue Officer have to consider the eventual position of the transferor. In considering that, "the nature of the transfer, that is whether it is a sale, mortgage or a lease, as well as the time when it is made are very material and form a most important factor." Therefore, it is "clear that it is the intention of the Legislature that a sanction given for one kind of transfer should not be used for another kind, or that a sanction given for a particular transfer cannot be available for a different one." It is open to a Civil Court, therefore, to "go behind the note of the Sub-Divisional Officer on the back of the mortgage in suit and say that the note is not supported by the required sanction". In this case the sanction is for a transfer by sale and cannot cover a transfer by mortgage. Cultivating rights in the *sir* must accordingly be exempted from foreclosure.

It seems to me clear that permission by the proper Revenue Officer to transfer the cultivating rights in *sir* land is permission to transfer them in any way for any consideration to any person at any time the owner pleases, unless the permission is expressly limited in any of these ways. The order of the Financial Commissioner in this case is in its words limited to a transfer by sale, but it is clear that there was no intention of limiting it in that way or of excluding a transfer by mortgage, The Revenue Officer has nothing to do with the transfer of the share or of the proprietary rights in the *sir*; he is concerned only with the cultivating rights in the *sir*. If he sanctioned the transfer of those rights in the whole of the *sir* land in a village, it would hardly be said that the proprietor could not transfer them in a half of it only, reserving the other half for himself. If that were so, the transfer of those rights in 36·44 acres in this case would be invalid because the order of the Financial Commissioner expressly mentions 41·18 acres and it is not shown that there were not 41·18 acres of *sir* land in the village though a statement to that effect has been made in this Court. Similarly, sanction for a complete transfer by sale must include sanction for a partial transfer by mortgage. It may be mentioned that it would be difficult for the Financial Commissioner or the Revenue Officer before deciding whether to grant the sanction, to consider "the time when" the transfer would be made in the future.

But we are not concerned with the orders of the Financial Commissioner at all. All that is required in the way of sanction by ss. 49 and 50 of the Tenancy Act, 1920, or even by any of the rules on the subject made under s. 109 of the same Act is the sanction of the Revenue Officer, that is the Sub-Divisional Officer. Under s. 50 (2) of the Act and the seventh of the rules made under s. 109, the Revenue Officer dealing with an application of this kind must in certain cases, if he does not reject it, "forward it for the orders of the Financial Commissioner" (now the Deputy Commissioner).

But there is nothing in the Act or the rules making the sanction of the Financial Commissioner (or the Deputy Commissioner) necessary for the validity of a transfer, even in those cases which have to be forwarded for orders. The sanction of the same Revenue Officer, that is, the Sub-Divisional Officer, is still all that is required, though he is forbidden to give it without the permission of a higher authority. That however does not concern anybody but those officers, and I apprehend that a sanction granted by a Sub-Divisional Officer after forwarding the case to the proper authority for orders would be valid and sufficient even in the unlikely event of its being not in accordance with those orders, as it has been held in the lower Court to be in this case.

Anyhow there was no disobedience or misunderstanding of orders here, and the proper Revenue Officer sanctioned the transfer by mortgage of the cultivating rights in 36·44 acres of *sir* land in the endorsement on the bond which is quoted at the beginning of this judgment. We are not concerned with anything beyond or behind that; the endorsement is complete proof that the proper Revenue Officer did sanction the transfer effected by the instrument, and we cannot enquire whether he ought to have done so or not.

The decree of the lower Court will be modified by the substitution of the word *including* for the word *excluding* in the description of the property to be foreclosed. All the costs in both Courts will be paid by the defendant-respondent. The time up to which redemption is allowed must be extended to the 26th of December 1925. The decree of the lower Court has, therefore, to be further modified by the substitution of the 26th of December 1925 for the 24th of May 1925 as the end of the period allowed for redemption, and of Rs. 7,471-10-0 for Rs. 6,894-10-0 as the total payable for principal and interest up to that date and costs in both Courts.

G. R. D. *Decree modified.*
Z. K.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.
December 2, 1925.
Present:—Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

Rao Bahadur MAN SINGH—
APPELLANT
versus
Maharani NAWLAKHBATI AND ANOTHER—RESPONDENTS.

Hindu Law—Widow—Surrender, validity of—Estate under management of Court of Wards, effect of—Court of Wards Act (IX B. C. of 1879), s. 60.

A surrender by a Hindu widow of the whole of her interest in the estate of her deceased husband in favour of the nearest reversioner or reversioners at the time of the surrender is valid, provided it is a *bona fide* surrender and not a device to divide the estate with the reversioners. [p. 836, col. 2.]

Where a Hindu widow's estate is under the management of the Court of Wards, the widow is not competent to surrender the estate to the nearest reversioner of her husband. Any such surrender is void under the provisions of s. 60 of the Court of Wards Act. [*ibid.*]

Appeal from a decree of the Patna High Court, (Mr. Justice Das and Mr. Justice Kulwant Sahay) in Appeal from Original

Decree No. 205 of 1922, dated the 6th April 1923, affirming that of the Additional Subordinate Judge, Bhagalpur, dated the 5th June 1922.

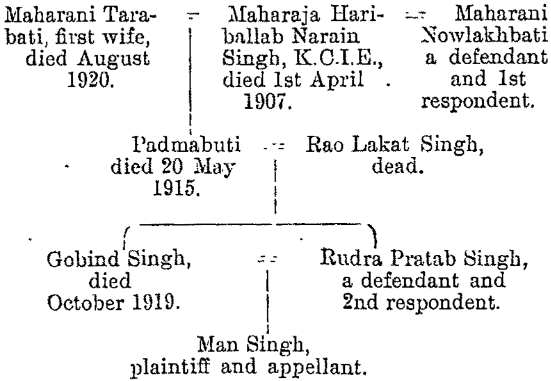
Messrs. *L. DeGruyther, K. C.*, and *S. Hyam*, for the Appellant.

Sir *G. R. Lowndes, K. C.*, and Mr. *E. B. Raikes*, for the Respondents.

JUDGMENT.

Sir Jhon Edge.—This is an appeal from a decree, dated the 6th April 1923, of the High Court at Patna, which affirmed a decree, dated the 5th June 1922, of the Additional Subordinate Judge of Bhagalpur.

The parties to the suit in which this appeal has arisen are Hindus, by caste Rajput, of the District of Bhagalpur, who are governed by the Law of the Mitakshara, and the following pedigree shows how they are related:—


Maharani Tarabati, first wife, died August 1920.
Maharaja Hariballab Narain Singh, K.C.I.E., died 1st April 1907.
Maharani Nowlakhbati a defendant and 1st respondent.
Padmabuti died 20 May 1915.
Rao Lakat Singh, dead.
Gobind Singh, died October 1919.
Rudra Pratab Singh, a defendant and 2nd respondent.
Man Singh, plaintiff and appellant.

Sir Hariballab Narain Singh died intestate on the 1st April, 1907, possessed of the Sonbarsa estate, which was situate principally in the District of Bhagalpur and produced an income of about two lacs of rupees a year. On his death his two widows, Maharani Tarabati and Maharani Nowlakhbati, succeeded him in the possession of the estate. On the 30th April, 1907, the two widows, who were *pardanashin* ladies, jointly presented to the Collector of Bhagalpur a petition in which they alleged that the estate was heavily involved in debt, that there were large arrears of income to be collected, and that they were unable to manage the estate, and asked that they should be held under s. 6 of the Court of Wards Act, 1879, to be disqualified proprietors, and should be declared by the Court of Wards incompetent to manage their own property and that the estate should be taken over by the Court of Wards. That application was forwarded by the Collector to the Court of Wards, and thereupon the Court of Wards under s. 27 of the Act made on the 27th May, 1907, an order declaring that the widows were incompetent to manage their own property and declaring that it was determined under s. 35 of the Act that the Court of Wards should take charge of the property of the widows and directed that possession of such property should be taken on behalf of the Court of Wards. Thereupon the widows became wards of the Court of Wards. The Court of Wards allowed to each of the widows Rs. 625 a month for her maintenance On the death of Maharani Tarabati in 1920 the monthly allowance made by the Court of Wards to Maharani Nowlakhbati for her maintenance was increased to Rs. 1,250. The widows and the survivor of them continued to live in the family house of the Sonbarsa estate.

On the 18th December, 1918, the widows, as parties of the first part, and Gobind Singh and Rudra Pratab Singh, as parties of the second part, made a deed, written in English, which, omitting the Schedule, is so far as is material as follows :—

"(*Sd.*) Sri Maharani Teravati. By my own pen.

(*Sd.*) Sri Maharani Nowalakhavti. By my own pen.

This INDENTURE made the eighteenth day of December of the Christian year One Thousand Nine Hundred and eighteen between Maharani Tarabati and Maharani Nowlakhbati, the senior and the junior widow respectively of the late Maharaja Harballabh Narain Singh Bahadur, K. C. I. E., residing at Sonbarsa in Thana Sonbarsa, Pargana Nisankhpur Korha, District Bhagalpur, hereinafter called the First Party of the one part; and Rao Bahadur Govind Singh and Rudra Pratab Singh sons of the late Rao Bahadur Takat Singh and daughter's son of the said Maharaja Harballabh Narain Singh Bahadur, K. C. I. E., residing at Barware, in the Jeypore State in Rajputana, hereinafter called the second party of the other part, WHEREAS the late Maharaja Harballabh Narain Singh Bahadur, K. C. I. E., died intestate on the 1st day of April, 1907, leaving considerable property, moveable and immoveable, commonly called the Sonbarsa Estate, mostly situate in Pargana Nisankhpur Kurha in the Sub-Division of Madhipura, District Bhagalpur, and leaving behind him no male issue but only two widows, namely, the first party and an only daughter namely, Maharaj Kumari Padmabati, mother of the Second Party, and two daughter's sons by the said daughter, namely, the Second Party AND WHEREAS on the death of the said Maharaja Bahadur the first party succeeded to and came into possession of all property, moveable and immoveable, left by him, with the rights of Hindu widows under the Benares School of Hindu Law, which governs the family of the said Maharaja Bahadur AND WHEREAS by reason of the FIRST PARTY being *pardanashin* ladies incapable of managing a big property like the Sonbarsa Estate, the Court of Wards has taken up the management of the said Estate under the provisions of Act IX of 1879 (B. C.) on their behalf, and is at present managing the property through Rai Sahib Nilmoney Dey, Manager appointed under the provisions of the said Act AND WHEREAS the First Party are now getting a monthly allowance of Rs. 625. (Rupees six hundred and twenty-five) each from the Court of Wards for their respective maintenance. AND WHEREAS the said Maharaj Kumari Padmabati died on the 20th day of May 1915, AND WHEREAS the first party are now growing old and are desirous of remaining aloof from the concerns of the world and of spending their latter days in Divine Worship and meditation in the Holy City of Benares, with an allowance for their maintenance befitting their rank and position. AND WHEREAS for the reasons aforesaid the first party wish to relinquish and surrender their Hindu widows' estate in the said property left by the said Maharaja Bahadur, their deceased husband, to the next heirs, the Second Party who have undertaken to pay them or the survivor of them, out of the income and profits of the said estate left by the said Maharaja Bahadur, the monthly sum of Rs. 2,000 (Rupees two thousand) for maintenance and also to defray the expenses of the daily and periodical worship of the family deities Lachhmi Narayan Jeo, Ram Chandra Jeo and Radha Krishan Jeo, at a cost of Rs. 100 (Rupees one hundred) per mensem. AND WHEREAS the Second Party have agreed to all the terms aforesaid.

NOW THIS INDENTURE WITNESSETH.

1. That the first party Maharani Tarabati and Maharani Nowlakhbati do hereby relinquish and surrender all their rights in the property moveable and immoveable, left by their husband, the late Maharaja Hariballabh Narain Singh Bahadur, K. C. I. E., commonly called the Sonbarsa Estate, now in the charge and under the management of the Court of Wards to and in favour of the Second Party Rao Bahadur Gobind Singh and Rudra Pratab Singh, the next heirs of the said Maharaja Bahadur under the Hindu Law, and in pursuance thereof the first party do hereby make over the entire property aforesaid to the second party in full extinction of their rights therein as Hindu widows.

2. That the second party will be entitled to the whole property aforesaid from this date and they will hold and enjoy the same in the rights of daughter's sons succeeding to the property of their maternal grandfather under the Benares School of Hindu Law, the share of each being a moiety of the said property.

3. That the second party will be entitled to have their names entered as proprietors in equal share in respect of the revenue-paying or revenue-free estates included in the said property by removing the names of the first party now recorded in the registers maintained under Act VII of 1876 (B. C.).

4. That the first party will at once inform the Court of Wards of this surrender and request the Court to make over the charge and management of the said property to the second party subject to the Court's retaining the management if it thinks fit, under s. 13A of the said Act IX of 1879 (B. C.)

5. That the first party or the survivor of them, will be entitled to receive a maintenance allowance of Rs. 2,000 (Rupees two thousand) per mensem, from the second party out of the rents and profits of the said property so long as they or either of them live or lives.

6. That the second party undertake to keep up and maintain the daily and periodical worship of the family deities Lachhmi Narayan Jeo, Ram Chandra Jeo, and Radha Krishna Jeo, installed at the Sonbarsa house left by the said Maharaja Bahadur, at a cost of Rs. 100 (Rupees one hundred) per mensem, and should they omit or neglect to carry out this undertaking the first party will be entitled to enforce the fulfilment thereof.

In WITNESS WHEREOF the said parties to these presents have hereunto set their hands and seals the day and year first above written in the presence of:—

Witnesses.-(1) Bindhyeswari Prasad Singh, High Court *Vakil*, Monghyr.
(2) Ajodhya Prasad Choudhary M. C., resident of Kassim Bazar, Monghyr.

Witness.—Prabhu Charan Ambasta, Bhikhanpur, Bhagalpur.
„ Bindyeswari Prasad Singh, *Vakil*, Monghyr.
„ Anirudh P. Singh *Pleadar* and Zemindar, Panjwara, Bhagalpur.
„ Ram Chandra Singh of Mohanpur, Bhagalpur.
„ Ram Chandra Singh of Mouza Chakla Hanuman Nagar. By my own pen.
„ Babu Nirbhay Narayan Singh of Bindwara Pargana, Monghyr. By my own pen."

The deed was registered on the 18th December, 1918.

On the same day, 18th December, 1918, Gobind Singh and Rudra Pratab Singh by their *ekrarnama* agreed in writing with the widows so far as is material as follows:—

"This agreement made on the 18th (Eighteenth) day of December one thousand nine hundred and eighteen between Rao Bahadur Gobind Singh and Rudra Pratab Singh, *alias* Begai Singh, sons of the late Rao Bahadur Lakat Singh, and daughter's sons of the late Maharaja Harballab Narain Singh Bahadur, K. C. I. E., residing at Barwara in the Jaipur State, Rajputana, hereinafter called the first party of the one part and Maharani Tarabati and Maharani Nowlakhbati, the senior and the junior widows, respectively of the said Maharaja Harballah Narain Singh Bahadur, K. C. I. E., residing at Sonbarsa, in *Thana* Sonbarsa, Pargana Nisankpur Karha, District Bhagalpur, hereafter called the second party of the other part, whereas the said Maharaja Harballab Narain Singh Bahadur, K. C. I. E. died intestate on the 1st April, 1907, leaving considerable property moveable and immoveable, commonly called the Sonbarsa estate, mostly situate in Pargana Nisankpur Kurha in the Sub-Division of Madhipura, in the District of Bhagalpur, but also situate in part in Pargana Farakya in the District of Monghyr and leaving behind him no male issue, but only two widows, namely, the second party, and an only daughter, namely, Maharaj Kumari Padmavati, mother of the first party, and two daughter's sons by the said daughter, namely, the first party. And whereas on the death on the said Maharaja Bahadur, the second party succeeded to and came into possession of all property, moveable and immoveable left by him with the rights of Hindu widows under the Benares School of Hindu Law, which governs the family of the said Maharaja Bahadur, and whereas by reason of the second party being *pardanashin* ladies, incapable of managing a big property like the Sonbarsa estate the Court of Wards has taken up the management of the said estate, under the provision of Act IX of 1879 (B. C.) on their behalf and is at present managing the property through Rai Saheb Nilmoney Day, Manager appointed under the provisions of the said Act: And whereas the said Maharaj Kumari Padmabati died on 20th (Twentieth) day of May, 1915. And whereas the second party who are now growing old and are desirous of remaining aloof from the concerns of the world, and of spending their latter days in Divine worship and meditation in the holy city of Benares, have proposed to surrender their estate to the first party who are now the next reversionary heirs of the said Maharaja Bahadur under the Hindu Law on getting a suitable maintenance for the remainder of their natural lives, and an assurance that the worship of the family deities at Sonbarsa should be kept up and maintained in the proper stage by the first party. And whereas the first party have agreed in the event of the said surrender being made, to give the second party or the survivor of them, a maintenance allowance of Rs. 2,000 (Rupses two thousand) per mensem, and also to keep up and maintain the worship of the said family deities in a suitable style at the cost of Rs. 100 (Rupees one hundred) per mensem. And whereas the second party consider the said amount of maintenance allowance and of the expenses of worship fair and reasonable and, therefore, they are executing the deed of surrender contemplated by them. The first party, therefore, in consideration of the premises, do hereby agree of their own free will and accord that from the day they became the proprietors of the said Sonbarsa estate, by reason of the surrender aforesaid they and their heirs, successors, executors, administrators and assignees shall pay to the second party or the survivor of them, so long as they or either of them live or lives, the monthly sum of Rs. 2,000 (Rupees two thousand) for their maintenance in a style suitable to the rank and position held by their deceased husband, and if they fail to pay the allowance due for any months (which is to be taken as an English month) on the first day of the following month, the second party will be at liberty to enforce the payment thereof, with simple interest at the rate of 12 per cent. per mensem, by process of Court, and the said arrears of allowance, with interest and the costs of the suit if any to enforce the payment thereof shall be the first charge on the property mentioned in the schedule hereto annexed which forms, a part of the estate surrendered by the second party as mentioned above. And the first party further agree that from the day aforesaid they shall keep up and maintain the daily and periodical worship of the family deities Lachhmi Narayan Jeo, Ramchander Jeo, and Radha Krishna Jeo installed at the Sonbarsa house left by the said Maharaja Bahadur, at a cost of Rs. 100 (Rupees one hundred) per mensem (the month being taken as an English month), and should they omit or neglect to carry out this agreement the second party will be entitled to enforce the fulfilment thereof. In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written in the presence of witnesses (1) Bindheyswari Prasad Singh, High Court Vakil, Monghyr, (2) Ajodhya Prasad Chaudhury, M. C., resident of Kassim Bazar Monghyr."

That agreement was registered on the 18th December, 1918.

On the 23rd December, 1918, the two widows sent the following letter to the Collector of Bhagalpur :—

"To

The Collector of Bhagalpore.

Dated Bhagalpore, the 23rd December, 1918.

Sir,

We have the honour to state the following for your information :—

That we are disqualified proprietresses of the Estate known as the Sonbarsa Estate and we are Wards of the Court.

That we have two grandsons named Rao Bahadur Gobind Singh and Rudra Pratap Singh.

That for sometime past we had been contemplating surrendering our rights to the estate in favour of our two grandsons who are the reversioners to the estate and we had informed Mr. B. C. Sen, I. C. S., the then Collector and the Hon'ble Mr. H. J. McIntosh, I. C. S., the then Commissioner, informally about our intentions.

That we have kept Mr. Sen informed informally about all the steps that we have been taking in connection with our intention to surrender the Estate.

That we had taken the best legal advice (*e. g.*,) of the Government Advocate, Bihar and Orissa and Government Pleader, Bhagalpore, and we were given to understand that under the law we had every right to surrender the estate in favour of our two grandsons.

That in pursuance of our intentions to keep the authorities informed about all our actions in connection with the surrender, we so far back as March 1918 sent a copy of the proposed deed of surrender to the Collector of Bhagalpore with our forwarding letter dated the 4th March 1918.

That we have executed and registered the deed of surrender on the 18th instant and as provided in para. 4 of the said deed we beg to inform you about the same and request you to take steps to make over the charge and management of the said properties to Rao Bahadur Gobind Singh and Rudrapratap Singh, our two grandsons aforesaid if the Court of Wards do not think fit to retain management under s. 13 (*a*) of Act IX of 1879 (B. C.).

That we have been given to understand that our two grandsons aforesaid are applying for the mutation of their names in the registers maintained under Act VII of 1876 (B. C.) and that we have no objection to their so doing.

We have the honour to be,
Sir,
Your most obedient servants,
(*Sd.*) Sri Maharani Tarabati.
(*Sd.*) Sri Maharani Nowlakhbati,
Maharanis of Sonbarsa."

The gentlemen whom the widows mentioned as the Government Advocate and Government Pleader in giving any advice to the widows acted as their legal advisers, and not in any respect as representing the Court of Wards.

On the 15th April, 1919, the Court of Wards through their Deputy Collector sent the following reply to the widows to their petition of the 23rd December, 1918 :—

"To

Maharani Tarabati Kumari and Nowlakhabati Kumari, Sonbarsa.

Their petition No. *nil*, dated the 23rd December, 1918.

The Maharanis of Sonbarsa are informed that the Board of Revenue, Bihar and Orissa considers that the deed of relinquishment executed by them in favour of their grandsons is invalid.

(*Sd*) H. Bhattacharyja, Wards Deputy Collector."

The Court of Wards had never given any sanction to the widows or to either of them to create any charge upon or interest in the property of the Wards or any part thereof.

In February, 1919, Gobind Singh applied to the Court of the Deputy Collector of Bhagalpur for mutation of names in his favour in respect of an eighth share in the estate on the ground that he had a right to the moiety of the estate, his contention being that the deed of the 18th December 1918, operated as a surrender of the interests of the widows of their interests in the estate. Rudra Pratab Singh did not oppose the application. The application was opposed by the Manager of the Court of Wards on various grounds, one of which it is only necessary in the view their Lordships take of the law applicable to the case to consider, and that is that the Court of Wards had not sanctioned the so-called surrender and that it was consequently invalid under s. 60 of the Court of Wards Act, 1879. That section is as follows:

"60. No Ward shall be competent to create, without the sanction of the Court, any charge upon, or interest in, his property or any part thereof."

The Court in that section mentioned was the Court of Wards. Gobind Singh's application for mutation of names was rejected.

Gobind Singh died in October, 1919. Maharani Tarabati (the first wife) died in August, 1920. Man Singh, who was the son of Gobind Singh, brought this suit on the 17th January, 1921. In his plaint Man Singh referred to the deed of the 18th December, 1918, and relied upon it as a surrender by the widows of their interest as proprietors of the Sonbarsa estate and as having vested that estate in his father, Gobind Singh and in Rudra Pratab Singh. The 11th, 12th and 13th paras. of the plaint state the title upon which the suit was brought, thus:—

"11. That by the said deed of surrender the said Maharanis having put an end to their life estate as Hindu widows in favour of the entire body of the then reversioners the aforesaid Rao Bahadur Gobind Singh and Rudra Pratab Singh the defendant, second party in the aforesaid Sonbarsa estate, all the properties both moveable and immoveable appertaining to the said Sonbarsa Estate vested solely and absolutely in the said reversioners, who became entitled to hold, possess and enjoy the aforesaid estate as the absolute owners of and successors to the properties left by their maternal grandfather by right of inheritance under the Benares School of Hindu Law.

12. That as the aforesaid heritage being one which is known as obstructed heritage, the plaintiff's father Rao Bahadur Gobind Singh and Rao Bahadur Rudra Pratap Singh, the defendant, second party acquired equal rights in the same and the share of each being a moiety of the said properties.

13. That the plaintiff's father, Rao Bahadur Gobind Singh died in October, 1919 leaving the plaintiff his only son and the sole heir to his estate and he is lawfully entitled to all the rights and interest acquired by his late father in the aforesaid Sonbarsa Estate by virtue of the aforesaid deed of surrender."

Man Singh, the plaintiff, prayed for the following amongst other reliefs:—

"(*a*) That the Court be pleased to declare that by the deed of surrender and the *ekrarnama*, dated the 18th of December 1918 the plaintiff's father and the defendant second party became entitled as the next immediate reversionary heirs of the late Maharaja Sir Harbalab Narain Singh Bahadur, K. C. I. E., to all the properties left by him and the defendant, first party has no right to withhold possession of the Sonbarsa estate from the plaintiff and the defendant second party.

(*b*) That the Court be pleased to pass a decree for recovery of possession of all the properties moveable and immoveable mentioned in Schedules A and B annexed to the plaint as well as any other properties that may be found on discovery to appertain to the Sonbarsa Estate in favour of the plaintiff and the defendant, second party by dispossessing the defendant, first party."

In Sch. B of the plaint, which contains a list of the moveable properties which were claimed, carriages, palkis, cattle, elephants, bullocks, cows, buffaloes, horses, and other things are mentioned as having been retained in the possession of Maharani Nowlakhbati.

The defendants, Maharani Nowlakhbati and Rudra Pratap Singh filed separate written statements. The Maharani Nowlakhbati in her written statement pleaded amongst other things that the widows being disqualified persons and their estate being under the management of the Court of Wards, they had no authority to execute the alleged deed of surrender without the sanction of the Court of Wards and that the plaintiff's father did not acquire any valid title under the said deed, and also did not admit as correct the view of the law propounded in paras. 12 and 13 of the plaint and put the plaintiff to proof of his title.

The defendant Rudra Pratap Singh in his written statement pleaded amongst other things that the alleged deed of surrender was not a surrender of the whole interest of the Maharani's and was void and illegal, and also that it was void and ineffectual as not having the sanction of the Court of Wards. Rudra Pratap Singh by his written statement put the plaintiff to proof of his title.

The Subordinate Judge framed twelve issues, of which the fifth is in the opinion of their Lordships the crucial issue in this case. It was "5. Is the deed of surrender valid having regard to the provisions of s. 60 of the Court of Wards Act (IX of 1879)? If it is found that the deed of the 18th December, 1918, was in contravention of that section the plaintiff's suit fails and this appeal fails, and it is not necessary for the Lordships to consider whether the widows understood the deed or had executed it under any misrepresentation as to its object or effect, or without any independent advice, or to consider any other issue, or the questions of law raised in the 11th paragraph of the written statement of the Maharani Nowlakhbati, which was that "the plaintiff should prove that he is entitled to a moiety share in the Sonbarsa estate, even if the said deed of surrender be held to be a valid document." Whilst saying this, their Lordships feel it right to say that the lengthy and elaborate judgments of the Courts below have been of assistance to them in understanding the facts which were in dispute between the parties to this suit.

In this case no question, that there was any necessity for the surrender, arose. There was in fact no necessity for a surrender of the interests of the widows. The Subordinate Judge and the High Court in appeal concurrently found in effect that the parties to the deed of the 18th December 1918, intended by that deed that the widows should surrender some of their interests in the Sonbarsa estate to Gobind Singh and Rudra Pratap Singh, and that the so-called surrender was void as being in contravention of s. 60 of the Court of Wards Act, 1879. Those learned Judges might have found on the facts that the deed was void independently of s. 60 of the Act.

The question as to whether a surrender without necessity by a Hindu widow of her widow's interest in her deceased husband's estate, even in favour of the nearest reversioner, is valid was considered by the Board in *Rangasami Gounden* v. *Nachiappa Gounden*, (1). In the judgment of the Board in that case, at page 84*, it was said that:—

"The result of the consideration of the decided cases may be summarized thus: (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner."

In *Sureshwar Misser* v. *Maheshrani* (2) the Board affirmed that pronouncement of the law. In the latter case, in which the parties were subject to the law of the Mithila School, the widow of the deceased proprietor on the death of her infant son took absolutely the moveable property. In that case there were serious disputes in the family as to title and the next reversioners to the son sued the widow and her daughters to set aside the Will of her husband under which the daughters were entitled to succeed to the immoveable

(1) 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66 (P. C.).

(2) 57 Ind. Cas. 325; 47 I. A. 233; (1925) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 25 C. W. N. 194; 48 C. 100; 41 C. L. J. 433 (P. C.).

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property on the death of the son without issue. A family compromise was agreed to, and in performance of it the widow surrendered all her rights of succession to the immoveable property, and the plaintiff the next reversioner, and her daughters gave her for life a small portion of the land for her maintenance. The Board held that the compromise was a *bona fide* surrender of the estate, and not a device to divide it with the next neversioner, the giving of a small portion of it to the widow for her maintenance not being objectionable, and consequently that the transaction was valid under the principles laid down by the Board in *Rangasami Gounden* v. *Nachiappa Gounden* (1).

The so-called surrender in the present case was, as stated above, void in law, and was also void as being in contravention of s. 60 of that Act.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Barrow, Rogers & Nevil.*

Solicitors for the Respondent:—Messrs. *Watkins & Hunter.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1693 OF 1923.

December 4, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Mukerji.

GNANADA GOBINDO CHOUDHURI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NALINI BALA DEBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Rent suit—Rate of rent.*

The essence of the doctrine of *res judicata* is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other, the same question cannot be agitated by them again in another suit. In the case of suits for rent or other recurring liability, the causes of action for suits for successive periods are different. In the case of such suits, for the doctrine to apply, it will have to be shown that the question of right or liability not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided the decision would be *res judicata* in respect of any suit for a subsequent period. If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding the right or liability for the period involved in the suit, then the issue was raised not directly and substantially but collaterally or incidentally. In a suit for rent, no issues need be framed, but where issues are framed, the non-existence of a direct issue of this character has to be seriously taken into account in determining whether the question of right or liability for all times was really directly and substantially in issue. [p. 839, cols. 1 & 2.]

Appeal against a decree of the District Judge, Pabna and Bogra, dated the 19th March 1923, modifying that of the Subordinate Judge, Second Court, Pabna, dated the 11th August 1922.

Babus *Brajo Lal Chakravarty* and *Susil Kumar Bose*, for the Appellants.

Mr. *Sarat Chandra Roy Chowdhuri* (with him Babu *Sarat Chandra Khan*, Mr. *Gopal Chandra Das* and Babu *Nirode Bandhu Roy*), for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit for rent in respect of a *patni* tenure for the years 1324 to 1327 *B.S.* The defendants may be classified into two groups, the defendants Nos. 1 to 5, 8 and 9 being the holders of an 8-annas interest, while the other 8-annas which was formerly held by the defendant No. 6 Jamini Kumar Pakrashi is now alleged to be held by the defendant No. 7 Nalini Bala Debi. The plaintiffs' case is that this 8-annas share was purchased by the estate of one Bidhumukhi Debi which now belongs to Nalini Bala Debi. Bidhumukhi is dead, and so is her adopted son Birendra, whose widow is Nalini Bala.

The Subordinate Judge decreed the plaintiffs' suit against the defendants Nos. 1 to 5 and 7 to 9. On appeal preferred by the defendant No. 7 Nalini Bala the learned District Judge absolved her from liability for payment and set aside the decree in so far as it was against her. The plaintiffs have appealed.

On the merits the learned District Judge was of opinion that the 8-annas share of Jamini was purchased for the estate of Bidhumukhi and with her money and, therefore, the estate was liable for the rent. He, however, held that a previous decision stood as a bar in the plaintiffs' way and operated as *res judicata.*

The facts relating to the previous litigation are these: That suit was instituted for rent of the *patni* for the years 1320 to

1323 *B. S.* The holders of an 8-annas share of the *patni* were the defendants Nos. 1 to 7 therein. Jamini Kumar Pakrashi was the defendant No 8. The defendant No. 9 was one Soshi Bhushan Chatterji (or Bhattacharjya) executor to the estate of Brojendra Mohan Roy, husband of Bidhumukhi, No. 9 (*ka*) was Birendra Mohan Roy son of Brojendra Mohan Roy, and No. 10 was the said Soshi Bhushan Chatterji, (or Bhattacharjya) executor to the estate of Bidhumukhi. It is not very clear when exactly the said defendant No. 10 was impleaded in the suit, but in any event, he was added after the issues in the suit had been framed. There was a debt due to Bidhumukhi by Jamini on note of hand, on which a decree was obtained and in execution of that decree Jamini's 8-annas share in the *patni* was purchased. In that suit question arose as to whether the plaintiffs were entitled to recover the rents from Soshi Bhusan as executor to the estate of Brojendra or from Birendra or from Soshi Bhusan as executor to the estate of Bidhumukhi. The Subordinate Judge in a long, hesitating and rambling judgment discussed the facts and eventually arrived at certain conclusions which may be gleaned from his judgment and which may be summarised as follows:—The property was an acquisition to the estate of Bidhumukhi. It was not purchased by Soshi Bhusan as executor to the estate of Brojo Mohan and so Soshi Bhusan as such executor was not liable; nor was Birendra liable; presumably as Bidhumukhi's estate was then unadministered and Soshi Bhusan as executor to that estate was in seizin thereof. In the judgment recorded by him on the 30th April 1918 the learned Subordinate Judge expressed an opinion that the purchase was made by Soshi Bhusan but not as executor to the estate of Bidhumukhi, and not with due regard to the interest of Birendra, who was a minor and out of fraudulent and selfish motives and ultimately held—"but as the decree was in a suit on a note of hand by Jamini in favour of Bidhumukhi and the sale was in execution of the decree on a note of hand by Jamini in favour of Bidhumukhi and Soshi is the executor to her estate, and as Soshi as such executor has not put in any objection to the claim against him as such executor, the suit is decreed *ex parte* against him". On the 1st May 1918 an application was made on behalf of Birendra for amendment of the judgment, and upon that the learned Subordinate Judge amended his judgment in this way: Instead of the decree being that the suit is decreed *ex parte* against Soshi as such executor, meaning executor to Bidhumukhi's estate, it would run thus—"The suit is decreed *ex parte* against Soshi, sued as executor to the estate of Bidhumukhi, but he is to be personally liable and not the estate for the rent claimed". It would seem that by this amendment the learned Subordinate Judge wanted to absolve the estate of Bidhumukhi from liability but then he proceeded to conclude his order with these observations:—"I ought to notice here that I have forgotten to notice and decide a point raised in the defence of defendant Birendra and argued by the Pleaders of the parties: it was to the effect that Soshi even if he purchased the *patni* as executor to the estate of Bidhumukhi could not by the purchase render the estate liable for rent for the *patni* and the estate could not be liable for rent for the period claimed. I regret that this matter escaped me when writing judgment, but I am not competent to decide it now". I confess I am unable to understand what the learned Subordinate Judge meant by these observations if in point of fact, he amended the judgment in the way that he did. On the basis of the judgment a decree was prepared and in that it was declared that "the estate of Bidhumukhi would not be liable for this decree." From this decree two appeals were preferred, one by Jamini with which we are not concerned now, and the other on behalf of Soshi as executor to the estate of Bidhumukhi. The latter challenged in the appeal the part of the decree making him personally liable and absolving Bidhumukhi's estate from liability. The learned District Judge held that a decree against Soshi as executor was quite right and the subsequent addition in the judgment "but he is to be personally liable and not the estate for the rents claimed" was wholly unwarranted. He, therefore, set aside the decree in so far as it purported to make Soshi personally liable and as regards the liability of the estate for the rent claimed he declined to interfere with the decree in that respect as the estate was not represented before him, Soshi Bhusan having ceased to be executor while the appeal was pending, and having thereafter died and Birendra also having died and Nalini Bala as his widow having been substituted as his heir in his place, but nothing appearing as to where the estate lay at the time. In accordance with this judgment, a decree was drawn up in which it was declared that "Soshi Bhusan is exonerated from the personal decree".

The learned District Judge has held that the decision of the Subordinate Judge absolving Bidhumukhi's estate from liability operates as *res judicata* and there cân be no decree against Nalini Bala who now holds that estate. He seems to have been of opinion that the question as to whether the estate was liable or not was specifically raised and decided in that case, that the previous suit was dismissed as against the estate of Bidhumukhi and that the decree of the Trial Court exonerating Bidhumukhi's estate became final.

The essence of the doctrine of *res judicata* is that where a material issue has been tried and determined between the same parties in a porper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other, the same question cannot be agitated by them again in another suit: *Krishna Behari Roy* v. *Bunwari Lall Roy* (1). In the case of suits for rent or other recurring liability, the causes of action for suits for successive periods are different. In the case of such suits, for the doctrine to apply, it will have to be shown that the question of right or liability not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided the decision would by *res judicata* in respect of any suit for a subequent period: *Nobo Doorga Dossee* v. *Foyzbux Chowdhury* (2) *Vishnu* v. *Ramling* (3) *Natesa Gramani* v. *Venkatarama Reddi* (4) and *Dwarka Das* v. *Akhay Singh* (5). If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding the right or liability for the period involved in the suit, then the issue was raised not directly and substantially but collaterally or incidentally. In a suit for rent, no issues need be framed, but where issues are framed, the non-existence of a direct issue of this character has to be seriously taken into account in determining whether the question of right or liability for all times was really directly and substantially in issue. In the present case in previous suit the ordering portion of the judgment of the Trial Court distinctly stated "that Soshi as executor was to be liable and not the estate for the rent claimed", the decree framed in accordance with the judgment expressly absolved the estate from liability in respect of the particular decree, and the concluding paragraph of the judgment which I have already quoted above left the question of the liability of the estate for all times as undertermined.

The respondents contend that the decision of a question in an earlier suit which was not raised in the issues but which it was necessary to decide therein operates as *res judicata* in respect of the same question when it is raised in a subsequent suit. They urge on the authority of the decision of the Privy Council in *Soorjomonee Dayee* v. *Suddanund Mohapatter* (6) that it is not necessary to constitute a matter directly and substantially in issue that a distinct issue should have been raised upon it and that it is sufficient if the matter was decided in substance. In that case the Privy Council followed a decision of Lord Hardwicke in *Gregory* v. *Molesworth* (7) that "where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves, in any other suit in any other form". Their Lordships were of opinion, that the expression "cause of action" should be construed with reference rather to the substance than to the form of action; the question which had been decided in the earlier suit in that case was necessary to be decided in the earlier case and it was a question on which the plaintiff had sought for the decision of the Court. Several other decisions are also relied on on behalf of the respondents to which it is now necessary to refer: *Lilabati Misrain* v. *Bishun Chobey* (8) in which it was laid down that a decision may operate as *res judicata* although no issue had been expressly raised and that the test to be applied was whether it plainly appears that the question so raised by the parties in their pleadings was actually submitted by them to the Court and judgment given on it: *Aghore Nath Mukerjee* v. *Kamini Debi* (9) in which it was observed that where the dispute relates to matters which had already been in controversy and formed the subsidiary consideration in the previous suit, although the cause of action in the two suits are distinct the estoppel is to be limited to matters distinctly put in issue and determined in the prior action ;the case of *Midnapur Zamindary Co.* v. *Naresh Narayan Roy* (10) in which it was laid down that if in a previous suit a Court having a question before its mind and specially brought to its notice as a thing of importance decided that the issue did arise and was a necessary one, the decision on that issue will be *res judicata* in a subsequent suit though the issue might not be a necessary or proper one to be tried; a decision that was affirmed by the Judicial Committee in the case of *Midnapur Zamindary Co.* v. *Naresh Narayan Roy* (11) and several other cases in which similar proposition have been laid down. In the present case, however, there is hardly any room for the application of these principles, as it is not at all clear that the question of liability of the estate for the rent of the *patni* for all times was either raised or decided, while on the other hand the matters which I have already referred to point to a contrary conclusion.

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(1) 2 I. A. 283; 1 C. 144; 25 W. R. 1; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 213; 1 Ind. Dec. (N. S.) 93 (P. C.).

(2) 1 C. 202; 24 W. R. 403; 1 Ind. Dec. (N. S.) 129.

(3) 26 B. 25; 3 Bom. L. R. 450.

(4) 30 M. 510; 17 M. L. J. 518; 2 M. L. T. 455.

(5) 30 M. 470; 5 A. L. J. 407; A. W. N. (1908) 192.

(6) 12 B. L. R. 304; 20 W. R. 377; I. A. Sup. Vol. 212 (P. C.).

(7) (1747) 3 Atk. 626; 26 E. R. 1160.

(8) 6 C. L. J. 621.

I am, therefore, of opinion that the decision of the learned District Judge on the question of *res judicata* cannot be supported and must be reversed.

The respondents have urged that if we consider the suit is not barred by *res judicata* we should remand the case to the lower Appellate Court in order to deal with the merits of the case. We readily assent to their prayer because the decision of that Court on the merits is far from satisfactory. No clear or definite findings have been arrived at on the questions of fact which arise in the case and the reasoning on which the finding as to liability of the estate is based does not commend itself to us.

We, therefore, set aside the decree of the learned District Judge and send the case back to his Court so that the appeal may now be re-heard and dealt with afresh on the merits. Costs of this appeal will abide the result.

Suhrawardy, J.—I agree.

Z. K. *Appeal allowed.*
Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 906 OF 1925.
February 18, 1926.
Present:—Mr. Lobo, A. J. C.
FIRM OF HAROON BROTHERS—
PLAINTIFFS
versus
COWASJI BEZONJI AGHA—
DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 1, 2—Interim *mandatory injunction, whether can be granted—Discretion, when to be exercised.*

A Court has power to grant an *interim* mandatory injunction, but the power should be exercised only in very exceptional circumstances, and for this purpose each case must be considered on its own merits. [p. 841, col. 2.]

Champsey Bhimji & Co. v. *Jumna Flour Mills Co.*, 28 Ind. Cas. 121; 16 Bom. L. R. 566 and *Kandaswami Chetti* v. *Subramania Chetti*, 41 Ind. Cas. 384; 41 M. 208; 6 L. W. 140; (1917) M. W. N. 501; 33 M. L. J. 48, followed.

Application for *interim* mandatory injunction.

Mr. *Pahlajsing B. Advani*, for the Plaintiffs.

Mr. *Srikishondas H. Lulla*, for the Defendant.

ORDER.—In this suit relating to easements, for a declaration and injunction, an application was filed along with the plaint for an *interim* injunction prohibiting the defendant from closing five windows on the ground floor of the plaintiffs' premises with regard to which the plaint mentioned that the defendant was erecting a shed which would result in closing these five windows. The application also prayed that the defendant be prohibited from proceeding to interfere with 17 other windows on the ground floor of the plaintiffs' premises. An *interim* injunction was issued.

On 12th January 1926 the *interim* injunction was confirmed without prejudice to the defendant's contentions regarding the

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(9) 6 Ind. Cas. 554; 11 C. L. J. 461.

(10) 63 Ind. Cas. 161; 33 C. L. J. 317.

(11) 80 Ind. Cas 827; 51 I. A. 293; A. I. R. 1924 P. C. 144; 26 Bom. L R. 651; 47 M. L. J. 23; 51 C. 631; 35 M. L. T. 169; (1924) M. W. N. 723; 29 C. W. N. 34; 20 L. W. 770; L. R. 5 A. (P. C.) 137; 23 A. L. J. 76; 3 Pat. L. R. 193; 6 P. L. T. 750 (P. C.).

22 windows. The Pleader for the defendant undertook not to block the remaining windows on the ground floor.

On 15th January the plaintiffs filed another application under O. XXXIX, rr. 1 and 2, C. P. C., praying for a mandatory injunction requiring the defendant to remove a corrugated iron shed put up by him against a part of the plaintiffs' northern wall which completely blocked up five of the 22 windows referred to in the plaint. The application is supported by an affidavit stating that the shed had been hurriedly completed by the defendant when the suit was filed, and before the injunction could be served on him. The application is also supported by the affidavits of two of the tenants of the plaintiffs who are affected by the closing of these five windows.

On behalf of the defendant an affidavit has been filed by Dhanjishah Cowasji Agha which on the point in question merely states that the shed put up by the defendant was completed "before the institution of the suit."

After hearing the arguments of the Pleaders for both sides, I was invited to inspect the premises in order to form my own opinion as to the necessity or otherwise of an *interim* mandatory injunction in respect of the five windows and the shed in question. The Pleader for the plaintiffs also stated that his clients were agreeable to advance the reasonable cost of pulling down the shed.

I have visited the premises in question. The tenements affected by the shed are single room tenements receiving ventilation on the northern side from the windows now closed by the shed and on the southern side from an entrance door and window. They receive neither light nor air from any apertures on the eastern or western side.

I think it would not be proper for me at this stage to say anything at all with regard to the effect on the tenements in question of the shed erected by the defendant which blocks up the five windows in these two tenements, as this is one of the materal questions in the suit, and anything said by me on this point would to some extent be a prejudging of a material question in the suit.

That I have the power to grant an *interim* mandatory injunction has been laid down by the Bombay High Court in a case reported as *Champsey Bhimji & Co.* v. *Jumna Flour Mills Co.* (1) and by the Madras High Court in a case reported as *Kandaswami Chetti* v. *Subramania Chetti* (2). In fact the Pleader for the defendant concedes that I have such power, but argues that a Court in its discretion would use this power only in very exceptional circumstances. The argument, no doubt, is sound, but each case is to be considered on its own merits. In the present case the structure put up by the defendant which blocks up the five windows with which I am dealing is a miserable, flimsy and dilapidated shed built of old corrugated iron sheets riddled with holes and full of cracks. This structure, I gather from the affidavits before me, has undoubtedly been hastily put up with hastily collected materials immediately before, if not partly after, the filing of this suit.

In these circumstances, without expressing any view with regard to the effect on the two tenements containing the five windows which are closed by the shed, I think I shall be exercising my discretion judicially in holding that the *status quo* should be maintained, and in ordering that on the plaintiffs' depositing the sum of Rs. 50 in Court, the defendant is to remove the obstruction to the five windows by the entire removal of the shed or in such other manner as may be agreed to by the Pleader for both parties. The sum of Rs. 50 deposited by the plaintiffs will be considered as costs in this suit.

P. B. A. *Injunction issued.*
Z. K.

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(1) 28 Ind. Cas. 121; 16 Bom. L. R. 566.

(2) 41 Ind. Cas. 381; 41 M. 206; 6 L. W. 140; (1917) M. W. N. 501; 33 M. L. J. 448.

PATNA HIGH COURT.

In the matter of APPEAL FROM ORIGINAL DECREE No. 135 OF 1922.
November 7, 1925.
Present:—Justice Sir Jwala Prasad, KT.
Sheikh ABDUL GHAFFAR AND ANOTHER —APPELLANTS
versus
MRS. F. B. DOWNING AND OTHERS— RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. III, r. 4—Court Fees Act (VII of 1870), Sch. II, Art. 10—Advocate, whether must file appointment in writing—Court fee, whether payable.

The effect of the Notification No. 57, dated the 16th September 1925, published in the Bihar and Orissa Gazette of the 7th October 1925, is to dispense with cl. (3) of r. 4 of O. III of the C. P. C., and an Advocate has now to file appointment in writing as any other legal practitioner in the High Court. [p. 842, col. 2.]

A power of appointment in writing filed by an Advocate, whether he is a Barrister or not, authorising him to make or do any appearance, application or act on behalf of his client, requires the Court-fee payable upon a *vakalatnama* as prescribed in Art. 10 of Sch. II to the Court Fees Act. [p. 844, col. 2.]

Reference made by the Taxing Judge under s. 5, Court Fees Act.

Mr. *S. M. Naimtullah*, for the Appellants.

Mr. *L. N. Singh* (Government Pleader), for the Respondent.

JUDGMENT.—This is a Reference to me as a Taxing Judge under s. 5 of the Indian Court Fees Act. The question is whether a particular document requires any stamp. The document is a letter of appointment given by two persons Sheikh Abdul Ghaffar and Sheikh Abdul Jabbar, appellants in First Appeal No. 135 of 1922 pending in this Court, to Mr. S. M. Naimatullah Barrister-at-law, who has been enrolled as an Advocate of this Court. The letter of appointment runs as follows:—

"Dear Sir,

"I/we hereby appoint you to act and plead on my/our behalf in the above-noted case and to make or withdraw all deposits that may have to be made or withdrawn on my/our behalf in connection with the said case." It bears the following heading:—"F. A. No. 135 of 1923, *Sheikh Abdul Ghaffar* (appellant-respondent) v. *F. B. Downing* (respondent-opposite party)."

This is in accordance with the Notification No. 57, dated the 16th September 1925, published in the Gazette on the 7th October 1925, which runs as follows:—

"Notwithstanding anything contained in O. III, r. 4 (3) of the First Schedule of the C. P. C., 1908, no Advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognised agent or by some other agent duly authorised by power-of-attorney to act in this behalf, or unless he is instructed by an attorney or Pleader duly authorised to act on behalf of such person."

Previous to the aforesaid notification no Advocate who was a Barrister was required to present any document empowering him to act by virtue of cl. (3) of r. 4 of O. III of the C. P. C. The first clause of that rule requires that the appointment of a Pleader to make or do any appearance, application or act for any person shall be in writing and shall be signed by such person or by his recognised agent or by some other person duly authorised by power-of-attorney to act in this behalf. The word "Pleader" is defined in s. 2, cl. (15), C. P. C., as "any person entitled to appear and plead for another in Court, and includes an Advocate, a Vakil and an attorney of a High Court." Therefore in order to exempt an Advocate from the necessity of filing his appointment by his client in writing, cl. (3) of r. 4 of O. III was enacted. The effect of the recent notification referred to above is to dispense with cl (3) of r. 4 and an Advocate has now to file his appointment in writing as any other legal practitioner in the High Court. The appointment is for the purpose of authorizing him to make or do any application or appearance or act on behalf of a suitor in this Court. Rule 1 of O. III enacts "any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except, where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent or by a Pleader duly appointed to act on his behalf." The subsequent rule defines "recognized agents" as including amongst others persons holding powers-of-attorney, authorizing them to make and do such appearance or applications or acts on behalf of such parties. Therefore the letter of appointment authorizing an Advocate to make or do appearance or application or act on behalf of any party in a litigation in this Court is a power-of-attorney. It is distinguishable from a power-of-attorney given to one who does not belong to the legal profession inasmuch as an Advocate is a Pleader within the meaning of the term as defined in the C. P. C. The letter of appointment being a power-of-attorney is not a document exempted from payment of stamp duty, for all powers-of attorney are chargeable to duty whether they come within the definition of a power-of attorney given in cl. (21) of s. 2 of the Stamp Act or are powers-of-attorney which go by the special name of *vakalatnamas mukhtarnamas*. The former are chargeable with the duty prescribed in Art. 48, Sch. I of the Indian Stamp Act and the latter under Art. 10, Sch. II of the Court Fees Act

There can, therefore, be no doubt that the letter of appointment in question in the present case filed by Mr. Naimatullah and for the matter of that any similar power of attorney called by whatsoever name filed by an Advocate whether he is Barrister or not must bear a stamp duty. Formerly the Barrister-Advocates were exempted from filing their appointment in writing and, therefore, there could be no question of their payment of any duty; but since they are now required to put in their appointment in writing for the specific purposes of making or doing any appearance, application or act on behalf of any suitor in this Court or in the Courts subordinate to this Court, the letter of appointment must be stamped with duty. Under the old rules also the power-of-attorney in question was chargeable with duty for it authorizes Mr. Naimatullah to withdraw deposits in Court on behalf of his client.

It was ruled long ago by Sir Edward Chamier, C. J., that if a Barrister wanted to perform the functions of a Pleader he must file a *vakalatnama*. *Vide* letter No. 5306 dated the 15th August 1917, from the Registrar of this Court to the Registrar of the Circuit Court wherein it is stated that Counsel must file a written authority similar to that required from Vakils to enable him to withdraw money. In the case of *Laurentius Ekka* v. *Dukhi Koeri* (1) I have referred to the case of Mr. Misra, a Barrister-Advocate of this Court, practising at Cuttack. He applied for refund of money on behalf of his client and filed a petition under his own signature without filing a *vakalatnama*. The learned Chief Justice observed that if Mr. Misra wanted to perform the functions of a Pleader he must file a *vakalatnama* This view has been maintained in this Court in several cases and a practice has been established of not allowing refund of money to an Advocate unless he is especially authorised in that behalf and files duly stamped *vakalatnama*. The stamp law requires that a refund of money can only be made to a person holding a power-of-attorney duly stamped, from the person on whose behalf withdrawal is sought. Therefore in so far as the letter of appointment in question authorises Mr. Naimatullah to withdraw deposits on behalf of his client it is chargeable with a Court-fee prescribed for a *vakalatnama* under Art. 10, Sch. II, of the Court Fees Act irrespective of the notification in question. The power-of-attorney authorized Mr. Naimatullah to act in the appeal on behalf of his client and the object of the Taxing Officer in referring the case to me is for the purpose of having a decision upon the general question whether a power of appointment which authorizes an Advocate to act, who is a Barrister or not, should be stamped as a *vakalatnama* under Art. 10, Sch. II, of the Court Fees Act, for he says that the question is one of importance and is likely to be raised frequently until the matter is finally decided. The general question is whether a power of appointment which authorizes an Advocate of this Court to make or do any appearance, application or act on behalf of his client, should be stamped as a *vakalatnama* under the Court Fees Act. The recent notification requires an Advocate of this Court, whether he is a Barrister or not, to file a power of appointment in writing for the purpose of acting, appearing or making application on behalf of his client. I have already held that such a power of appointment must bear a stamp as a power-of-attorney either under Art. 48, Sch. I read with cl. (21), s. 2 of the Stamp Act or as a *vakalatnama* or *mukhtarnama* under Art. 10, Sch. II, of the Indian Court Fees Act.

It was held in the Full Bench case of *Permanand* v. *Sat Pershad* (2) that a document purporting to authorize the person in whose favour it was executed, who was not a certificated *mukhtar* or Pleader, to appear and do all acts necessary for the execution of a decree of a Court, outside the United Provinces, which had been transferred to a Court in those Provinces for execution, required to be stamped as a power-of-attorney with a one rupee stamp and not as a *vakalatnama* or *mukhtarnama*. To the same effect is the Full Bench decision of the Madras High Court in a *Reference under s. 46 of the Indian Stamp Act*, 1879 (3). The distinction drawn is based on the principle that a Pleader should file a power of-attorney called *mukhtarnama* or *vakalatnama* as provided for in Art. 10, Sch. II, of the Court Fees Act, whereas any person who is not a Pleader may file a power-of-attorney as provided for in the stamp law.

Now the word "Pleader" as defined in s. 2, cl. (15) of the C. P. C., includes an Advocate, a Vakil and an attorney of a High Court and his appointment to make or do any appearnce, application or act for a suitor, will, for the purpose of r. 4, O. III, cl. (1), be an appointment of a Pleader. Inasmuch as the appointment in writing of a Pleader under r. 4, O. III requires a fee prescribed for the power-of-attorney known by the name of *vakalatnama* in Art. 10 of Sch. II of the Court Fees Act, a similar power of a appointment in writing filed by an Advocate, whether he is a Barrister or not, will also require a stamp prescribed for a *vakalatnama*. It is contended that the word "*vakalatnama*" applies to a power-of-attorney given to a Vakil and consequently a power-of-attorney given to an Advocate would not come under the word "*vakalatnama*" mentioned in Art. 10, Sch. II, of the Court Fees Act.

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(1) 92 Ind. Cas. 179; 4 Pat. 766; A. I. R. 1926 Pat. 73.

(2) 9 Ind. Cas. 617; 33 A. 487; 8 A. L. J. 378.

(3) 9 M. 358; 3 Ind. Dec (N. S.) 645.

Reference has been made to the Legal Practitioners' Act which recognizes three classes of practitionres called Vakils, Pleaders and Advocates and it is said that the word "*vakalatnama*" used in the aforesaid Art. 10 of the Court-Fees Act refers only to the power-of-attorney filed by a Vakil and not to a power-of-attorney filed by an Advocate. The argument ignores the fact that the Pleaders of the Subordinate Courts who are not Vakils in the special sense of the term as not being entitled to practise in the High Court are also required to file *vakalatnama* for which a fee is payable as prescribed in Art. 10, Sch. II, of the Court Fees Act. The word "Vakil" used in Art. 10 does not, to my mind, refer to the special class of practitioners known as "Vakils." It is a vernacular word and connotes in English a document which authorizes one person to represent another. The word "Vakil" itself means an agent or representative authorized to conduct any business on behalf of another person and in the Muhammadan Law, persons who conduct marriages on behalf of the principles are called Vakils. Persons who conduct a case in Court for another came subsequently to be called Vakils and such agents were recognized in the law Courts prior to the establishment of the British Courts in India and any Pleader practising in the lower Courts even now is popularly called a Vakil though he is not a Vakil in the special sense of the term which applies only to one entitled to practise in the High Court. The word "Pleader" as used in the C. P. C. includes a "Vakil" and an "Advocate" and in the Government of India Act s. 101 (*d*), a Vakil is described as a Pleader, of a High Court. Article 10 of the Court Fees Act uses the word "*vakalatnama*" as meaning a power-of-attorney executed for the conduct of any case in a Court and its various provisions indicate that the word "*vakalatnama*" relates to a power filed by a legal practitioner to conduct a case on behalf of a suitor irrespective of the class to which that legal practitioner belongs. The word "*vakalatnama*" there refers to a power-of-attorney filed by a Pleader as used in the C. P. C., s. 2, cl. (15) and O. III, r. 4. Therefore a power-of-attorney filed by an Advocate would also come under the category of *vakalatnama* mentioned in Art. 10 of the Court Fees Act, when it authorizes an Advocate for the purpose of conducting a case to make or do any appearance, application or act on behalf of his client.

I, therefore, hold that the power of appointment in writing filed by an Advocate, whether he is a Barrister or not, authorizing him to make or do any appearance, application or act on behalf of his client, would require a Court-fee payable upon a *vakalatnama* as prescribed in Art. 10, Sch. II, of the Act.

Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1703 OF 1924.
August 6, 1925.
Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.
SIVADAS DUTTA AND ANOTHER—DEFENDANTS—APPELLANTS
versus
BIRENDRA KRISTA DUTTA—PLAINTIFF—RESPONDENT.

*Landlord and tenant—Suit for rent by co-sharer landlord—Abatement, plea of, whether can be raised—Measurement, whether can be claimed—Civil Procedure Code (Act V of 1908), s. 11—Consent decree—Unnecessary finding—*Res judicata*—Rent suit, findings in, where binding.*

In a rent suit the tenants are not precluded from raising the question of abatement of rent by reason of the fact that the suit is one between one of several co-sharer landlords and the tenants, when the plaintiff co-sharer under an arrangement between himself and his other co-sharers and the tenants has been collecting his share of the rent separately. [p. 845, col. 2]

When deduction or abatement of rent is claimed by a tenant in a suit for rent he may insist on a measurement and an order for measurement must be made if a case justifying or necessitating the order is made out. [p. 846, col. 1.]

Res judicata by its very words means a matter upon which the Court has exercised its judicial mind, and a judgment passed on consent cannot be considered as a *judicium.* A consent decree, therefore, does not come within the rule of *res judicata* as contained in s. 11 of the C. P. C. It, however, raises an estoppel as much as a decree passed in *invitum* and the decree must be held binding as against the parties thereto unless there was want of jurisdiction or there were present circumstances which would go to vitiate the agreement on which the consent was founded. [p. 847, col. 2; p. 848, col. 1.]

Where a Court in a rent suit definitely determines the area of the land in the possession of the tenant and the annual rent payable for the same, it might be said that the determination is general and not limited to the particular years for which rent is claimed, and in a subsequent suit the tenant can only dispute the findings by proving that the area or the rent has since altered. [p. 848, col. 2.]

Where a decree is not based on a finding but is granted in spite of it and the party against whom the finding is arrived at is not able to challenge it on appeal, the finding cannot be regarded as necessary for the decision of the suit and does not operate as *res judicata.* [p. 849, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court, 24-Pergannas, dated the 15th of April 1924, affirming that of the Munsif, First Court at Baruipore, dated the 28th of November 1921.

Babus *Jogesh Chandra Ray, Sitaram Banerjee, Pankaja Kumar Dutt* and *Probodh Kumar Das*, for the Appellant.

Sir *Provash Chandra Mitter* and Babu *Shamadas Bhattacharjee*, for the Respondent.

JUDGMENT.

Mukerji, J.—The appeal arises out of a suit for rent. The plaintiff claims in his one-anna share, rent for certain lands at the rate of Rs. 89-10-10½ *gandas* per year from 1324 to 1327, alleging that the defendants hold 2610 *bighas* odd at a rental of Rs. 1,434-8-8 *gandas.* His case is that the area and the rental were fixed in a suit *inter partes*, *i. e*, Rent Suit No. 49 of 1887 of the First Court of the Subordinate Judge at Alipore. The defendants contend that they hold about 1002 *bighas* of land under two *pottas* dated 4th *Jaistha* 1242 and 5th *Falgoon* 1247, that since the grant of the said *pottas* the plaintiff and his co-sharers have got remission of 25 per cent. of the rent payable by them to the Government under whom they hold, and that by the terms of the aforesaid *pottas* the defendants are legally entitled to get a deduction at the same rate. They further say that some of the lands have been washed away or rendered unculturable and under the terms of the *pottas* they are entitled to a deduction on that ground as well. In order to have the rental assessed they applied for a measurement of the lands. As regards Rent Suit No. 49 of 1887 their case is that the result thereof is of no consequence so far as the plaintiff is concerned.

The Courts below have decreed the plaintiff's suit. The Court of first instance held that the defendants are bound to pay rent to the plaintiff at the rate claimed and that in a previous rent suit between the parties, *viz.*, Suit No. 447 of 1917 it had been held that that was the rate at which they should pay. It refused the application for measurement and left the question as to the area of the rent-land open and undecided. It also observed in its judgment that the *pottas* had not been proved in the case and so no interpretation of the *pottas* was possible, and that the defendants had failed to prove what quantity of land, if any, had been washed away. The Court of Appeal below proceeded upon the view that no plea of abatement could be given effect to in a suit in which all the co sharer-landlords are not parties. It also held that the decree in Suit No. 49 of 1887 was binding between the parties as to the rental, as also the decree in the subsequent suit for rent, namely, Suit No. 447 of 1917. The defendants have thereupon preferred this appeal.

In our judgment of the 27th February 1925 we decided that the learned Subordinate Judge was wrong in holding that the defendants were precluded from raising the question of abatement of rent by reason of the constitution of the suit, namely, that it was a suit between one of several co-sharer-landlords and the tenants, when the said co-sharer under an arrangement between himself and his other co-sharers and the tenants has been collecting his share of the rent separately. To this decision we still adhere.

Then arises the question whether the defendants are entitled to have the lands measured in order that their plea of abatement may be given effect to. As regards this part of the case I confess I was under a misconception and I did not appreciate the exact position until Sir Pravas explained the facts to us.

The question whether the defendants are entitled to have the lands measured could not and in point of fact did not arise in any of the earlier suits, and standing by itself that question cannot be regarded as concluded upon any principle of *res judicata* or any such similar principle. When deduction or abatement is claimed by the tenant in a suit for rent he may insist on a measurement, and an order for measurement must be made if a case justifying or necessitating the order is made out. In the present case the defendants' application for an order for measurement has been refused; and in order to determine whether it has been rightly refused or not we must examine the grounds on which the application was based, or rather the grounds on which abatement was claimed.

The defendants' plea of abatement of rent rests on the terms of the *pottas* of 1242 and 1247 referred to above. To put the matter more precisely we have to refer to some documents which have been freely referred to in the arguments before us, though some of them, *e. g.*, the *pottas* of 1242 and 1247, are not on the record. The defendants, as I have said, had to make out a case for measurement, and if we are to proceed merely on the materials on the record we must be constrained to hold that the necessary evidence has not been adduced by them. It would not, however, be right to dispose of the appeal on that ground as the relevant documents, on which the decision of the question depends, have been placed before us and have been referred to by both the parties, and the facts in so far as they are necessary for the determination of the question are either undisputed or indisputable.

It appears that there is no controversy as to the rent payable under the lease of 1242. There is, however, a stipulation in the lease of 1247 which runs thus: "As the Government will in my case exempt embankments, *dams*, *chowkas*, pasturage and irreclaimable lands from assessment, so (we) shall allow exemption in your case." The landlords subsequently obtained a concession from the Government exempting them from assessment to the extent of one-fourth of the entire grant for ever. The defendants, therefore, claim that under the stipulation contained in the aforesaid terms of the lease they are entitled to a deduction of one-fourth of the rental, and for that purpose they want the lands to be measured. In para. 10 of the written statement the defendants further alleged that large quantities of land have been washed away or rendered unfit for cultivation owing to influx of saltwater and that they are entitled to have the lands measured and claim abatement of rent on that ground under the terms of the *pottas*. Evidently, therefore, there were two grounds on which the measurement was asked for, that is to say firstly to support the claim on the ground of deduction of 25 per cent, and secondly to support the claim on the ground of abatement for diminution of area.

As regards the second of the aforesaid two grounds, it may be disposed of in a few words. The *pottas* are not in and it is not possible to say whether the right which the defendants claim is reserved to them. Moreover the learned Munsif observes in his judgment that, "the defendant (*sic*) has not examined any witness and has failed to prove what quantity of his land has been washed away." It is clear, therefore, that this ground is not supported in any way, and no case has been made out for a measurement on this ground.

The other ground requires serious consideration. The plaintiff's case is that by reason of the decree in Suit No. 49 of 1887 the defendant is precluded from claiming the deduction of one-fourth of the rental as stipulated for in the *pottas* of 1247. The facts relating to that suit are these: In that suit five persons, *viz.*, Bhupendra, Jnanendra Narendra, Jatindra and Sukhamoyee who were owners of 3-annas15-gandas. share sued the appellant's predecessor Mr. A. B. Mitter for rent for the years 1290 to 1292 *B. S.* for 13 annas share of the rent making all the other co-sharers *pro forma* defendants. These co-sharers were ranged in two groups; the first group consisting of *pro forma*-defendants Nos. 1 to 13, who were the owners of the remainder of the 13-annas. share, and the second consisting of the *pro forma* defendants, one Uma Sundari who was the owner of the remaining 3-annas. share which was not included in the suit. Soon after the institution of the suit some of the *pro forma* defendants of the first group including one Haridas Dutt, the *pro forma* defendant No. 2 in the suit, who was the predecessor of the plaintiff in this suit got themselves transferred to the category of the plaintiffs. The other *pro forma* defendants of this group and also *pro forma* defendant Uma Sundari, the owner of the remaining 3-annas share remained *pro forma* defendants as before. In that suit rent was claimed on the allegation that the suit-lands were 1265 *bighas* 10 *cottas* 6 *chittaks* and at the rate mentioned in the *pottas* that is to say

Rs. 715 and odd. Mr. Mitter, the appellants' predecessor pleaded in that suit that he was entitled to the deduction on the basis of the *pottas.* One of the issues framed in the suit was : "What is the amount of *jama* payable by the defendant? Is not the defendant entitled to get a deduction of one-fourth of the rental according to the terms of the *potta* dated the 5th *Falgoon* 1247 ? This issue was decided against the defendant Mr. Mitter by the Court of first instance. He appealed to the District Judge who allowed him the deduction claimed. The five original plaintiffs then preferred an appeal to this Court with the principal defendant Mr. Mitter, the added plaintiffs amongst whom was Haridas Dutt, and the other co-sharer defendants as respondents in that appeal. Of the respondents the only one who appeared in the appeal was Mr. Mitter. That appeal was disposed of by this Court (Maclean, C. J. and Banerjee, J) on the 24th April 1890 by the following order :—" By consent let this case be remitted to the Court of first instance which is to depute an *Amin* to go to the place and measure the culturable lands included within the defendants' holding and the amount of rent which will be payable by them will be assessed upon that measurement. The costs will be in the discretion of the Court of first instance". On this order the case went before the Trial Court and a measurement being made a report was submitted by the *Amin* who made the measurement. The Subordinate Judge then took up the matter and in his judgment there appears the following observation: " The defendant cited the Civil Court *Amin* as a witness on his own behalf, but declined to examine him, and nothing has been shown to induce me to think that the *Amin's* measurement is inaccurate. I must under the circumstances find the quantity of culturable land within the defendants' holding to be 2610 *bighas* 9½ *cottas*". The learned Judge, however, held that the quantity of land being in excess of the area stated in the plaint, he should make a decree in favour of the plaintiffs for the amount claimed. A decree was very carefully prepared and the relevant portions of that decree run as follows :—

" The claim of the plaintiffs and the *pro forma* defendants in respect of their 13-annas share be decreed. Out of Rs. 2733-6 2¼ *gandas* claimed Rs. 789-14-14¾ *gandas* due in the share of the plaintiffs Nos. 1 to 5 be decreed in their favour with interest at the rate of 12 per cent. per annum from the 11th April 1887, the date of suit to the date of realization and that the principal defendant No. 1 the Official Trustee do pay the said amount to the plaintiffs Nos. 1 to 5 from out of the estate of the late Srinath Dutt". Then follow certain directions as to costs in favour of the plaintiffs Nos. 1 to 5. Thereafter, " It is further ordered and decreed that the rent of the land in arrears be assessed as follows :—For 1086 *bighas* 4 *cottas* 8 *chittaks* of culturable land in plot No. 1 of the *potta* dated 4th *Jaistha* 1242, Rs. 577-3-0. For 456 *bighas* 18 *cottas* of culturable land in plot No. 2 and 1067 *bighas* 5 *cottas* of culturable land in plot No. 3 of the *potta* dated 5th *Falgun* 1247, Rs. 577-3annas and Rs. 857-5-8¼ *gandas* respectively. As regards the balance of the amount in claim, *viz.*, Rs. 1,943-7-8 *gandas* the *pro forma* defendants do get the same together with interest at the rate of 12 per cent. per annum from the 11th April 1887 the date of the institution of the suit, from the defendant No. 1 out of the said estate, that is to say the co-plaintiff Haridas Dutt will get in his own 1-anna share Rs. 210-10-6-9. 12." Then follow the amounts which the other co-plaintiffs would recieve.

This decree does not purport to have been passed in the presence of the Pleaders of the co-plaintiffs. Nevertheless it was a decree *inter partes* as between the predecessors of the parties to the present suit. Of this decree two views may possibly be taken. As between the original plaintiffs and Mr. Mitter it was a decree passed on the basis of a consent order, and as between the co-plaintiff Haridas Dutt and Mr. Mitter it was passed, not on the basis of a consent order, but in the ordinary way in a contested proceeding. The effect of this decree judged from either point of view, in my opinion, is practically the same.

Res judicata by its very words means a matter upon which the Court has exercised, its judicial mind, and a judgment passed on consent cannot be considered as a *judicium.* A consent decree, therefore, does not come within the rule of *res judicata* as contained in s. 11 of the C. P. C. It, however, raises an estoppel as much as a decree passed in *invitumm Nicholas* v. *Asphar* (1), *Laksmishankar Devshankar* v. [*Vishnuram* (2), *Bai-*

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(1) 24 C. 216 at p. 237; 12 Ind. Dec. (N. S.) 810.

(2) 24 B. 77; 1 Bom. L. R. 534; 12 Ind. Dec. (N. S.) 588.

shankar v. *Morarji* (3) and *Kumara Venkata Perumal* v. *Thatha Ramaswamy Chetty* (4).] In so far as the decree was based on the consent order, and purported to proceed on the consent as between the original plaintiffs and Mr. Mitter it must be held binding as against them unless there was want of jurisdiction, such as was the case in *Rajlakshmi Dassi* v. *Katyayani Dassi* (5), and some of the authorities cited and discussed therein or unless there were present some circumstances which would go to vitiate the agreement on which the consent was founded, as was the case in *Huddersfield Banking Co.*, v. *Lister* (6) or *Great North West Central Railway* v. *Charlebois* (7). The decree, therefore, although it goes beyond the scope of the suit, which must be taken to have been enlarged by consent, is binding as between the consenting parties and their successors-in-interest.

As between Haridas Dutt and Mr. Mitter it was not a decree based on consent, but a decree passed in a contested proceeding, wherein Haridas Dutt cast in his lot with the original plaintiffs and took no active part in the litigation and secured ultimately a decree as against Mr. Mitter giving him certain rights. Consent was given by Mr. Mitter to have the decree which the learned District Judge had made in his favour allowing him deduction of the 25 per rent. on the basis of the *pottas* set aside, the scope of the suit was enlarged and a decree was passed in the suit, the suit being finally heard and determined in his presence. He waived the objection which he had taken to the claim on the ground of the deduction to which he was entitled, and allowed a decree to be passed declaring the quantity of the land, and the rental to be paid for it. This objection not only might and ought to have been made a ground of defence in the former suit, but was actually taken therein. An issue was directly raised on it, and it was decided against Mr. Mitter in the Trial Court and in his favour in the Appellate Court. He allowed the decision of the latter Court to be set aside, waived the objection and allowed a decree to be passed fixing the quantity of land and assessing the rental thereon and he took no appeal from this decree. In my judgment the same matter can no longer be pleaded in defence to the plaintiff's claim and the defendant's plea as to deduction based on the aforesaid term of the *pottas* must be ruled out as being barred by the principle of *res judicata*.

But then it is said that the cause of action in the present suit is different from what it was in the suit of 1887 and, therefore, the defendants are entitled to raise the question again. I have carefully considered this matter, but, in my opinion, in the face of the declaration in the decree to which I have referred it is impossible to take the view that the defendant Mr. Mitter merely failed to prove in the said suit his right to the deduction he claimed—a position which would have enabled him or his successors to raise the defence in a subsequent suit; but that the only view possible to take of the matter is that in the said previous suit the Court definitely determined the area of the land in the defendant's possession and the annual rent payable for the same. The distinction has been very clearly pointed out in the decision of this Court in the case of *Nil Madhab Sarkar* v. *Brojo Nath Singha* (8) where this is what is stated, "But the cause of action is in this case different, each year's rent being in itself a separate and entire cause of action, and the mere failure of the defendant to prove what he tried to prove in the previous suit would not, we think, prevent him from proving it in this. The case might have been different if the Court had in the previous suit definitely determined the area of the land in the defendant's possession and the annual rent payable for the same. It might then be said that the determination was general, and not limited to the particular years for which rent was claimed, and that the defendant could only succeed in the present suit by proving that the area and the rent has since altered". In my opinion the present case comes within the class of cases last mentioned in these observations.

It then becomes necessary to decide whether the decision of Suit No. 447 of 1917 of the First Court of the Munsif at Baruipur operates as *res judicata* or not. That suit was between the parties to the present suit and was in respect of rent for the same lands for the years 1321 to 1323. The

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(3) 12 Ind. Cas. 535; 36 B. 283; 13 Bom. L. R. 950.

(4) 9 Ind. Cas. 875; 35 M. 75; (1911) 1 M. W. N. 290; 9 M. L. T. 487; 21 M. L. J. 709.

(5) 12 Ind. Cas. 464; 38 C. 639.

(6) (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 70[illegible] 43 W. R. 567.

(7) (1899) A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35.

(8) 21 C. 236 at p. 239; 10 Ind. Dec. (N. S.) 789.

Munsif held as to the plea for deduction of 25 per cent. that the decree in Suit No. 49 of 1887 operated as *res judicata*. The Subordinate Judge on appeal was of a different opinion but he decreed the plaintiff's suit in full, so that the plaintiff could not prefer any appeal against this adverse finding of the Subordinate Judge on the questions of *res judicata*. Under circumstances such as these it has been repeatedly held that the finding cannot operate as *res judicata*, the decree of the learned Subordinate Judge not being based on the finding but inspite of it and such a finding not being necessary for his decision: *Rango Balaji* v. *Mudiyeppa* (9), *Nando Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (10) and *Thakur Magundeo* v. *Thakur Mahadeo Singh* (11).

Lastly in view of the arguments advanced before us it is necessary to refer to the result of a few other litigations in some of which, it is said, a view contrary to which I have taken has been adopted by this Court of the effect of the decree in Suit No. 49 of 1887.

The first one is the litigation which culminated in R. A. Nos. 373 and 450 of 1897. These appeals arose out of Suit No. 13 of 1895 in which the five original plaintiffs sued the predecessors of the present defendants for their 3 annas-15-gandas share of the rent. The suit finally came up to this Court on appeal. This Court, Maclean, C. J. and Banerjee, J., overruled the defendants' contention that the decree had gone beyond the limits of the suit held that the decree was binding between the parties to the consent, and that the true view to be taken was that by consent of the original plaintiff and the defendant and the other parties not objecting the scope of the suit had been enlarged. In the judgment in these appeals there is, if anything a declaration very much against the appellant's contention, a declaration to the effect that the decree of the previous suit is binding on the appellant as regards future rents. This declaration seems to be too general, but what the precise meaning of it is need not be enquired into in the present appeal.

The next one is S. A. No. 75 of 1903. It arose out of a suit for rent against the appellant No. 1 and another instituted by the heirs of Umasundari the owner of the 3-annas share. Umasundari's interest was outside the scope of Suit No. 49 of 1887. This Court, Mitra, J., held that she was not competent to take advantage of the decree.

The next one is S. A. No. 1867 of 1911. In this suit the plaintiffs who claimed not merely the shares of the original plaintiffs but also of some of the co-sharers, who were not made co-plaintiffs sued the appellants for rent. This Court (Chatterjea and Beachcroft, JJ.) held that so far as the share of the original plaintiffs was concerned the decree was binding but in respect of the shares which the plaintiff obtained from the *pro forma* defendants, the co-sharers of the remainder of the 13 annas share, who had not transferred themselves to the category of the plaintiffs the decree was not binding.

None of these decisions appear to me to be in conflict with the view I take.

The result, therefore, is that, in my judgment, no ground has been made out which would support a prayer for measurement such as was put forward on behalf of the defendant in this suit and the suit has been rightly decided by the Courts below. The appeal fails and should accordingly be dismissed with costs.

As regards the proceedings in review I desire to observe that the incorrect information supplied by the parties to their learned Vakils was responsible for the error in our judgment of the 27th February 1925, and that, therefore, the costs of these proceedings should be borne by each party for himself or themselves.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

(12) 88 Ind. Cas. 654; 41 C. L. J. 330; A. I. R. 1925 Cal. 783.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 280 OF 1922.
December 1, 1925.
Present:—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.
Thakur SHEORAM SINGH AND OTHERS
—PLAINTIFFS—APPELLANTS
versus
BABU SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 132, 147—Transfer of Property Act (IV of 1882), s. 58—Mortgage by conditional sale—Suit to recover money due—Limitation, commencement of—Option given to

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(9) 23 B. 296; 12 Ind. Dec. (N. S.) 197.
(10) 13 C. 17; 6 Ind. Dec. (N. S.) 508.
(11) 18 C. 647; 9 Ind. Dec. (N. S.) 432.

mortgagee—Waiver—Interpretation of Statutes.

Article 147 of Sch. I to the Limitation Act is applicable only to the class of mortgage generally known and defined by the Transfer of Property Act as an English mortgage. A suit to recover money due on a mortgage by conditional sale is governed by Art. 132 of Sch. I to the Limitation Act and limitation begins to run from the time when default is made in payment of an instalment of interest, where the mortgagee is given the right on such default to sue for the whole amount. [p. 850, col. 2; p 851, col. 1.]

There is a presumption that the Legislature when it repeats in a latter Act an expression which has obtained a settled meaning by judicial construction, intends the words to mean what they meant before. [p. 850, col. 2.]

Per *Kanhaiya Lal, J.*—The essential characteristic of a mortgage by conditional sale is that on the breach of the condition of re-payment the contract executes itself and the transaction is closed and becomes one of absolute sale to be enforced in a particular manner. [p. 853, col. 1.]

A mortgage-deed provided that if interest for any six months remained unpaid, the mortgagee shall have power either to bring a suit in respect of the entire mortgage-money and interest without waiting for the expiry of the stipulated period or to wait for the payment of the principal and interest and compound interest till the expiry of the term fixed. In a suit to recover the amount of the mortgage-money:

Held, that despite the authority given to the mortgagee by the mortgage-deed, the operation of the clause which gave an option to the mortgagee for his own benefit could not be waived so as to prevent or postpone the starting of limitation against him and that limitation began to run from the date when interest for a period of six months became due and remained unpaid. [p. 852, col. 2.]

First appeal from a decree of the Second Subordinate Judge, Cawnpore, dated the 10th of April 1922.

Dr. *K. N. Katju*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.

Walsh, J.—The main question, which has been argued in a very interesting discussion in this appeal, is the question which Article of the Limitation Act applies to this mortgage. The learned Judge in the Court below has applied Art. 132. If this is a mortgage by conditional sale, that would be right. We are of opinion that it is a mortgage by conditional sale. In the first place the parties so described it. That would not be conclusive, but the vernacular word employed is always used as meaning mortgage by conditional sale, and the general form of the document corresponds to such mortgages as drawn in these Provinces. In the second place there is a provision that if default is made in payment of interest, at the time of such default the mortgage-deed shall be treated as a sale deed. In other words it is ostensibly a sale, or perhaps it would be more accurate to describe it as a bargain and sale to be defeated by a condition subsequent, namely, the payment of interest. But if default is made in the payment of interest, then it becomes a real sale, and the definition in s. 58 of the Transfer of Property Act provides that where a mortgagor ostensibly sells on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or that on payment being made the sale shall become void, such transaction is called a mortgage by conditional sale. Thirdly, the plaintiffs by their plaint did not ask for foreclosure or sale, or for a sale at all, but sued for the money or for foreclosure, clearly treating their rights as governed by the law applicable to a mortgage by conditional sale in respect of which a decree for sale is prohibited by s. 67. We are asked, on the other hand, to hold that Art. 147 applies on the ground that this was not really a mortgage by conditional sale, and (although not an English mortgage), a mortgage in respect of which the mortgagee might sue for foreclosure or sale, and we were asked to apply Art. 147 to such a document in spite of the judgment of the Privy Council in the case of *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1) We are unable to do so. We regard the judgment of the Privy Council in that matter as peremptory and binding upon us. Whether or not their Lordships' observations were necessary for the disposal of the case, they were considered observations delivered for the express purpose of setting at rest a question which was much controverted at the time in India, and they held that Art. 147 was applicable only to the class of mortgage generally known and defined by the Transfer of Property Act as an English mortgage. They gave what they described as preponderating reasons for adopting this view. The second was that there was a presumption that the Legislature, when it repeated in a later Act an expression which had obtained a settled meaning by judicial construction, intended the words to mean what they meant before. That reason applies with even greater force to their Lordships' view, at the present day than it did then. The judgment was delivered in 1907. The provisions of the Transfer of Property Act were re-enacted so far as they apply to remedies in respect of mortgages in the First Schedule to the C. P. C. of 1908, and Art. 147 of the Limitation Act has been re enacted in the Limitation Act of 1908 without change, and, therefore, bearing the narrower interpretation given to it by the judgment of the Privy Council to which we have referred. We hold, therefore, that Art. 132 applies to this case. It follows that the claim is barred unless the plaintiffs establish payment of interest sufficient to take the case out of the mischief of the Statute. We are bound in this Court where the law has been finally settled until it is reversed elsewhere, to hold the view that in a mortgage in this form the Statute begins to run from the time when default is made in payment of an instalment of interest, where the mortgagee is given the right on such default to sue for the whole amount. The question of the payment of interest is a question of fact which the learned Judge has disposed of in an emphatic judgment. It is not necessary to enter into the details of this question. It is not quite clear whether or not the learned Judge meant to hold that all the entries of payments in the plaintiffs' books were false. In some respects, however, the criticisms which might be made on the plaintiffs' case are stronger than the learned Judge recognised. There is absolutely no excuse for the failure of the plaintiffs to enter their books in the list required by law under O. VII, r. 14. The failure to do so was, in any view, a piece of gross neglect by Brij Narain their Vakil. He produced them almost at the last moment, namely, in March. The defendants entered a strong objection. The learned Judge gave leave for their production, but was obviously unfavourably impressed by the failure of the plaintiffs to give notice at the proper time of the existence of these documents. The deliberate withholding of these books was a flagrant breach of the endorsement which the plaintiffs themselves and their Vakil had put on the plaint, that whatever papers were in the possession of the plaintiffs would be filed. These papers were in the possession of their Vakil, either as an ex-arbitrator or as their Vakil or as both. From the moment that he chose to act as their Vakil he could not deny that he held them as the plaintiffs' representative, and it is not to be wondered at, inasmuch as they were withheld for some weeks, and the witnesses who were called to support them were also called late in the hearing, that the Judge regarded them with suspicion. Even if the books contain genuine entries of actual payments made by the family of the defendants, the entries entirely fail to identify such payments with a liability for interest in respect of this bond. There is no reference to the principal due under the bond. There were admittedly other transactions with the debtor. Some of the entries undoubtedly related to other transactions, and none of them can be clearly identified as relating to this transaction, though some of them, if genuine, may have done so. The total entries shown by the plaintiffs in their books amount to over Rs. 1,500, and they alleged in the plaint that only Rs. 600 had been paid. Their oral evidence entirely failed to explain anything. In our view the plaintiffs failed to discharge the onus which lay upon them, and nothing has been shown which would justify us in differing from the learned Judge upon these findings of fact. The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

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(1) 30 M 426; 9 Bom. L. R. 1104; 4 A. L. J. 625; 11 C. W N. 1005; 6 C. L. J. 379; 2 M. L. T. 333; 17 M. L. J. 444 3 I. A. 186 (P. C.).

Kanhaiya Lal, J.—I wish to add a few observations as to the questions which have been argued before us in the course of the hearing. The plaintiffs sought to recover money due on a mortgage effected by Darshan Singh the predecessor of the defendants, in favour of Prag Singh, the predecessor of the plaintiffs, on the 7th of August 1903. The mortgage-deed provided for the payment of the mortgage-money with interest thereon at eleven-annas per cent. per mensem within seven years, and further contained a stipulation that the interest accruing due for the half year shall, if not paid up, be added to the principal amount, and that if interest for any six months remained unpaid, the mortgagee shall have power either to bring a suit in respect of the entire mortgage money and interest without waiting for the expiry of the stipulated period or to wait for the payment of the principal and interest and compound interest till the expiry of the term fixed. It is further stated that both the conditions were left entirely to the choice or option of the mortgagee, that the mortgagee had liberty to act in accordance with either of those conditions, that is to say either to bring a suit in respect of the entire mortgage money and interest without waiting for the expiry of the stipulated period, or to waive the default and wait for the payment of the principal and interest and compound interest agreed till the expiry of the term fixed. In fact the mortgagor covenanted that in no circumstances he shall have power to raise any objection or make any refusal, and he further agreed that if at the stipulated time the money remained unpaid, the mortgage-deed shall be treated as a sale-deed, and the mortgage-money as the sale-consideration.

The allegation of the plaintiffs was that they had received Rs. 600 on account of interest at different times from one of the defendants, and they sued for the foreclosure of the mortgage in case the mortgage-money was not paid within such time as might be fixed by the Court for the purpose.

The defendants pleaded *inter alia* that they had made no payments towards the mortgage-money, and that the claim was barred by limitation. There were other pleas raised in defence with which this appeal is not concerned.

The Court below dismissed the suit holding that the plaintiffs had failed to establish that the defendants had made any payments towards interest as such within the meaning of s. 20 of the Limitation Act (IX of 1908). On the other points raised in the suit it gave its findings in favour of the plaintiffs. The sole question for determination in this appeal, therefore, is whether the claim of the plaintiffs is within time, either by reason of the covenants entered in the mortgage-deed or of the payments alleged to have been made by the defendants. The Court below applied Art. 132 of the Indian Limitation Act which provides a limitation of 12 years for a suit to enforce payment of money charged upon immoveable property, and that period is to be computed from the time when the money becomes due. Under one covenant that money was to have fallen due on the expiry of seven years unless re-paid at any time within that period. By another covenant it could have been claimed on the non-payment of interest for any six months unless the default was waived by the mortgagee, who was given the right or an option by the contract of mortgage to disregard it and wait till the expiry of the longer term. The argument addressed to us here is that the contract gave the mortgagee authority, option or liberty to act in either one of the two ways mentioned in the deed on the happening of a certain event, and it was open to him, to waive the one and adhere to the other. In other words it is suggested that the effect of the waiver by the mortgagee authorized by the contract would be not to stop the running of limitation, but to postpone the cause of action or starting of it, till the other default provided for by the deed had taken place. Whatever might be said in favour of the view contended before us, the Full Bench decision in the case of *Shib Dayal* v. *Meharban* (2) is conclusive on the matter, and we are constrained to hold that despite the authority given by the contract, the operation of the clause which gave an option to the mortgagee for his own benefit could not be waived so as to prevent or postpone the starting of limitation against him.

It is argued, however, that the mortgage-deed in question is in terms not a mortgage by conditional sale, and that under O. XXXIV, r. 4, cl. (2) the plaintiffs could be given either a decree for foreclosure or for sale within the meaning of Art. 147 of the Indian Limitation Act, which was introduced for the first time by Act XV of 1877. As observed by their Lordships of the Privy Council in the case of *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1), suits of the present class were governed before Act XV of 1877 was passed by Art. 132 of Act IX of 1871, which referred to suits for money charged upon immoveable property. The language of Art. 132 has since then been slightly altered. The Limitation Act of 1871 provided a limitation of 60 years for a suit to recover possession of the immoveable property mortgaged from the mortgagee from the date when the right to recover possession accrued. There was no provision in that Act for suits "to redeem" a mortgage other than a mortgage accompanied by possession. By Act XV of 1877 suits against the mortgagee to redeem a mortgage were also provided for, and it is suggested that in order to make the remedies of the mortgagor and the mortgagee co-extensive, a departure was deliberately made, when Art. 147 was introduced for the first time. Whether this was so or not, the decision of their Lordships in the case of *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1) and the earlier decision of Wilson and Porter, JJ., in the case of *Girwar Singh* v. *Thakur Narain Singh* (3) which they followed does not leave it any longer open to us to determine how far Art. 147 of the Limitation Act of 1877 was intended to apply to suits for foreclosure like the present.

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(2) 69 Ind. Cas. 981; 20 A. L. J. 819; A. I. R. 1923 All. 1; 45 A. 27 (F. B.).

(3) 14 C. 730; 7 Ind. Dec. (N. S.) 484 (F. B.).

The learned Counsel for the plaintiffs-appellants has argued that the mortgage in question is an anomalous mortgage within the meaning of s. 78 and not a mortgage by conditional sale, and reading s. 67 of the Transfer of Property Act with O. XXXIV, r. 4, cl. (2) of the C. P. C., a decree for either foreclosure or sale can be passed in the present case. The mortgage-deed does not purport to provide for the immediate sale of the property conditionally or otherwise. It only provides for the enforcement of the deed by foreclosure at the expiry of the stipulated period, but as observed by their Lordships of the Privy Council in the case of *Thumbusawmy Moodelly* v. *Hossain Rowthen* (4) the essential characteristic of a mortgage by conditional sale is that on the breach of the condition of re-payment the contract executes itself and the transaction is closed and becomes one of absolute sale to be enforced in a particular manner. Section 58 of the Transfer of Property Act defines a mortgage by conditional sale as a transaction by which the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute. The deed in the present case is not exactly worded in that form; but in substance it adopts that form, and as pointed out in the case of *Ali Ahmad* v. *Rahmatullah* (5) such defaults in which deeds are generally executed are intended to operate as deeds of mortgage by conditional sale. Article 147 of the Limitation Act IX of 1908, cannot, therefore, be applied to the case. The only other question is that of the alleged payments said to have been made towards interest, but the account books produced only go to show that there was a general account between the mortgagor and the mortgagee in connection with this deed and certain other advances independently made by the mortgagee, about which an arrangement appears to have been made by the mortgagor to pay the moneys due by instalments of Rs. 400 per year. The account books contain certain entries showing payments made towards these instalments, but they do not show that these payments were made towards interest *as such* due on the deed in suit, and the oral evidence produced on the point to supplement what is not entered in the books cannot be believed. The Court below was, therefore, justified in holding that these payments if made, did not save limitation.

I agree in the order proposed.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

Second Civil Appeal No. 209 of 1923.
September 4, 1925.
Present :—Mr. Justice Reilly.
KODURI VENKATARAMAYYA—
Defendant—Appellant
versus
THUMULURI PUNNAYYA—Plaintiff—
Respondent.

Evidence Act (I of 1872), s. 115—Specific Relief Act (I of 1877), s. 41—Minor, execution of sale-deed by, representing to be adult—Suit to set aside alienation—Minor whether estopped—Refund of purchase-money on setting aside sale.

Where a minor represented himself to be a major and joined in the execution of a sale-deed and the alienee believed in that representation and acted on it in taking the sale, in a suit by him on attaining majority for a declaration that the sale-deed was void against him on the ground that he was a minor on the date of sale:

Held, (1) that the plaintiff was not estopped from proving that he was a minor at the date of sale;

(2) that under s. 41, Specific Relief Act, the decree in favour of the plaintiff could be made conditional on the plaintiff re-paying the consideration paid by the alienee in respect of the sale.

Second appeal against a decree of the Subordinate Judge, at Masulipatam, in A. S. No. 163 of 1921, preferred against that of the Court of the Additional District Munsif, Gudivada, in O. S. No. 112 of 1920.

Mr. *B. Satyanarayana*, for the Appellant.

Mr. *B Somayya*, for the Respondent.

JUDGMENT.—Plaintiff and his elder brother sold certain property to defendant under Ex. I in 1915. He has sued for a declaration that Ex. I is void so far as i relates to his one-half share of the property on the ground that he was a minor when he joined his brother in executing it and for the partition and recovery of his one-half share. The District Munsif dismissed the suit; but on appeal the Subordinate Judge has made the declaration prayed for and has decreed that the property be divided and plaintiff's half share be delivered to him; but he has made all this conditional on plaintiff depositing in Court within 3 months Rs. 1,250, that is, half the amount of the purchase-money paid by defendant, failing which the suit will be dismissed. Defendant appeals to this Court.

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(4) 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 193; 3 Sar. P. C. J. 531; 1 Ind. Dec. (N. S.) 1 (P. C.).

(5) 14 A. 195; A. W. N. (1892) 42; 7 Ind. Dec. (N. S.) 495.

It has been found by both the lower Courts that plaintiff was a minor when he executed Ex. II but that he dishonestly represented to defendant at that time that he was a major and that defendant believed that representation and acted on it in taking the sale-deed from plaintiff as a major that is, that plaintiff intentionally caused defendant to believe that he was a major, and to act on that belief. Both the lower Courts are of opinion that plaintiff is not estopped in this case from pleading minority. Defendant alleged in his written statement that plaintiff was a major at the date of Ex. I. It is urged for defendant that, as that was defendant's case and as it was found that plaintiff intentionally caused defendant to believe that he was a major and to act on that belief, the lower Courts were not at liberty to find that plaintiff was a minor at the date of Ex. I. Plaintiff was estopped under s. 115 of the Evidence Act from denying that he was a major at that date, and, therefore, we have no knowledge, and must carefully guard ourselves against acquiring any knowledge, that he was not then a major. That appears to be the logical result of applying s. 115 of the Evidence Act to the facts found in this case, there being nothing in the section itself to confine it to persons other than minors or to preclude it from affecting a minor who in fact has intentionally caused another party to believe a thing to be true and to act upon that belief. But that is the very position taken up in *Dadasaheb Dasrathrao* v. *Bai Nahani* (1) which was expressly dissented from by Coutts-Trotter, J., (now C. J.) in *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya* (2). In that case, in which the prayers were similar to those in this case, it was proved that at the time of the sale-deed the plaintiff was a minor but not that he had represented that at that time he was a major. It is not, therefore, as accepted by the lower Courts, an authority that plaintiff is not estopped in the present case from pleading his minority. But it has been brought to my notice that is A. S. No. 89 of 1920 on the file of this High Court (unreported) in which the Original Court had found that a defendant who had executed a mortgage-deed when a minor fraudulently representing to the mortgagee that he was a major and causing the mortgagee so to believe, was liable to refund the mortgage-money and eventually made a preliminary decree for sale as on a valid mortgage. Wallis, C. J., and Krishnan, J., laid down that the defendant was not estopped from pleading his minority and dismissed the suit. In doing so they quoted as authorities *Guruswami Pantulu* v *Budhkaran Lall* (3) from the very brief report of which it appears that a defendant who when a minor had executed a mortgage-deed, was held by Wallis, C. J., and Sadasiva Iyer, J., not to be estopped from proving that he was a minor at the date of execution even if he had so misrepresented himself as a major and *Leslie* v. *Sheil* (4) It was *Leslie* v. *Sheill* (4) which Coutts Trotter, J., regarded as sufficient to destroy the value of the Bombay decision in *Dadasheb Dasrathrao* v. *Bai Nahani* (1) and was also treated as the leading authority in *Guruswami Pantulu* v. *Budhkaran Lall* (3). As Coutts Trotter, J., pointed out *Leslie* v. *Sheill* (4) has been mentioned with approval by the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (5). But with great respect I may perhaps point out that *Leslie* v. *Sheill* (4) has little to do with estoppel. There it was part of the plaintiff's case that the defendant was a minor at the time of the transaction concerned. Indeed he was still a minor when the writ was issued and the decision was that the plaintiff had not any of the remedies claimed against the defendants who had obtained a loan from them by misrepresenting himself as a major. The approval of *Leslie* v. *Sheill* (4) expressed by the Privy Council in

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(1) 41 Ind. Cas. 180; 41 B. 480; 19 Bom. L. R. 561.
(2) 43 Ind. Cas. 908; 7 L. W. 124.
(3) 53 Ind. Cas. 14; 10 L. W. 225; 26 M. L T 245.
(4) (1914) 3 K. B. 607; 111 L. T. 106; 58 S. J. 453; 30 T. L. R. 460; 83 L. J. K. B. 1145.

Mahomed Syedol Ariffin v. *Yeoh Ooi Gark* (5) appears to have had no reference to any question of estoppel; and in that case it was not found that the mortgagee-plaintiff actually believed that the minor concerned was a major. Several other cases of this and other Courts have been quoted before me; but I do not think it necessary to discuss them now. I think I am clearly bound by the decision of a Bench of this Court in A. S. No. 89 of 1920 to find that plaintiff was not estopped from proving that he was a minor at the date of Ex. II. The appeal on that point fails.

Plaintiff has filed a memorandum of objections appealing against the Subordinate Judge's order that he must deposit half the purchase-money. I do not think that *Leslie* v. *Sheill* (4) and *Gurusami Pantulu* v. *Budhkaran Lall* (3) on which Mr. Somayya has relied to show that a defendant who when a minor has obtained money on loan or mortgage by representing himself as a major cannot be compelled to refund it, are of much interest in connection with this aspect of the present case. Here plaintiff comes to Court and asks for relief by way of a declaration that Ex. I is void so far as it relates to his share of the property, and under s. 41 of the Specific Relief Act that relief may be granted to him on the condition that he makes such compensation to defendant as justice may require. *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya* (2) is authority for that if any is required. Nor is it necessary, in my opinion, to attempt to trace in any detail where the purchase-money for plaintiff's share of the property went or to attempt in such a case as this to distinguish between restitution and re-payment. The Subordinate Judge has found that except an advance payment of Rs. 100 made to plaintiff's brother, the whole of the purchase-money was paid to plaintiff and his brother jointly and that plaintiff derived full benefit from the purchase-money. In the circumstances, the fact that the disposal of Rs. 400 out of the total purchase-money Rs. 2,500 has not been shown by the evidence does not affect the propriety of the latter finding. An attempt has been made on plaintiff's behalf to question this finding at the hearing in other respects; but, as plaintiff has not had the evidence printed, he cannot succeed in that attempt. Since the date of Ex. I plaintiff and his brother have become divided, and plaintiff is in possession of his share of the family property. In the circumstances the Subordinate Judge's decision to make plaintiff's success in the case conditional on his payment of the Rs. 1,250 appears just and proper. The objection in regard to mesne profits, which has been raised in plaintiff's memorandum, has not been argued before me.

An additional ground of appeal has been filed subsequently by defendant, to the effect that plaintiff should have been directed also to pay him Rs. 150, half the amount spent by defendant in improving the land while in his possession since the date of Ex. I. About this there is only the vague evidence of defendant himself unsupported by any accounts. The point does not appear to have been argued before the Subordinate Judge. I see no sufficient reason to interfere with the Subordinate Judge's decision in this respect.

Both the appeal and the memorandum of objections are dismissed with costs.

V. N. V. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 52 OF 1925.
January 1 , 1926.
Present:—Mr Justice Raza.
AHMADULLAH AND OTHERS—DEFENDANTS —APPELLANTS
versus
BASHIR AHMAD—PLAINTIFF AND
Musammat RUQQAN BIBI—DEFENDANT —RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 144—Co-owners—Suit for possession—Limitation—Ouster—Adverse possession.

The possession of one co-owner must be deemed to be the possession of all the co-owners, unless there was some act of ouster by which one of the co-owners was deprived of possession by another. [p. 857, col. 1.]

Where parties are co-sharers and no partition has taken place between them, mere non-participation of profits by one and occupation and enjoyment of the joint property by the others is not *per se* adverse possession. There must be a disclaimer of others' right by an open assertion of a hostile title on the part of the other co-owner setting up adverse possession and notice of such disclaimer to the others. Limitation against a co-sharer does not begin to run until his title is openly denied. [p. 857, cols. 1 & 2.]

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(5) 39 Ind. Cas. 401; 43 I. A. 256 at p. 261; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678 (P. C.).

Where in a suit for possession the plaintiff has established his title as a co-owner, the onus is on the defendant co-sharer to plead and prove adverse possession for the statutory period. Article 144 of Sch. I o the Limitation Act applies to such a case. [p. 857, col. 1.]

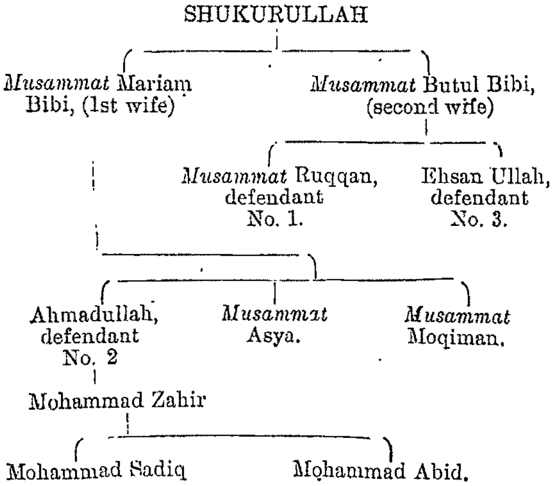
Secretary of State for India v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.), followed.

Appeal against a decree of the District Judge, Fyzabad, dated the 3rd November 1924, modifying that of the Additional Subordinate Judge, Sultanpur, dated the 7th May 1924.

Mr. *Hyder Husain*, for the Appellants.

Mr. *M. Wasim*, for Respondent No. 1.

JUDGMENT.—This is an appeal from a decree of the learned District Judge, Fyzabad, dated the 3rd November 1924, modifying a decree of the learned Additional Subordinate Judge, Sultanpur, dated the 7th May 1924, partially decreeing the plaintiff's claim. This was a suit for possession of a certain *zemindari* property specified in the plaint. The relative position of the parties will appear from the following pedigree:—


SHUKURULLAH
Musammat Mariam Bibi, (1st wife)
Musammat Butul Bibi, (second wife)
Musammat Ruqqan, defendant No. 1.
Ehsan Ullah, defendant No. 3.
Ahmadullah, defendant No. 2
Musammat Asya.
Musammat Moqiman.
Mohammad Zahir
Mohammad Sadiq
Mohammad Abid.

Shukurullah died about 35 years ago. His second wife, *Musammat* Butul Bibi, died in his life-time. The plaintiff obtained a sale-deed from *Musammat* Ruqqan, defendant No. 1 on the 26th May 1919. He brought the present suit for possession of the property on the basis of that deed. His case was that *Musammat* Ruqqan was entitled to a share in the inheritance of her father Shukurullah and her mother *Musammat* Butul both. The defence which was raised by the defendants and which is material to this appeal is as follows:—

1. *Musammat* Ruqqan was excluded from inheritance by custom, so far as Shukurullah's property is concerned.

2. She was never in possession of the property in suit within limitation.

The first Court gave the plaintiff a money-decree against the defendant No. 1; but dismissed the claim for possession of the property, finding both the points mentioned above, against the plaintiff and in favour of the defendants. The lower Appellate Court allowed the appeal and modified the decree of the first Court and gave the plaintiff a decree for joint possession against the defendants Nos. 1 to 4 in respect of a 13/16th pies share in the villages in suit belonging to Shukurullah and *Musammat* Butul Bibi. The plaintiff was also given a decree for Rs. 593-12-0 as against defendant No. 1 (*Musammat* Butul Bibi) together with interest at 6 per cent. per mensem on the said amount from the 26th May 1919 to the date of realization.

This appeal has been filed by Ahmedullah and Ehsanullah, brothers of *Musammat* Ruqqan. Ehsanullah has sold his share to Mohammad Azim who is the appellant No. 3 in this appeal. The share sold by Ehsanullah exceeds his legal share to the extent of a 6/16th pies share.

The appellants challenge the findings of the learned District Judge on the two points mentioned above. It is admitted by the parties that 13/16 pies share is the share to which *Musammat* Ruqqan is entitled under the Muhammadan Law in the property of her father and her mother both.

I take up the first point. The family custom has been set up in respect of the father's property only. There is no documentary evidence to prove the alleged custom. Two *wajib-ul-araiz* have been produced in this case. Exhibit 24 is the *wajib-ul-arz* of Satthin and Ex. 2, the *wajib-ul-arz* of Asroga. Shukurullah was a resident of Satthin. According to the *wajib-ul-arz* of Satthin, the rules of Muhammadan Law are observed there in questions regarding succession. According to the *wajib-ul-arz* of Asroga, daughters are excluded from inheritance by custom: That *wajib-ul-arz* was dictated by Sham-sher Ali Khan, "*karinda*" of one Bibi Ghasiti. It appears that *Musammat* Ghasiti was the wife of one Pir Ali, maternal uncle of Shukurullah. It may be that Shukurullah had got the Asroga property through, *Musammat* Ghasiti but the *wajib-ul-arz* of that village cannot help the defendants in this case. In that *wajib-ul-arz* the custom prevailing in the family of *Musammat* Ghasiti was recorded. That custom cannot anyhow be the custom of Shukurullah's family. The oral evidence which has been produced to prove the alleged custom is quite worthless and must be rejected. The learned District Judge has subjected the whole evidence to a careful analysis. Some instances are cited, but no connection of these instances with Shukurullah's family is shown. The oral evidence is quite unreliable and was properly rejected by the learned District Judge. The first point must, therefore, be decided against the defendants.

The second point also must be decided against the defendants. The appellants' learned Counsel has argued, with reference to the plaint, that Art. 142 of the Limitation Act governs the case. I am not prepared to agree with him on that point. I have examined the plaint carefully. I am of opinion, having regard to all the allegations in the plaint, that the present suit falls under Art. 144 of the Limitation Act. Under Art. 144 where plaintiff has established his title, the onus is on the defendants both to plead and to prove adverse possession for the statutory period [*Secretary of State for India* v. *Chelikani Rama Rao* (1) and *Inderpal Singh* v. *Thakur Din Singh* (2).] The possession of one co-owner must be deemed to be the possession of all the co-owners, unless there was some act of ouster by which one of the co-owners was deprived of possession by another. The mere fact that the defendant No. 1 was not in enjoyment of the rents and profits of the property in suit does not establish that her brothers and co-sharers were in possession adverse to her. It is not shown that they ever set up any title adverse to the defendant No. 1. Where parties are co-sharers and no partition has taken place between them, mere non-participation of profits by one and occupation and enjoyment of the joint property by the others is not *per se* adverse possession. There must be a disclaimer of others' right by an open assertion of a hostile title on the part of the other co-owner setting up adverse possession and notice of such disclaimer to the others. Limitation against a co-sharer does not begin to run until his title is openly denied.

I do not think it proper or necessary to interfere with the discretion of the learned District Judge in awarding costs in this appeal. The result is that the appeal fails and must be dismissed. I dismiss the appeal with costs and order the appellants to pay the costs of the contesting respondent in this Court. The decree of the lower Appellate Court is confirmed in all respects.

N. H. *Appeal dismissed.*

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(1) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C).

(2) 78 Ind. Cas. 895; 27 O. C. 77; 10 O. L. J. 646; A. I. R. 1924 Oudh 266.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 120 OF 1924.
March 20, 1925.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Rankin.
THE OFFICIAL TRUSTEE OF BENGAL —PLAINTIFF—APPELLANT
versus
W. G. BOWDEN—DEFENDANT—RESPONDENT.

Calcutta Rent Act (III of 1920), s. 11—Landlord and tenant—Covenant not to sublet without written consent—Breach of covenant—Waiver of breach—Ejectment.

Where a lease provides that the lessee shall not assign, sub-let or part with possession of the demised premises or any part thereof without the previous consent in writing of the lessor but that such consent shall not be unreasonably withheld in the case of a responsible and respectable person, and the lessee subsequently sub-lets the premises, without the written consent of the lessor, the lessor continuing to receive the rent with knowledge of the sub-lease and without objection thereto, the breach of covenant is merely technical and the subsequent receipt of rent by the landlord amounts to a waiver of the breach. In such a case it cannot be held that the tenant has failed to perform the conditions of the tenancy within the meaning of s. 11 (1) of the Calcutta Rent Act. [p. 859, col. 2.]

Per *Rankin, J.*—The last words of sub-s. (1) of s. 11 of the Calcutta Rent Act cannot possibly mean that because a breach of covenant was committed by a tenant in 1921, which was perfectly harmless, was never made a grievance of, and as to which no request for compensation or damages was ever made, therefore, it is impossible for the Court to give the tenant, in 1924 the benefit of the Rent Act. [*ibid.*]

Appeal against the judgments of Buckland, J, dated the 22nd February 1924 and of Ghose, J., dated the 20th May 1924.

Mr. *Pugh* (with him Mr. *Barwell*), for the Appellant.

Mr. *B. K. Ghosh* (with him Mr. *P. C. Basu*), for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal from two judgments, the first of which was delivered by my learned brother Mr. Justice Buckland on the 22nd of February 1924, and the second of which was delivered by my learned brother Mr. Justice C. C. Ghose on the 20th of May 1924.

The suit was brought by the plaintiff, the Official Trustee of Bengal, as Trustee of the Estate of Anna Apcar, on the 5th of December 1923: and, it was alleged that the defendant had been the lessee under a lease, dated the 20th of November 1919 for a period of four years, the term of which expired on the 30th day of September 1923.

There was a further allegation that on the 13th of August 1923, the plaintiff gave notice to the defendant to quit and vacate the premises on the expiry of the lease, as the premises were required for the use and occupation of one Johannes Apcar, the present sole beneficiary under the trust.

The plaint alleged that the defendant failed to give possession of the premises and, it then contained a definite statement that "the premises were *bona fide* required for the use and occupation of the said beneficiary Johannes Apcar."

It is, therefore, clear that when this plaint was filed, the plaintiff had the provisions of the Calcutta Rent Act in mind, and he was asserting in effect that the Calcutta Rent Act would not protect the defendant from an order of ejectment by reason of the fact that the premises were *bona fide* required for the use and occupation of Mr. Apcar. It is material to notice this and because of what occurred at the trial. The suit was heard on the 21st and the 22nd of February. On the second day, namely, the 22nd, it appears from the judgment of my learned brother Mr. Justice Buckland that the learned Counsel for the plaintiff then stated for the first time that he relied not only on the allegation that the premises were required for the use and occupation of Mr. Apcar but also upon the latter words of s. 11, sub-s. (1) of the Calcutta Rent Act.

The learned Judge came to the conclusion that it was not proved that the premises were *bona fide* required by Mr. Apcar for his own occupation, and, I need not say more than that I agree with the learned Judge's finding upon that question of fact.

The learned Judge then allowed the other point, which had been raised by the learned Counsel for the plaintiff, to be investigated: and, he gave directions that the necessary pleadings should be filed by the one side and by the other: and, he adjourned the hearing of the suit for a month.

The suit then came before my learned brother Mr. Justice C. C. Ghose.

The allegations upon which the plaintiff relied on that occasion were these: He relied first of all upon a covenant in the lease which is as follows: "The lessee doth hereby covenant with the lessor not to assign, sublet or part with possession of the said premises or any part thereof without the previous consent in writing of the lessor, but such consent shall not be unreasonably withheld in the case of a responsible and respectable person other than a boarding house keeper or tenants other than Europeans:" and, it was alleged on behalf of the plaintiff that the defendant without the knowledge or consent of the plaintiff and without application made for the consent of the plaintiff, sublet and gave possession of the upper floor of the premises, during the subsistence of the lease, to one Mr. Stevenson at a monthly rent of Rs. 225 and that the defendant also without such knowledge or consent and without such application made, and during the subsistence of the said lease, sublet and parted with possession of and was now subletting certain of the godowns, forming part of the said premises to other persons as monthly tenants, and that such persons were now in possession thereof.

The learned Judge came to the conclusion that there had been a breach of the covenant in question; and he stated that, in his opinion, the question was whether or not there had been a waiver of the breach of that covenant. He then concluded as follows: "In my opinion, therefore, there was waiver of forfeiture of the lease, and accordingly the plaintiff's suit for ejectment must fail and be dismissed."

With much respect to the learned Judge, it seems to me that the conclusion at which the learned Judge arrived was not framed in the correct manner. Waiver of the breach of the covenant and waiver of the forfeiture are not the same things. In my judgment there was no forfeiture, because even though there may have been a breach of covenant the lessor had not done any act which showed his intention to determine the lease, as provided by s. 111......... (g) of the Transfer of Property Act, 1882, and the learned Counsel who appeared for the appellant agreed that in this case there was no forfeiture. But I understand that the learned Judge meant to come to the conclusion that the plaintiff had in fact waived the breach of the covenant and that consequently the plaintiff was not entitled to succeed.

With regard to the two allegations upon which reliance was placed and as to which there is really no question of fact before us, it appears to me that the alleged subletting of the godowns is of no avail to the plaintiff in this case, because as I understand the case, the position seems to be that the godowns were sublet before the lease was executed and that the ground floor, in the time of the defendant's predecessor, as well as in the time of the defendant, had been used as an office for the purpose of conducting the business of the Melitus Estate and that those facts must have been known to every one concerned.

The other matter relating to the subletting of the upper floor to Mr. Stevenson is in a different position: Mr. Stevenson went into possession in April 1921, and remained there until April 1923: and, the learned Judge has found as a fact that the plaintiff, the Official Trustee, knew either in July or in August 1923 that there had been a subletting to Mr. Stevenson. That finding of fact of the learned Judge has not been contested in this Court.

The question, therefore, remains whether the subletting to Mr. Stevenson in April 1921 is sufficient to prevent the defendant from relying upon the provisions of the Calcutta Rent Act.

Section 11 (1) provides as follows: "Notwithstanding anything contained in the Transfer of Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or the Indian Contract Act, 1872, no order or decree for the recovery of possession of any premises shall be made so long as the tenant pays rent to the full extent allowable by this Act, and performs the conditions of the tenancy . . . . ." In my judgment there was no doubt a technical breach of the covenant committed by the defendant in April 1921 when he sublet the upper floor of the premises to Mr. Stevenson: and, the technical breach consisted in that he failed to apply for the plaintiff's consent in writing to that subletting. There is nothing to suggest that if he had applied he would not have got the consent of the lessor or if the consent had been refused it is possible that the defendant might have let it to Mr. Stevenson without such consent on the ground that he was a responsible and respectable tenant. That is the technical breach and the only breach upon which, in my judgment, the plaintiff could rely in this case. I have no doubt that that technical breach was waived by the Official Trustee when he heard about it in July or August 1921. It is clear that he received the rent for August and September 1923 after he had obtained that knowledge. He never made the smallest complaint about the upper floor being sublet to Mr. Stevenson in April 1921, and he did not take any steps to terminate the tenancy on the ground of the breach of the covenant to which I have referred. I have no doubt that there was a complete waiver by the plaintiff of the technical breach of the covenant.

In these circumstances, in my judgment, it cannot be said that the defendant failed to perform the conditions of the tenancy within the meaning of s. 11 (1) of the Calcutta Rent Act.

For these reasons, in my judgment, the conclusion at which the learned Judge arrived was correct and this appeal must be dismissed with costs.

Rankin, J.—I agree. With reference to the words in the first sub-s. of s. 11 of the Calcutta Rent Act, there are some things that those words *must* import, some things which they *may* import and there are some things which they *cannot* import. I do not think that they can possibly mean that because a breach of covenant was committed in 1921 which was perfectly harmless, which never was made a grievance of, and as to which no request for compensation or damage was ever made, therefore, it is impossible for the Court to give the tenant in 1924 the benefit of the Rent Act. Whether the phrase "and performs the conditions of the tenancy" must be read as applying only to the time, during which the tenant's right to possession depends entirely upon the Calcutta Rent Act, has been argued before us. If that position be correct it still remains that by the last words of the proviso to sub-s. (1) the Court could in a proper case take into account breaches of the conditions of the tenancy committed during the course of the original tenancy. But it is not necessary for the purposes of this case to determine any nice question of construction.

The position is that, so far as it appears, no objection could have been taken to Mr. Stevenson. Had permission been asked and refused it would presumably have been open to the tenant to ignore the covenant altogether. Mr. Stevenson appears to have been in occupation of a part of the premises for two years. He left in April 1923. Whether the Official Trustee at that time knew anything about his occupation, it seems almost certain that the beneficiary Mr. Apcar to whose instructions the Official Trustee paid great attention, must have known about this fact. So far from making any grievance of the matter, when it was discussed between the Official Trustee and his beneficiary in July 1923 the correspondence shows that there was no objection at all being taken about this question of subletting. The letter of the 2nd of August is not the letter of the man who says "you have been guilty of this breach; I do not think it necessary to forfeit, but at the end of your time you will have to go." His point is that, "The end of your lease is coming. I desire to charge you more rent; and one of the things which makes it reasonable for me to charge you more rent is the amount of rent you have been realising from your sub-tenants to say nothing of the rent that I presume is paid for the use of the office." Suppose for the sake of argument that in 1921 this matter had come to the notice of the Official Trustee and the tenant had said, "I am very sorry. I should have asked for your permission before I sublet," and the lessor had said, "Never mind, it is all right," or suppose the landlord said, "I will not forfeit but I shall charge you as damages one rupee" and that the tenant had paid. It is absurd, in these circumstances, to suppose that, because there was a technical breach in 1921, that it could have been utilized against the tenant at the end of 1923 or the beginning of 1924. The facts in this case are certainly not so strong but they come, in my opinion, to the same result: they show, in point of fact, a knowledge of the whole transaction after the event without any complaint being entertained in the mind of the landlord in respect of this matter. Had such a complaint been made, anything that could have been asked as compensation might have been paid by the tenant. In my judgment it would be putting an unreasonable construction upon s. 11 in this case, if we were to hold that the tenant after 1921 was entirely deprived of any benefit of the Calcutta Rent Act. I entirely agree that the mere question of waiver of the right of re-entry is in no way conclusive in this case.

It seems to me that the learned Judge's decision was right in the result, and I agree that the appeal should be dismissed.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 111 OF 1923.

March 23, 1925.

Present:—Justice Sir Kumaraswami Sastri Kt., and Mr. Justice Krishnan.

THE PURASAWALKAM HINDU JANOPAKARA SASWATHA NIDHI LTD. BY HIS SECRETARY K. CHINNATHAMBY PILLAI—PLAINTIFF—APPELLANT

versus

KUDDUS SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 69—Mortgage—Sale, power of, irregular exercise of—Mortgagee, right of, to recover balance of mortgage-money—Notice, whether necessary—Negligence—Principal and agent—Agent acting to best of his capacity, whether liable.

Where one person is employed by another to do a certain kind of work with full knowledge of his qualifications and the latter does the best that he can with respect to the work entrusted to him, there can be no question of negligence unless he does something which any reasonable man with his qualifications would have omitted to do. [p. 862, col. 1.]

Where in a mortgage-deed the amount due for principal is not re-payable at any particular time nor is anything stated as to when it is to be re-paid, there can be no default in payment of the principal sum due within the meaning of s. 69 of the Transfer of Property Act until there is a demand made for the money. [p. 863, cols. 1 & 2.]

When a mortgagee demands payment of the mortgage-money, he should be in a position to give back the mortgaged property and allow the mortgagor to redeem. Where he has wrongfully disabled himself from doing so, for instance, by having sold away the mortgaged property under an irregular exercise of his power of sale; he cannot sue the mortgagor for the balance of the mortgage-money. [p. 864, col. 1.]

A mortgagee has a right to make use of his remedies against the mortgagor for obtaining payment of his money; but as soon as the mortgage-money has been fully paid he is bound to deliver over the mortgaged property to the mortgagor. If he has made it impossible for himself to restore the property mortgaged, he cannot proceed against the mortgagor to recover the amount of the mortgage-money. [p. 864, col. 2.]

Per *Krishnan, J.*, *Obiter* :—In cases falling under s. 69 of the Transfer of Property Act, if interest amounting to at least Rs. 500, is in arrears and unpaid for three months the mortgagee, if he has got a power of sale under the mortgage, can exercise the power without notice to the mortgagor. [p. 867, col. 2.]

Appeal from a decree of Mr. Justice Coutts Trotter, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 3 of 1923.

The Advocate-General and Mr. *K. Narasimha Aiyar*, for the Appellant.

Mr. *T. Pattabhirama Aiyar*, for the Respondents.

JUDGMENT.

Kumaraswami Sastri, J.—This is an appeal from the decision of Justice Coutts Trotter dismissing the plaintiff's suit; the plaintiff which is a fund sued to recover Rs. 6,032-9-6 with costs and further interest. Plaintiff's case is that the 1st defendant applied for a loan to the fund of Rs. 10,000 on the mortgage of two of his properties, 17, Thacker Street, Vepery, and 17, Perambore Barracks Street. On his application the usual form and papers were filed with the 2nd defendant who is the appraiser and the 3rd defendant who is the surveyor of the fund in the usual course of business to value and appraise the properties, that they wrongfully valued the properties at about Rs. 12,000 and odd while the real value of the properties was much lower, that on the strength of their valuation the fund advanced Rs. 9,475 to the 1st defendant and got the mortgage-deed, Ex. C executed on the 8th February 1921, that as the defendant did not pay the money due on the mortgage the mortgaged property was sold under power of sale reserved to the plaintiffs under the deed of mortgage on the 13th and 21st October 1922 when the properties realised only Rs. 2,150 and Rs. 2,600 respectively as against the sum of Rs. 10,782-9-6 due on the mortgage at the date of the sale, that the 1st defendant has to pay Rs. 6,032-9-6, the difference between the amount due on the date of the sale and the amounts realised by private sale, that the 2nd and 3rd defendants by their wrongfully appraising the property at an amount far in excess of the actual value acted in conspiracy with the 1st defendant to defraud the fund and acted also with gross negligence in the valuation and that they are, therefore, liable to pay the difference between the actual value of the property and the amount due on the mortgage. The 1st defendant denied the claim of the fund. He pleaded that the properties mortgaged were worth about Rs. 20,000, one property being worth Rs. 8,000 and the other Rs. 12,000. He sets up an agreement whereby the fund itself promised to lend the money in order to enable him to redeem a prior mortgage. He states that the power of sale was wrongfully exercised and the sale is not binding on him. He also pleads that the property was under-sold collusively by the fund.

The defendants Nos. 2 and 3 denied that they overvalued the properties. They denied that there was any fraud or collusion between them and the 1st defendant. They stated that the property was correctly valued and that they are not liable for the deficiency if any. They also pleaded that the sale was not properly conducted.

Justice Coutts Trotter dismissed the plaintiff's suit against defendants Nos. 2 and 3. He held that there was no conspiracy or negligence and as regards the 1st defendant he held that the power of sale was improperly exercised, that notice was not properly given and that consequently the plaintiffs have no right to claim any deficiency. So far as the 2nd and 3rd defendants are concerned the learned Advocate General who appeared for the fund conceded that no case of conspiracy was proved but he supported the appeal on the ground that the defendants grossly overvalued the property. Reliance was mainly sought to be placed on the evidence of Mr. Aiyaswami Mudaliar who was called by the plaintiffs to prove the value. I am not satisfied on the evidence that the defendants Nos. 2 and 3 negligently overvalued the properties or that there was any conspiracy between the parties. The 2nd and 3rd defendants have given evidence as to what they did so far as the valuation of the properties was concerned. There are some facts which to my mind make it rather clear that there could not have been over-valuation which is now sought to be suggested. I find on the evidence of the 1st defendant that there were previous mortgages on this property in favour of the Madras City Co-operative Bank at a time when there was only one item of property in existence and the other was only a vacant site. We find that at that time a sum of Rs. 5,000 was lent and under the rules of the Bank only 2/3rd can be lent so that about a year before the suit mortgage, the properties were valued by that Bank at Rs. 7,500. I also find that a *sowcar* lent Rs. 3,000 on one item of property. The evidence is that after the mortgage to the Bank, the 1st defendant built on the vacant site at a cost of about Rs. 5,000 so that at the time of the mortgage to the fund it is difficult for me to believe that the property was worth only about Rs. 4,000 as Mr. Aiyaswami Mudaliar would have us believe. Under these circumstances I think that there has been no case made out against the 2nd and 3rd defendants either on the ground of conspiracy or on the ground of negligence. As pointed out by the learned Judge the 2nd and 3rd defendants were employed by the fund with knowledge of their qualifications and so far as they are concerned they did what they thought to be the best. There can be no question of negligence unless they have done anything which any reasonable man with their qualifications would have omitted to do. The fund which employed them was aware of their qualifications.

I may say in this connection that I disagree with the learned Judge in the view he takes that there has been anything in the conduct of Mr. Sivagnana Mudaliar which is unprofessional. He got permission from the High Court to act as legal adviser and director of this fund. So far as the business of the fund is concerned, it appears that the fund consists of persons who take shares and borrow monies and what the share-holders get is about 9 per cent. compound interest and it is only the balance that is divided. It is divided in such a way as to give a remuneration to the legal adviser, the director, the appraiser and others. In this case it cannot be said that the percentage allowed to Mr. Sivagnana Mudaliar is anything which can be said to be high or unreasonable. On the contrary it works out at a very low figure, about Rs. 200 a year.

As regards the directors I do not think they can be blamed for employing the 2nd and 3rd defendants because in their case also the qualifications will depend on the remuneration and they could not have gone and employed experts or men with high qualifications having regard to the very small remuneration paid to both of them. They had to fix the remuneration according to the funds in their hands. I do not think it can be said that in employing the 2nd and 3rd defendants the directors were guilty of negligence or were answerable for employing persons who ought not to have been employed, more especially as we find in this case that during all these years there have been no complaints made by the share-holders or anybody of any misconduct or any loss that arose to the fund by their employment.

So far as I have dealt with the case of 2nd and 3rd defendants which seems to us to be fairly clear. The case of the 1st defendant is a little more complicated. So far as the sale is concerned the evidence of the Secretary is that this sale was conducted in pursuance of a notice, Ex. D which was given on the 26th July 1921. The sale took place on the 13th and 21st October 1922 about 15 months after the date of the notice. It also appears that after the notice was given, the fund received payments of Rs. 300 while the amount due at the date of the notice was about Rs. 442. No payments were made subsequently. So far as the notice is concerned I have little doubt that the receipt of Rs. 300 after the notice and the staying of the sale as threatened was clearly an abandonment of any rights which the fund wanted to enforce by reason of the notice. They received the money and kept quiet 15 months after. I do not think that the fund could act on that notice at the expiration of such a long time. Fresh notice ought to have been given if they wanted to sell.

Then the question is whether the fund is entitled to sell without giving any notice. On this part of the case we have to see the Articles of Association and the mortgage-deed. The Articles of Association define the rights between the share-holders and the fund. This is clear from s. 21 of the Indian Companies Act. In this case the loan was to a share-holder. Article 72 runs as follows:—

"If any person who has received loans on mortgage of moveable or immoveable properties, fails to pay the monthly interest regularly and allows such interest at any time to accumulate to what shall be due for three months, the Secretary shall call upon him by notice in writing to pay the principal and interest due and in default of such payment the property shall be liable to be sold by public auction; provided always that the Secretary may at any time before the commencement of the sale at his discretion withdraw from sale any property moveable or immveable the arrears of interest on which shall be less than what shall be due as interest for three months." It is argued by K. Narasimha Iyer that this is merely a direction to the Secretary and it confers no rights on the share-holder or the mortgagor. I do not think that this contention can be upheld. It is clearly a provision put in in the interests of both the fund and the mortgagor, the fund being entitled to sell if three months' interest is in arrears, the mortgagor being entitled to due notice to enable him to pay up. The deed of mortgage, Ex. C provides for a power of sale. The clause runs as follows:—

"If with regard to the interest payable every month accordingly, three months' interest falls in arrears at any time or if the Nidhi being in need of the principal and interest gives intimation by means of notice to pay off the same and I or my heirs fail to pay the principal and interest, the Nidhi itself shall sell the aforesaid houses and grounds by public auction or private sale under s. 69 of the Transfer of Property Act and credit the expenses in connection with the said sale and whole of the amount due by me to the Nidhi; and if there is excess it should be paid to me. If there is shortage I shall myself be responsible and pay the amount falling short together with interest as mentioned above". It ends as follows:—"Further, until this mortgage debt is discharged I shall be bound by the rules now in force in the Nidhi and the rules which may be framed from time to time".

This mortgage, therefore, incorporates the provisions of the Transfer of Property Act and of the Articles of Association. The amount due for principal is not re-payable at any particular date. Nor is anything stated as to when it is to be re-paid. Under these circumstances it seems to me to be clear that until there is a demand made for the money, there can be no default in payment of the principal sum due. No doubt the fund could have sued the next day for the money or the mortgagor might have offered to redeem the next day but that would not make non-payment a default within s. 69 of the Transfer of Property Act. I may refer in this connection to the case in *Ramadh Bibi Ammal* v. *Kandasami Pillai* (1) where Justices Spencer and Krishnan have discussed the question of what is the meaning of default and they incline to the view that before there can be said to be default where no time is fixed there ought to be a demand. Section 69 of the Transfer of Property Act begins by stating that the power of sale in the mortgage-deed conferred on the mortgagee or any person in his behalf to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property or any part thereof without the intervention of the Court is valid in certain specified cases. Then it says in what cases such power of sale will be valid. There is to be a default in the payment of the mortgage-money. Now, in this case, reading s. 69 with the Articles of Association and the mortgage-deed, I am clearly of opinion that before the sale is held for the purpose of recovering principal and interest due on the mortgage notice has to be given and the learned Judge was right in coming to the conclusion that the want of notice was an irregularity because the fund did not act in a manner that would entitle them to have sold the property rightly. There was no notice given before the sale. It is suggested that there was a notice of the date of the sale sent to the 1st defendant to his address but that was returned as he was not in Madras and it cannot be said that that notice was not a notice required by the Transfer of Property Act or Art. 72. It is unnecessary in this case to decide the wider question raised whether in case of interest alone being due notice is necessary; because I think that if Art. 72 is also to be considered notice is necessary whether the sale is for the amount due for principal or interest. There having been, therefore, no proper notice under Art. 72 as regards sale of this property, the question is whether the plaintiffs can sue to recover the balance which is claimed under the sale. The evidence in the case shows that the sales were not properly held. One item of property was purchased by Swaminatha Mudaliar a relation of a director *benami* in the name of his brother. So far as the sale is concerned, it appears that there were only three bidders as regards that item. One was the Secretary himself and the other two, Munisami Naicker and Murugesa Mudaliar. It appears from the evidence that the sale was adjourned from time to time. Only 200 notices seem to have been printed for all the six occasions on which sales were adjourned and no proper notice was given so as to enable the general public to come and bid for the properties. I do not think that on the evidence on records the sale can be said to have been duly and properly held so as to entitle us to hold that the prices realised at the sales were fair and adequate prices. Having regard to the evidence as regards the value of the property given by the plaintiff I do not think I can hold that the sales were for adequate prices. I am of opinion that the properties mortgaged are worth at least 10,000 rupees.

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(1) 51 Ind. Cas. 724; 9 L. W. 479; (1919) M. W. N. 82; 25 M. L. T. 154.

The next question is as to whether the plaintiffs are entitled to sue for the balance which they claim even though the power of sale was improperly exercised and even though there were irregularities in the sale, and low prices realised leaving the 1st defendant to file a counter-claim or a separate suit for damages, or whether the suit itself cannot be maintained. Before dealing with the question it must be remembered that the suit is not against the purchaser of the property as he is not a party to the suit, and it is not by the defendant to redeem or get damages for wrongful sale but it is a suit by the plaintiff against the defendant to recover the balance of mortgage-money. The case does not fall within s. 69 of the Transfer of Property Act and has to be decided on considerations as to the general law regulating the rights of mortgagor and mortgagee. It is clear that when a mortgagee demands payment of the mortgage-money, he should be in a position to give back the mortgaged property and allow the mortgagor to redeem. This is the effect of O. XXXIV, rr. 5, 6 and 8 of the C. P. C. and mortgage-decrees are always drawn in the form that on payment of the money the mortgagee should return the title-deeds and, if, in possession, give possession to the mortgagor. Where he wrongfully disables himself from doing so the law in England seems to be that he cannot after a wrongful sale sue for the balance of the mortgage-money. The authorities on the subject are referred to in *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (2) Lord Justice Warrington refers to the rule of equity at page 470* as follows:—

"A mortgagee who cannot or will not return the mortgaged property on payment is not entitled to sue for the debt."

He goes on to observe: "There can, I think, be no question that such was and is the rule in equity. In *Palmer* v. *Hendrie* (3) the rule was there stated by Romilly, M. R: 'These then are the relative duties and reciprocal obligations between mortgagor and mortgagee. The mortgagee has a right to make use of all his remedies against the mortgagor for obtaining payment of his money; but as soon as the mortgage-money has been fully paid, he is bound to deliver over the mortgaged estate to the mortgagor. The question is whether, when the mortgagee has made it impossible to restore the property mortgaged, he can proceed against a mortgagor to recover the amount of the mortgage-money He can undoubtedly, at law, sue upon the covenant, and consequently, the executors of Hendrie are, at law, entitled to recover from the plaintiff the unpaid mortgage-money; but the mortgagees must perform their reciprocal obligations; they are bound, on payment, to restore the property to the mortgagor, and this—is a most important part—'if it appears, from the state of the transaction, that, by the act of the mortgagee, unauthorised by the mortgagor, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law."

The learned Judge also says that this statement of the law was cited and adopted by Stirling, J., in *Kinnaird* v. *Trollope* (4) and refers to the rule being based on the very nature of a mortgage security and the reciprocal obligations of mortgagor and mortgagee and considers it as being in accordance with justice and common sense. Sargant, J., observes: "The cases of *Walker* v. *Jones* (5), *Palmer* v. *Hendrie* (3) and *Kinnaird* v. *Trollope* (4) have definitely recognised that, in general a mortgagee or his

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(2) (1924) 2 Ch. 451; 93 L. J. Ch. 554; 131 L. T. 652; 68 S. J. 682; 40 T. L. R. 680.

(3) (1859) 27 Beav. 349; 54 E. R. 136; 122 R. R. 426.

(4) (1888) 39 Ch. D. 636 at p. 644; 57 L. J. Ch. 905; 59 L. T. 433; 37 W. R. 234.

(5) (1865) 1 P. C. 50; 3 Moo. P. C. (N. S.) 397; 35 L. J. P. C. 30; 12 Jur. (N. S.) 381; 14 L. T. 686; 14 W. R. 484; 16 E. R 151; 146 R. R. 114.

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*Page of (1924) 2 Ch.—[*Ed.*]

assignee cannot recover his debt from the mortgagor except upon performing his reciprocal obligation of reconveying the mortgaged property to the mortgagor and, accordingly, where the security for the debt was a specific estate, and through the unauthorised acts of the mortgagee it had become impossible to restore the estate at law, the mortgagee lost the right to sue for the mortgage-debt." All the learned Judges of the Court of Appeal are clear that a mortgagee who wrongfully disposes of property so as to prevent redemption could not sue for the mortgage-debt. In the case of moveables they thought that if he could purchase exactly similar stock and deliver he might do so. But in the case of immoveable property it is clear that the principle could not apply as both under the Specific Relief Act and otherwise, it is presumed that the breach of contract to deliver immoveable property cannot be compensated for by damages. This decision was affirmed by the House of Lords as appears from the note in the Weekly Notes of the 28th February 1925 page 61 [*Ellies & Co.'s Trustee* v. *Dixon Johnson* (6)] where the Lord Chancellor is reported to have held that a creditor holding securities which he has wrongfully disposed of could not have judgment for his debt. Reference was made to *Madras Deposit & Benefit Society* v. *Passanha* (7) and it is argued that a suit would lie to recover the balance. It was a reference from the Small Cause Court and all that the Judge held was that the provision giving 15 days' notice in the mortgage-deed was invalid but it did not prevent a suit for the recovery of the debt. It also appeared there that more than three months' notice was, as a matter of fact, alleged to have been given. It does not appear that there was no default in the payment of the mortgage-money and the report is so meagre that it is difficult to hold that it is clear authority for holding that a person who sells mortgaged property wrongfully can turn round and demand the balance of the money leaving the mortgagor to a separate suit for damages. As pointed out in *Ellis & Co.'s Trustee* v. *Dixon Johnson* (2), above referred to, it is not a question of set-off or counter-claim, it is a question of defence to the action itself on the ground that it is not maintainable. The latest decision of the House of Lords and the Court of Appeal are clear so far as the law goes. The sections of the Conveyancing Act as to power of sale do not differ in any material part from s. 69 of the Transfer of Property Act, the sections of the Conveyancing Act being almost identical with the sections of the Transfer of Property Act, I think there is clear authority for holding that where there has been a wrongful sale it is not open to the mortgagee who has put it out of his power to allow the defendant to redeem to sue the mortgagor for recovering the balance of the mortgage-money. We think that the judgment of Justice Coutts Trotter is correct and that the suit against the 1st defendant also fails. In the result the appeal fails and is dismissed with costs three sets.

Krishnan, J.—In this case the fund called the Purasawalkam Janopakara Nidhi, Ltd., is the appellant before us. The suit of the fund against the three defendants has been dismissed by Mr. Justice Coutts Trotter and hence the appeal against the defendants. The 1st defendant a Muhammadan and a share holder of the fund applied for a loan of Rs. 10,000 from the fund on the security of two of his properties in Madras one in Thacker's Street and the other in Perambore Barracks Road. The papers in connection with this application were sent by the Secretary of the fund to the 2nd defendant, the appraiser of the fund for the purpose of ascertaining the value of this property. It was a rule of the fund that mortgages should be given on immoveable property only to the extent of 75 per cent. of their value. The appraiser went and saw these houses and made certain measurements and finally estimated the value of the properties to be about Rs. 12,000 and odd. The papers were then sent by the fund to the surveyor, the 3rd defendant whose duty was to check the estimate of the appraiser. He adopted the usual method he was adopting of making inquiries in the neighbourhood about the rental value and generally looking at the property to satisfy himself that the appraiser's value was more or less correct. He reported after making such investigation as he usually did that the value of the properties as estimated by the appraiser was correct. On this the fund advanced to the 1st defendant a sum of Rs. 9,475. This was on the 8th January 1921. The fund subsequently had these properties sold under the power of sale granted to them by the mortgage-deed, Ex. C in October 1922. When the properties were sold they fetched only about Rs. 4,750 in all, so that the fund stood to lose about Rs. 6,000 and odd in this transaction if further money was not realised from the 1st defendant, the mortgagor. They bring this suit against the mortgagor, the 1st defendant, for the balance due on the mortgage. They have in this suit added also their two officers, the appraiser and the surveyor on the allegation that they conspired together with the 1st defendant to unduly inflate the value of the properties so that a larger amount might be given on the security of the properties than would otherwise have been given. They also charge that these two officers were grossly negligent in the performance of their duty even if they did not actually conspire with the 1st defendant and on that ground also they sought to make them liable to make good the loss which the fund was likely to suffer. The case proceeded to trial on this footing on the issues raised between the various defendants and the plaintiffs.

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(6) (1925) W. N. 61; (1925) A. C. 489; 94 L. J. Ch. 221; (1925) B. & C. R. 54; 133 L. T. 60; 69 S. J. 395; 41 T. L. R. 336.

(7) 11 M. 201; 4 Ind. Dec. (N. S.) 140.

It is convenient to consider the case of these defendants separately as the plea of conspiracy has entirely failed which was the only common ground between all the defendants. The fund have not adduced any evidence of this conspiracy and no attempt has been made to controvert the finding of the learned Trial Judge that the conspiracy is not proved. I will take the case of the surveyor first because that seems to be the easiest of the three. The learned Judge has found that the surveyor is not chargeable with any negligence at all and I think the learned Judge is right in that view. The surveyor is as the learned Judge points out, an ex-school-master, who does not seem to be properly qualified to do the work of surveying which he has been appointed to do. The directors knew the qualifications of the surveyor when they appointed him. They must be taken to have accepted the best he could do in the discharge of his duty as a satisfactory discharge of his functions. What he usually did was, as I have said already, to go and value the property by looking at it generally and by finding out from the neighbourhood the rental value of the property. In this case the rental value which he found on inquiry justified him in coming to the conclusion that the estimate of the appraiser was correct. After all it must be understood that this appraising and checking are not expected to be very accurate but only to give a rough idea of what the property is worth so that the fund may not lose money. As the surveyor did what he usually did in such matters and as the directors must be taken to have known his practice and they never objected before, he cannot be charged with negligence at all. Therefore the case against him for negligence fails.

Next, as regards the appraiser, the 2nd defendant, the learned Judge has come to the conclusion that he was negligent for he says: "He saw thousands of cubic feet of bricks which were not there, he imagined the existence of concrete foundations which in fact did not exist, he measured joists and beams not with a tape but with an eye which made him find more than he saw." I do not think that that is altogether a fair way of putting the case so far as he is concerned. He went there and took his measurements as usual. He was apparently never in the habit of measuring very exactly the walls and the joists and so on but he was taking rough measurements of things and upto date no complaint had been raised against him, for doing his work in that manner. When the Engineer Aiyaswami Mudaliar went there he apparently found that those measurements were not accurate. He took very strict measurements evidently but it seems to me that the differences between the measurements of Iyaswami Mudaliar and of the 2nd defendant do not show such a disparity as to attribute negligence to the latter. If the appraiser had not gone to the place where those houses were, and merely made a fanciful estimate, one can say he was negligent, but when he did the very things he was expected to do and which the directors knew he was doing and arrived at results which were perhaps not quite so accurate as one would have liked, I do not think it is correct to attribute negligence, to him. I am inclined to think that the finding that he was grossly negligent is not correct. The learned Judge dismissed the case against him in spite of his finding that he was negligent on the ground that the failure to realise enough money to cover the mortgage by the sale of these two properties was not due to any act of the appraiser. He was of opinion that the properties were under-sold in the auction that took place because at that time there was a slump in the value of property in the neighbourhood on account of certain disturbances in the Buckingham and Carnatic mills. The evidence in the case shows that the properties must have been undersold for, as my learned brother has pointed out, they were worth at least Rs. 8,000 or Rs. 9,000. The two properties without the new house constructed on the second of them were accepted as sufficient security for a loan of Rs. 5,000 by a very careful money-lending body called the Madras City Co-operative Bank. That implies that they estimated the value at Rs. 7,500 before the new house was built as they advanced only 2/3rh of the value and the new house was built at an expenditure of about Rs. 5,000 by the 1st defendant. Making all deductions, I think one may very well value the properties at Rs. 9,000. I do not think, therefore, that there was very much loss caused by the report of the appraiser. However that may be, I prefer to put my judgment on the ground that he has not been proved to have been guilty of negligence and, therefore, he is not liable.

Now, as regards the 1st defendant, as remarked by my learned colleague, his case is a little more difficult and raises some interesting questions of law. The learned Trial Judge has dismissed the suit against him on the ground that the sale was carried through in defiance of the provisions of the Transfer of Property Act. He observes: "As the 1st defendant has not secured the rights given to him by the Transfer of Property Act, I think the suit against him must also fail." He has not discussed the case of the 1st defendant, at any length and, therefore, it is difficult to be sure how the learned Judge dealt with it. It is argued before us by the 1st respondent that the properties were really worth about Rs. 20,000 or at any rate more than enough to cover the mortgage debt and that the sale of these properties without notice to him and in a manner which led to considerable loss because the sale was not conducted with that amount of publication and care as one would expect the mortgagee to take in selling the mortgaged property, was an improper sale and, therefore, he was not bound to make good the balance of the mortgage debt. The first question that arises on the defence is whether it was necessary to have given him notice before the sale. If notice was necessary, I am in agreement with my learned brother in thinking that no proper notice was given. The notice relied on by the Secretary to the fund sent 15 months before the date of the sale for the payment of a sum of interest then due but mostly re-paid subsequently is not sufficient, in my opinion, to justify the sale 15 months after. It is stated—and I take it that it is correct—that at the time of the sale about Rs. 1,300 was due for interest alone and it is argued that under s. 69 of the Transfer of Property Act when interest on the mortgage amounted to at least Rs. 500 and remained unpaid for three months after becoming due, the power of sale can be exercised by the mortgagee without any notice whatsoever given. It seems to me that it is not necessary to definitely pronounce upon this argument but I am inclined to think that the argument is correct that in cases falling under s. 69 if interest amounting to at least Rs. 500 is in arrears and unpaid for three months the mortgagee, if he has got the power of sale under the mortgage, can exercise the power without notice to the mortgagor but that is not the point here. The point here is that under the Articles of Association it is expressly provided under Art. 72 that "the Secretary shall call upon him (the debtor) by notice in writing to pay the principal and interest due and in default of such payment the property shall be liable to be sold by public auction." This article is certainly a binding provision between the mortgagor in this case who is a share-holder of the fund and the fund itself. The Secretary was bound under that article to call upon the defendant by notice in writing to pay up the principal and interest due and it was only in default of his complying with that demand that the properties could have been sold. It was suggested that this article was only a sort of direction by the fund to its own Secretary as to how he was to act and that the mortgagor, the 1st defendant could not take advantage of the provision. I do not think that this suggestion is at all correct for it is one of the Articles of Association, a rule in an Article of Association can very well be relied upon by a person dealing with the fund knowing that the fund could not act without the provision of the article being complied with and here there is the further reason that the 1st defendant was himself a shareholder. Under these circumstances, it is perfectly clear that the Art. 72 should have been complied with by the Secretary. Now let us see what the result of his non-compliance is. Section 69 says that the power conferred by the mortgage-deed on the mortgagee to sell or concur in selling in default of payment of the mortgage-money is valid in the following cases and in no others. To start with, therefore, it must be established that the power of sale under the mortgage-deed has come into play, in other words that the mortgage-money has become payable, as Chief Justice Macleod has held in *Jerup Teja & Co.* v. *Peerbhoy Adamji* (8). There it was a case where a time was fixed for the mortgage-money to be re-paid and as the sale was attempted within that time, the learned Chief Justice held that the money did not become payable and, therefore, the power exercised under s. 69 was improperly exercised. I am of opinion, that as notice should have been given before the power of sale could have been exercised by the fund, the absence of that notice makes it an improper sale. Our attention was drawn to what is called a notice said to have been sent just before the sale to the address of the 1st defendant through post but that notice came back undelivered to the fund and the fund knew perfectly well that the notice had not been served. If it did not come back, the fund might have been justified in presuming that it was delivered but it was returned. Furthermore the notice itself was not a proper notice calling upon the debtor to pay the principal and interest due as required under Art. 72, it was a printed copy of the notification to the public of the sale that was going to take place of the properties and nothing more. For both these reasons that notice was inadequate to serve the purpose of compliance with Art. 72 of the Articles of Association. It follows, therefore, that according to my view the mortgage-money had not become payable under the mortgege-deed with the result that, though the plaintiffs need not have served any notice for making sub-cl. (c) of cl. (2) of s. 69 applicable, they were not in a position to exercise the power of sale because of the initial difficulty of making out that there was a default in payment of the mortgage-money. The question then argued was what effect should be given to this failure to give the necessary notice? On the one hand it was suggested that we should take no notice of it in this case but that the 1st defendant should be referred to a new suit for damages if he had suffered any damage by the sale having been held in an improper manner without notice to him. On the other hand it was argued for the 1st respondent that, this being a suit for the balance of the mortgage-debt by the setting-off the sale-proceeds of a sale which was illegally held, the mortgagee's suit should be dismissed *in toto* because it was urged that a mortgagee who is not in a position to deliver over the mortgaged property because he has parted with it in a wrongful manner cannot sue the mortgagor for payment of the mortgage-debt. So far as the English Law is concerned it is pretty clear from the authorities cited and which have been referred to by my learned brother that the law is that the mortgagee who wrongfully disposes of the property and who is, therefore, unable to restore the mortgaged property when the mortgage-money is paid to him cannot maintain a suit for the mortgage-debt at all and necessarily, therefore, for any balance of the mortgage-debt. For this the latest authority is the case in *Ellis & Co.'s Trustee* v. *Dixon Johnson* (2). The learned Judges have stated there the law on the point although in the particular case they stretched a point in favour of the mortgagee and made him liable only for damages as the case was one of wrongful sale of shares which could easily be purchased and re-placed In such a case they held that the strict rule applicable to immoveable property need not be applied and that the Trial Judge was right in estimating the amount of damages arising from the action of the mortgagee and allowing that amount. Here this being a case of immoveable property the rule would apply in all its strictness if it were in England. The question then is whether this rule should be applied in this country or not. There is nothing so far as I can see in s. 69 of the Transfer of Property Act or any other section of that Act which militates against the application of this rule. Sections 20 and 21 of the English Conveyancing Act of 1881 are very nearly in the same words as s. 69 of our Transfer of Property Act; and certainly the last clause of s. 69 is exactly in the same words. Nevertheless the learned Judges in England have applied that rule as between mortgagor and mortgagee when the latter lost the mortgaged property by some wrongful act of his. The Lord Chancellor in his judgment affirming the decision in *Ellis & Co.'s Trustee* v. *Dixon Johnson* (2), above cited, lays down the rule in very broad terms as appears from *Ellies & Co.'s Trustee* v. *Dixon Johnson* (6). I must confess that I felt some hesitation in applying this rule here when we have no Indian authority on the point brought to our notice. However that may be the rule seems to be based upon equity and good conscience and I think we must adopt it here as well. The case cited in the *Madras Deposit and Benefit Soceity* v. *Passanha* (7) has really no bearing on the present point. That is the only case under s. 69 which has been brought to our notice. There certain property had been sold under the power granted under the mortgage-deed. It appears from the statement made by the learned Judge of the Small Cause Court making the reference that in that case the sale had taken place as a matter of fact after proper notice to the mortgagor. But it was apparently argued in that case that because in the mortgage-deed there was a covenant that the property might be sold after 15 days' notice which was against the provisions of s. 69 of the Transfer of Property Act the sale should be treated as invalid and the claim for the balance of the mortgage-debt should be held to be barred. The learned Judges rightly held if I may say so with respect that the provision in the mortgage-deed did not constitute a bar at all. But they certainly did not consider the question as to what was to happen if the sale was an improper sale and if the mortgaged property had been parted with by the mortgagee by a wrongful act of his. That question was not before them at all. I am, therefore, of opinion that the learned Judge's decision that the plaintiff's claim against the 1st defendant also fails is correct in this case.

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(8) 64 Ind. Cas. 634; 23 Bom. L. R. 1241.

Before closing I should like to add that the strictures passed by the learned Judge against a well-known member of the Bar Mr. Sivagnana Mudaliar are, in my opinion, not justified. The Vakil, it is now stated, had obtained the leave of the Chief Justice to become a director of the fund; and the fact that he became legal adviser to the fund does not, in my opinion, amount to anything unprofessional in his conduct. The fee he was getting was a very small one. I must, therefore, agree with my learned brother in holding that the learned Trial Judge was not right in passing the strictures he passed on the Vakil.

The directors of the fund also have a grievance because it is suggested by the learned Judge that the share-holders may make a claim against them. That is a matter with which we are not concerned at all. So far as I can see the directors have done nothing to justify a claim by the share-holders but I do not wish to say anything more about it. I agree that this appeal fails and must be dismissed with costs, three sets.

V. N. V. *Appeal dismissed.*
Z. K.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 241 OF 1925.
November 25, 1925.
Present:—Mr. Justice Sulaiman.
Musammat BITTEE—JUDGMENT-DEBTOR—APPELLANT
versus
Pandit KANHAIYA LAL MISIR—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Sale of decree—Application for execution by purchaser directed to be filed owing to defect in sale-deed—Removal of defect—Fresh application—Limitation.

The purchaser of a decree from a decree-holder made an application for execution of the decree but it was discovered that the number of the decree was entered incorrectly in the deed of sale. The application for execution was, however, merely ordered to be "filed". The purchaser then obtained another sale-deed which described the decree correctly and made a fresh application for execution:

Held, that the previous application having been ordered to be simply 'filed' and not having been struck off owing to a default of the decree-holder, must be deemed to have been still pending when the subsequent application was made and that the subsequent application must be treated as an application for revival of the previous application and no question of limitation arose in respect of the subsequent application, which in its turn could be availed of as giving a fresh start of limitation. [p. 870, col. 2; p. 871, col. 1.]

Execution second appeal against a decree of the District Judge, Benares, dated the 8th November 1924.

Mr. *Hazari Lal Kapoor*, for the Appellant.
Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—This is a judgment-debtor's appeal arising out of certain execution proceedings. In 1913 a final decree for partition was passed in favour of Sheo Shanker the vendor of the contesting respondent. Applications for execution were made by Sheo Shanker in 1914 and in subsequent years but no delivery of possession could be made. On the 2nd of October 1916 Sheo Shanker executed a sale-deed in favour of the present respondent. On the strength of this sale-deed Sheo Shanker's vendee filed an application for execution on the 9th of January 1918. Notice was ordered to be issued on this application and was served on the judgment-debtor *Musammat* Bittee. On the 10th of May 1918 she filed objections to the execution. She did not plead that the application of the 9th of January 1918 was in any way barred by time, nor did she plead that Kanhaiya Lal Misir was not a transferee of the decree and was not entitled to execute it. The only objection which she raised was that he could not execute the decree without first paying her Rs. 30 allowed under the partition decree. Subsequently on the 8th of June 1918 Sheo Shanker the original decree-holder filed an application stating that he had transferred the decree to the applicant who should be allowed to execute it. On the 15th of June 1918 the application came up for disposal. The Court looked at the copy of the sale-deed filed by the applicant and noticed that the number of the decree mentioned in it was slightly different from the number of the decree sought to be executed. The Court thought that apparently the transfer was of some other decree. If that was its real conclusion, it ought to have dismissed the application on the ground that Kanhaiya Lal Misir had no *locus standi* to execute the decree. The Court, however, did not dismiss the application nor rejected it, nor did it even strike it off. It was simply ordered to be 'filed'.

On the 6th of September 1918 Kanhaiya Lal got a second registered document executed in which the mistake in the previous sale-deed was corrected. He then filed a fresh application on the 2nd of May 1921 for execution. This time he did not file a copy of the decree along with this application and though the Court on several occasions granted him time to file a copy he failed to do so. His application was ultimately struck off. He then filed another application on the 15th of January 1924 which also was struck off. Lastly he filed the present application on the 21st of May 1924 for execution. The judgment-debtor filed objections to the execution. The Courts below have overruled those objections and have allowed the execution to proceed. The judgment-debtor has come up in second appeal. The learned Counsel for the appellant had not urged any plea of want of right in the respondent to execute the decree, nor has he urged any plea of *res judicata*. The only plea urged before me is that the present application is barred by time. The argument for the appellant is that there being no valid sale-deed of the decree on the 9th of January 1918, Kanhaiya Lal had no *locus standi* to make the application. His application, therefore, was not according to law. It is further urged that in any case the Court by its order dated the 15th of June 1918 decided that the transfer was of a different decree. It is then urged that if the application of the 9th of January 1918 was itself not according to law the subsequent applications cannot be deemed to be applications within time or according to law.

The Courts below have taken the view that there was a mere mistake in the sale-deed which was subsequently corrected and that it was the intention of the parties that the decree should be transferred. The learned Judge has relied on the case of *Salekhan* v. *Vishvanath* (1) and held that a mistake of that kind was a technical one and could be cured subsequently. If, however, the order of the 15th of June 1918 were to be taken to be an adjudication that there was no transfer of the decree in favour of Kanhaiya Lal then there would be difficulty in the way of the respondent in saying that this application of the 9th of January 1918 in spite of that adjudication must be deemed to have been in accordance with law. The Court, however, did not pass any formal order allowing the objections nor did it pass any formal order dismissing the application. The order that it should be filed, whatever the true intention might have been, was meaningless. I have already said that the plea of *res judicata* is not urged before me. It is, therefore, impossible to say that the Courts below were precluded from holding that the original sale-deed was in reality a sale-deed of the decree though a mistake crept in in its number. That being so it cannot be doubted that the application of

(1) 9 Ind. Cas. 349; 13 Bom. L. R. 22.

the 9th of January 1918 was not incompetent.

That application having been ordered to be simply 'filed' and not having been struck off owing to a default of the decree-holder must be deemed to have been still pending when the application of the 2nd of May 1921 was filed. Although this last application purported to be a fresh application for execution it can be treated as an application for revival, as has been done in several cases. I may only mention the case of *Qamaruddin Ahmad* v. *Jawahir Lal* (2). This application for revival would then at the very least become a step-in-aid of execution. The application of the 15th of January 1924 would then be within three years of this last step and that application in its turn would make the present application within time.

I am, therefore, bound to hold that the application was not barred by time and I accordingly dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(2) 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).

CALCUTTA HIGH COURT.

Civil Rule No. 801 of 1925.
July 22, 1925.
Present:—Justice Sir Hugh Walmsley, Kt., and Mr. Justice Mukerji.
SACHINDRA LAL MITTER—
Defendant No. 2—Petitioner
versus
PANCHANON MITTER and others—
Opposite Party.

Civil Procedure Code (Act V of 1908), s. 94, O. XXXIX, r. 1—Suit for declaration—Temporary injunction, whether can be granted.

In a suit for declaration of title which contains no prayer for any injunction which may last after the disposal of the suit, the plaintiff is not entitled to ask for a temporary injunction restraining the defendant from interfering with the exercise of his rights by the plaintiff during the pendency of the suit.

Application under s. 115 of the C. P. C., 1908, in the matter of Miscellaneous Appeal No. 75 of 1925 of the Court of the First Additional District Judge of 24-Perganas (Alipur), and in Title Suit No. 15 of 1925 of the Subordinate Judge, Second Court, 24-Perganas, (Alipur).

Dr. *Bijan Kumar Mukerji*, for the Petitioner.

Babus *Rupendra Coomar Mitter*, *Mrtyunjoy Chattopadhya* and *Panna Lal Dutt*, for the Opposite Party.

JUDGMENT.

Mukerji, J.—It is unnecessary to set out the facts connected with the litigation out of which this application arises as they have been set out in detail in the judgments of the two lower Courts. The application arises out of an order issuing a temporary injunction restraining the defendants, one of whom the defendant No. 2 is the petitioner before us, from interfering with the possession of the plaintiffs. The sole question before us now is whether the Courts below had jurisdiction to pass the order of temporary injunction complained of in this case. The order has been made in connection with a suit which is now pending in the second Court of the Subordinate Judge of the 24 Perganas. The prayers in the plaint in that suit are substantially as follows: (*a*) that the right of the plaintiffs who are three in number, as *shebaits* of certain deities may be declared; (*b*) that it may be declared that the three plaintiffs are entitled to the management of the *debutter* properties for a period of three years commencing from the 1st *Magh* 1331, *B. S.*, each of the plaintiffs being entitled to such management for a period of one year; (*c*) that the defendants be restrained from interfering with the possession of the plaintiff No. 1 till the decision of the suit; the prayers (*d*), (*e*) and (*f*), that if necessary a scheme may be framed, need not be referred to as they relate to certain consequential reliefs. It is clear, therefore, that the suit is not for recovery of possession against the defendants. In cl. (*c*) to which I have already referred, the plaintiffs pray for an injunction restraining the defendants from interfering with their possession only till the decision of the suit. There is, therefore, no prayer for any injunction which may last after the disposal of the suit. The question is whether, upon prayers such as these, a temporary injunction may be issued by the Court in connection with the suit. In order to determine this question, we have to refer to the application upon which this injunction has been granted. The application filed by the plaintiffs supported by the affidavit of the plaintiff No. 1 states, first of all, the facts relating to the suit that is now pending. In para. 2 of the application, it is distinctly stated that the plaintiff No. 1 is now in possession of the properties which form the subject-matter of the suit, having been put in possession thereof by the last manager

Kanailal Mitter. In para. 3, it is stated that, if the defendants be not restrained from interfering with the possession of the plaintiff No. 1, there will be a serious dislocation of business, the properties will be wasted, the *sheba* and *puja* of the deities will suffer as there will be no realization from the *debutter* properties and there will be breaches of the peace. Upon these allegations, it is difficult to say how a case justifying an injunction either under the provisions of O. XXXIX or s. 94 of the C. P. C. has been made out. Indeed, the learned Vakil appearing on behalf of the opposite party does not profess to contend that the case comes within the purview of O. XXXIX, C. P. C., but he urges that the injunction granted should not be disturbed inasmuch as it was really issued in accordance with the terms of s. 94, C. P. C., to prevent the ends of justice from being defeated. The allegations taken at their highest amount to this that, if an injunction is not granted, there will be interference in the plaintiffs' collection of rents, that there may be apprehension of a breach of the peace and that there may be disturbances of the plaintiff No. 1's peaceful possession of the properties to which he has been put in possession. These allegations even if established would not, having regard to the nature of the suit and the reliefs prayed for, bring the case within the scope of s. 94, C. P. C., and it cannot be said that, even if these allegations be true, the refusal to grant a temporary injunction would defeat the ends of justice. Whatever other remedies he may have in the matter, injunction in the present suit is not his remedy. In this view of the matter, I am of opinion that the order that has been passed restraining the defendants from interfering with the plaintiffs' possession till the decision of the suit has been passed without jurisdiction. I would, therefore, make the Rule absolute and set aside the order passed by the Court below with costs to the petitioners, the hearing-fee being assessed at two gold *mohurs*.

Walmsley, J.—I agree.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 31 OF 1925.
March 8, 1926.
Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.
Babu SHEO DARSHAN SINGH—
OPPOSITE PARTY—APPELLANT
versus
BENI CHAUDHRI AND OTHERS—
APPLICANTS—RESPONDENTS.

Mortgage—Redemption decree—Costs, whether charge on mortgaged property—Decree, interpretation of.

Costs awarded to the mortgagee in a redemption suit are, as a rule, added to the amount of the security, and the mortgagor is made personally liable for them only in very exceptional cases of misconduct.

It is competent to the Court in the exercise of its discretion to award the costs personally against the mortgagor, but where the terms of the decree are ambiguous it ought not to be construed in such a manner as to enable the mortgagee to realise his costs personally from the mortgagor.

Amina Bibi v. *Ram Shanker Misar*, 50 Ind. Cas. 730; 41 A. 473; 17 A. L. J. 582, followed.

Letters Patent Appeal against a judgment of Mr. Justice Daniels (differing from that of Mr. Justice Mukerji), dated the 18th December 1924.

Mr. *Shiva Prasad Sinha* for Mr. *Haribans Sahai*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This case comes before us by reason of a difference of opinion between the Judges who decided Second Appeal No. 1696 of 1922.

The question is one of the interpretation of a decree passed in a suit for redemption of a mortgage, and the facts may shortly be stated as follows:—

Babu Sheo Darshan Singh brought a suit for redemption of a mortgage and obtained on the 22nd of April 1919 a preliminary decree. The Court found that the plaintiff had to pay for redemption a sum of Rs. 1,747-8-6 for principal and interest and Rs. 69-2-0 for costs, making a total of Rs. 1,816-10-6.

The item for costs just referred to included only two-thirds of the costs incurred by the defendants-mortgagees.

This sum was deposited by the plaintiff-mortgagor in Court and on the 26th of June 1919 a final decree under O. XXXIV, r. 8 was passed. On the 15th of July 1919 the plaintiff was put in possession of the mortgaged property.

Meanwhile the mortgagees appealed against the preliminary decree and on the 2nd of December 1920 the Appellate Court varied the preliminary decree by directing the payment of a larger sum and also by giving direction for payment of certain costs. The time for payment was extended by the appellate decree to the 2nd of March 1921. Before this latter date the plaintiff did deposit in Court an extra sum of Rs. 175 making a total of Rs. 1,991-10 6. There was, however, due from him under the appellate decree a further sum of Rs. 45-6-0 in respect of costs, and this sum he did not pay before the date in question.

On the 18th of June 1921 the mortgagees applied to the Court and asked to be restored to possession of the mortgaged property, on the grounds that the decree of the Appellate Court had modified the decree of the Court of first instance and that the full sum payable by the plaintiff-mortgagor had not been deposited in Court. The mortgagee also asked for mesne profits for the period covered by the plaintiff's possession. The defendants got an order for re-delivery of possession and also got an order entitling them to Rs. 800 as mesne profits for two years. The plaintiff then appealed on the ground that he had in effect complied with the terms of the appellate decree and was not entitled to re-deliver possession to the mortgagees. In other words his plea was that the payment of the above mentioned sum. of Rs. 45-6-0 was not a condition precedent to his obtaining redemption and to his being entitled to retain possession of the mortgaged property.

The question arose, therefore, whether this sum of Rs. 45-6-0, costs awarded in appeal, was a charge on the mortgaged property. Was this sum added to the mortgage money? The two learned Judges of this Court have differed in their opinion regarding this matter. It appears to us, however, that the view taken by Mr. Justice Daniels is the correct view and that, as a matter of law, this sum of Rs. 45-6-0 was a charge on the mortgaged property. It is true that in the decree of the Appellate Court there was some confusion regarding the order for costs. The Appellate Court was of opinion that the defendants-mortgagees were entitled to their full costs in the Court of first instance, that is to say to a sum over Rs. 100 and it made an order accordingly. It laid down that the plaintiff-mortgagor was liable to pay Rs-1,991-10-6 by the 2nd of March 1921, and then went on to give further direction regarding costs. Both sides admit that as framed the additional order regarding costs was erroneous in respect of the amount specified but there is no dispute whatever that a sum of Rs. 45-6-0 was payable by the mortgagor under the Appellate Court's decree. The question, whether costs awarded in the manner just referred to were a charge on the mortgaged property, is one regarding which the law is well-settled and in this connection we may refer to the statement of the law laid down in Ghose's Law of Mortgage in India, 4th Edition, Vol. I, page 619. Speaking of redemption the learned author says: " But the costs of the action will, as a rule, be only added to the amount of the security; and the mortgagor will be made personally liable for them only in very exceptional cases of misconduct." The learned author goes on to say that it is certainly competent to the Court in the exercise of its discretion to award the costs personally against the mortgagor but where the terms of the decree are ambiguous it ought not to be construed in such a manner as to enable the mortgagee to realise his costs personally from the mortgagor. The law has been laid down in the same sense in a case in this Court reported as *Amina Bibi* v. *Ram Shanker Misar* (1). We think, therefore, that the interpretation put upon this decree by Mr. Justice Daniels was a correct one, and in accordance with the law as explained above. It follows, therefore, that the mortgagor, having failed to make a deposit in Court of the full sum charged upon the property, was not entitled to retain, possession as against the mortgagees after the decree had been passed in appeal. We approve of the view taken by Mr. Justice Daniels and dismiss this appeal with costs including fees on the higher scale.

S. S.

N. H. *Appeal dismissed.*

(1) 50 Ind. Cas. 730; 41 A. 473; 17 A. L. J. 582.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 7 OF 1924.

December 22, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

JATINDRA CHANDRA BANERJEE
—DEFENDANT—APPELLANT
versus
MURLIDHAR—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 116—'Latent defect, *meaning of—Sale by sample—Open delivery—Refund, suit for, whether maintainable—Damages.*

Where in a case of sale of goods by sample open delivery is taken after examination of the goods and the goods are subsequently discovered to be defective, the purchaser cannot claim a refund of the purchase-money, his only remedy is by way of damages. [p. 875, col. 1.]

The expression "latent defect" in s. 116 of the Contract Act means a defect which is not obvious to the eye and is not apparently noticeable. [p 875, col. 2.]

Section 116 of the Contract Act is applicable to a case of sale by sample. [*ibid.*]

Appeal against a decree of Mr. Justice Buckland, dated the 11th December 1923.

Sir *B. C. Mitter* and Mr. *I. B. Sen*, for the Appellant.

Messrs. *Pugh* and *Moor*, for the Respondent.

JUDGMENT.

Chakravarti, J.—The defendant appeals against the judgment of Mr. Justice Buckland delivered on the 11th December 1923 decreeing the suit of the plaintiff for refund of the purchase-money of certain goods.

The facts are shortly these:—On the 13th October 1922 the plaintiff purchased from the defendant ready goods, three cases of Black Italian for Rs. 6,002-5-6 and took open delivery of the goods on the same day from the godowns of Messrs. Cox & Co. in three boxes of which two had already been opened and two pieces were taken out for samples. It is the plaintiff's case that the pieces were counted at the time of delivery and no question was then raised that there was any deficiency in the goods or that the goods were not up to the sample.

It appears that the defendant on his turn had purchased the said goods from Cox & Co. and in fact on the same day paid Rs. 5,402-2-0, to Cox & Co. the price for which he had purchased the goods.

The goods continued in the possession of the plaintiff and on the 9th November for the first time the plaintiff wrote to the defendant that the goods were found tender (*i. e.* rotten). The defendant replied to this letter on the 10th alleging that the open delivery of the goods were taken after examining them in the presence of the broker and no objections were taken before that date. Then after demand for refund of the purchase price, this suit was brought on the 26th January 1922.

The defendant in his written statement stated that the delivery of the goods was taken after full inspection and that the plaintiff had no right to reject the goods and that the "alleged rejection was not made within a reasonable time."

A number of issues were raised and the only claim in the issues was for refund and not for damages.

The evidence adduced in the case was not so full as it might be, but that was owing to the fault of the parties and consequently the learned Judge had to decide the matter on the record as it was. It appears that the goods were surveyed by a professional surveyor who made a report on the 27th November 1922 and Mr. H. R. Stark, the surveyor was examined in the case and proved his report.

The learned Judge found upon the evidence that the sale was by sample and that the goods were rotten and unsaleable. Further the learned Judge has found that the plaintiff had no reason to suspect between the 13th October and 7th November that the condition of the goods was unsatisfactory and that in the circumstances of the delay in claiming rejection of the goods was not unreasonable. Then the learned Judge held that the plaintiff exercised no act of ownership beyond keeping the goods in his godown. On these findings the learned Judge made a decree in favour of the plaintiff directing a refund of the money claimed.

Sir B. C. Mitter for the appellant contended that the plaintiff has made out no case for damages and his only case was for refund of the purchase-money and that case should fail because the plaintiff exercised acts of ownership by selling the goods and there was unreasonable delay before the plaintiff complained against the soundness of the goods. The learned Counsel further contended that assuming that the plaintiff was entitled to claim damages the plaintiff has failed to prove what the damages really were. It was further contended that the goods were according to sample and that the defect in the goods, if any, was a latent defect and that under s. 116 of the Contract Act the defendant was not liable to pay damages. In support of his last contention he strongly relied upon the report and the deposition of Mr. Stark.

As to the first point, Mr. Pugh for the respondent, at the very outset stated that he would not press his claim for refund and he would be content with a decree for damages and that as the value of the goods was only Rs. 50 he asked for a decree for the amount claimed less that amount, It appears to us that in the circumstances, the plaintiff could not claim a refund of the purchase-money, his remedy if any would be by way of damages and not refund.

It further appears to us that the plaintiff after he took possession of the goods, exercised acts of possession as an owner when he sold some of the goods on the 25th and 26th of October to sub-purchasers who according to the plaintiff returned the goods to him as unsaleable. We are not satisfied that the delay in rejecting the goods was a reasonable delay and that after exercising acts of ownership in the goods the plaintiff could not claim refund of the purchase-money.

We agree with the learned Judge in his finding that the goods were not saleable and their value was only Rs. 20 as established by the evidence of Mr. Stark and there was no rebutting evidence on the point. There was an alternative claim for damages in the plaint and evidence was led on this point.

The most important point is the question as to whether or not the defect in the goods was a latent defect within the meaning of s. 116 of the Contract Act.

The report and the evidence of Mr. Stark conclusively show that on outward view the goods appeared to be perfect. I quote a passage from his report where he says:—

"An examination of the cloth in 3 and 4 was made and although the paper wrappers and tape which secured same appeared in perfect orders, the cloth itself, which also appeared on inspection to be undamaged was when tested by tearing found to be partially rotten."

"The state of the cloth which renders it of little value and quite unacceptable by the buyers for sound goods is due, in my opinion, to the effect of the fumes from some substance like bleaching powder."

The vendor failed to detect the defect when open delivery of the goods was taken and in fact it was not detected until a long time after when the sub-purchasers returned the goods. There can then be no question that the defect was one which was not obvious to the eye and could not be detected without testing the strength of the cloth.

There is no suggestion that the vendor was guilty of any fraud in the matter. In fact he bought the goods as they were lying in the godowns and made only a small profit on the bargain and there was no special warranty for quality by the defendant.

Section 116 of the Contract Act runs as follows :—" In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it".

The word "latent defect" is not defined in the Act. Taking the illustration as a guide, it seems clear that the word 'latent defect' means a defect which is not obvious to the eye and is not apparently noticeable.

The English Sales of Goods Act defines the word but that is of little help to us in construing a different Act. The learned Counsel for the plaintiff did not contend that the defect was not a "latent" one within the meaning of s. 116 but he contended that s. 116 did not apply to a case of sale by sample. No authority for this proposition was cited before us. On a careful reading of the sections of the Contract Act beginning with s. 110 to s. 116 we find nothing in them which would suggest that the operation of s. 116 is limited in that way.

We are, therefore, of opinion that the defendant is not liable for damages for a defect in the goods which was a latent one within the meaning of s. 116 of the Contract Act.

The result, therefore, is that this appeal is allowed and that the plaintiff's suit should be dismissed with costs in all Courts.

Greaves, J.—I agree.

Z. K.   *Appeal allowed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 61 OF 1924.

February 1, 1926.

Present :—Mr. Justice Hasan and Mr. Justice Raza.

Syed MOHAMMAD ZAFAR—PLAINTIFF—APPELLANT

versus

Musammat KANIZ SAIYADA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Court-fee not tendered—Procedure—Amendment at late stage.

An application for amendment of a plaint should not be rejected on the ground that the necessary Court-fee had not been paid with the application. The application should be granted and the plaintiff required to pay the requisite Court-fee within a time fixed by the Court. [p. 876, col. 2.]

Under O. VI, r. 17, C. P. C., all amendments ought to be allowed at any stage of the proceedings which satisfy the two conditions:

(a) of not working injustice to the other side, and [p. 877, col. 1.]

(b) of being necessary for the purpose of determining the real question in controversy between the parties. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Sultanpur, dated the 21st September 1924.

Messrs. *Niamat Ullah* and *Ali Zaheer*, for the Appellant.

Mr. *M. Wasim*, for the Respondent.

JUDGMENT.—This appeal arises out of a declaratory suit. The plaintiff is the son of one Mohammad Baqar of Isauli, who died on the 22nd October 1922 leaving *zemindari* property in certain villages in the Sultanpur District. The defendants Nos. 1 and 2 are the daughters of Mohammad Baqar and the defendant No. 3 is his widow. On the death of Mohammad Baqar mutation was effected in favour of the parties in respect of the shares they were entitled to under the Muhammadan Law. The shares are as follows:—

Plaintiff 7-annas.
Defendant No. 1 3½-annas.
Defendant No. 2 3½-annas.
Defendant No. 3 2-annas.

The plaintiff brought the present suit on the 3rd November 1923, alleging that he alone was in possession of the entire property left by Mohammad Baqar and that he alone was entitled to the entire property, the defendants being excluded from inheritance by a custom. He prayed for a declaration that he was entitled to the 9-annas share in respect of which mutation had been effected in favour of the defendants by order of the Revenue Court.

The defendants Nos. 2 and 3 filed their written statements admitting the plaintiff's claim. The suit was resisted by the defendant No. 1 alone. She denied the plaintiff's allegations about possession and custom and contended that she was in rightful possession of the share which she was entitled to under the Muhammadan Law as an heir of Mohammad Baqar deceased. It was further pleaded that the suit for declaration was not maintainable as the plaintiff was not in possession of the share in dispute.

The learned Subordinate Judge decreed the plaintiff's claim for declaration with respect to the 5½-annas share of the defendants Nos. 2 and 3 who confessed the judgment However he dismissed the claim against the defendant No. 1 with respect to her 3½-annas share on the finding that the plaintiff was not in possession of that share and the suit for mere declaration was not, therefore, maintainable.

The plaintiff has filed this appeal challenging the finding on the point decided against him. It is also contended that the learned Subordinate Judge was wrong in not granting the plaintiff's applications for amendment of the plaint.

We think this appeal should be allowed. The appellant's prayer, that the decree of lower Court be set aside and the case remanded for decision on merits, must be granted.

The plaintiff filed an application on the 22nd January 1924 for amendment of the plaint praying for insertion of a relief for recovery of possession in case the plaintiff was not found in possession of the property in dispute. That application was rejected on the ground that the necessary Court-fee had not been paid with the application. The plaintiff filed another application for amendment to the same effect on the 30th August 1924. This application was accompanied with the requisite amount of Court-fee. This second application was also rejected. It was rejected on the ground that it was filed too late as the parties had closed their evidence on all the points. The arguments were concluded on the 27th August and the case was then reserved for judgment.

We think the learned Subordinate Judge did not exercise his discretion properly in rejecting the applications for amendment in this case. No difficulty would have arisen if the first application for amendment had been allowed and proper order passed thereon. That application should not have been rejected on the ground that the necessary Court-fee had not been paid with the application. This was irregular. The application should have been granted and the plaintiff required to pay the requisite amount of Court-fee within the time fixed by the Court. If he had failed to comply with the order then he would have suffered the consequences. It was not necessary for him to pay the Court-fee just at the time he had presented the application for amendment.

The second application was of course filed late; but having regard to the facts and circumstances of the case, we think it ought to have been allowed even at that late stage. The learned Subordinate Judge has himself observed in his judgment that applications for amendment may be allowed at a very late stage of the suit even in second appeal. He has rejected the application observing, that "the loss caused to the plaintiff by the dismissal of the suit on this ground would not be irretrievable as the fresh suit after this will not be barred on any ground." This being the case, the application should have been allowed to avoid multiplicity of suits. Under O. VI, r. 17, C. P. C. all amendments ought to be allowed at any stage of the proceedings which satisfy the two conditions:

(*a*) of not working injustice to the other side, and

(*b*) of being necessary for the purpose of determining the real question in controversy between the parties.

The amendment applied for does not alter the real matter in controversy between the contending parties. The learned Subordinate Judge has not rejected the application for amendment on that ground. We do not think that the amendment would have caused the contesting defendant an injury which could not be compensated in costs. We find that both parties have led evidence on the whole case and it is necessary that findings should be given on all the issues arising on the case. The suit should be finally determined.

We allow the appeal. The decree of the lower Court is set aside as against the contesting defendant. The plaintiff's application for amendment dated the 30th August 1924 is allowed. The plaint will be amended accordingly. The plaintiff should pay Rs. 100 as costs to the contesting defendant in this connection, within one month hence. The case is remanded to the lower Court for decision on merits under O. XLI, r. 23, Sch. I of the C. P. C. No fresh evidence will be admitted on the issues on which the parties have already produced their evidence and closed their respective cases. The Court-fee stamp which has been returned to the plaintiff by the lower Court should be filed in that Court before the case is taken up by that Court. Costs here and hitherto will abide the result.

We find the plaintiff has filed an application for revision against an order rejecting his application for amendment of the decree. It is contended that the Pleader's fee was not correctly entered in the decree. The learned Subordinate Judge rejected the application on the ground that there was an appeal from the original decree to this Court and the point could be taken up here. As the decree has been set aside, this application should be dismissed. Now there will be a fresh decree when the suit is finally determined by the lower Court as directed above. No order as to costs of this application.

N. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 354 OF 1925.

November 25, 1925.

Present:—Mr. Justice Sulaiman.

DEBI BAKHSH—JUDGMENT-DEBTOR—DEFENDANT—APPELLANT

versus

FIRM SHAMBHU DIAL-GANGA PRASAD—DECREE-HOLDERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Decree passed against wrong person by mistake—Application for execution—Amendment—Substitution of judgment-debtor's name—Limitation, extension of—Previous application, whether in accordance with law.

In a suit in which there were several defendants the Court purporting to pass a decree against one particular defendant passed it by mistake against another. The decree-holder made several applications for execution of the decree against the defendant whose name was entered in the decree. The latter then applied for amendment of the decree and the decree was amended by striking out his name and substituting the name of the defendant against whom the Court had intended to pass the decree. This was done more than three years after the date of the passing of the decree. When the decree-holder made an application for execution of the decree against the defendant whose name was entered in the decree on amendment an objection was taken that the application was barred by time:

Held, (1) that so long as the wrong decree stood, the only person against whom the decree-holder could proceed in execution was the person whose name was entered in the decree and that, therefore, the applications made by the decree-holder for execution prior to the amendment of the decree were made in accordance with law within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operated to save limitation; [p. 879, col. 1.]

(2) that the present application having been filed within three years of the last application was within time; [p. 879, col. 2.]

(3) that on another view of the case, it was not possible for the decree-holder to execute the decree against the real judgment-debtor till the date of the amendment and that it was only after the amendment that a right to apply to execute the decree against him had accrued and that for this reason also the application was within time. [*ibid.*]

Execution second appeal from a decree of the First Subordinate Judge, Cawnpore, dated the 13th November 1924.

Mr. *S. N. Seth*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This is a judgment-debtor's appeal arising out of an execution proceeding. A curious point of law arises in this case owing to a mistake made by the Court of first instance when passing the decree. The suit was instituted against three persons whose names were mentioned in the plaint in a certain order. The learned Munsif, when writing his judgment, altered the serial numbers of the defendants and although apparently he intended to pass a decree against the appellant Debi Bakhsh, the decree was passed against Bhawani Shankar on the 16th of January 1916. The plaintiff armed with this decree against Bhawani Shankar proceeded to execute it. Applications for execution were filed against Bhawani Shankar on the 23rd of July 1919, on the 13th of July 1922 and on the 26th of February 1923. With regard to this last application it may be mentioned that originally the names of all the three defendants were included in this application but when objections were raised by persons whose names were not to be found in the decree, the decree-holder's Vakil naturally exempted them and asked for execution against Bhawani Shankar alone.

Bhawani Shankar then filed an application for amendment of the decree on the ground that it was not the intention of the judgment to decree the claim against him. Owing to a second blunder, notice of this application was not sent to Debi Bakhsh the appellant, but only to the plaintiff-decree-holder. The Court being satisfied that Bhawani Shankar had not been made liable amended the decree and substituted the name of Debi Bakhsh in place of Bhawani Shankar on the 5th of January 1924, although no notice had been issued to Debi Bakhsh.

The decree-holder then put in an application for execution of this amended decree on the 28th of January 1924 against Debi Bakhsh. Debi Bakhsh objected to the execution. His objections were disallowed by the first Court. He appealed to the lower Appellate Court and the only point urged before that Court was that the present application for execution was barred by time. His appeal, however, has been dismissed.

In second appeal the learned Vakil for the appellant contends that inasmuch as there were no proceedings in execution against Debi Bakhsh from the date of the decree till the supposed amendment the decree had become dead and no amount of amendment could revive it. His contention is that the present application for execution, even though it be within three years from the date of the amendment, is barred by time. His second contention is that the decree-holder having exempted him in Execution Department once before is now estopped from asking execution against him, and the third point, though not taken in the grounds of appeal, is that the amendment, having been made behind his back, is a nullity and not binding on him.

If one reads the language of Art. 182 (4) of the Limitation Act (IX of 1908) the first impression would be that an application for execution if made within three years of the date of its amendment is within time. That would seem to be a proper inference on its literal construction, as there are not any further qualifying words. But it does seem to have been held in several cases that if the decree was time-barred, and in that sense had become dead, its amendment would not give the decree-holder a fresh start. I may refer to the case of *Anandram* v. *Nityananda Barham* (1) which was followed in the case of *Rabiuddin* v. *Ram Kanai Sen* (2). As it is not absolutely necessary in this case to decide this point finally I assume this contention to be correct, that is to say I assume that if the decree had become time-barred on the date of its amendment then the decree-holder cannot get a fresh start.

As regards the question of an amendment behind the back of the appellant I must concede that it was unfair to amend the decree without giving Debi Bakhsh an opportunity to show cause against it. But if the amendment has been wrongly made it is still open to Debi Bakhsh to apply to the Original Court which has amended the decree for a review of its order on the ground that it was passed behind his back and that it is unjust or wrong. It is not necessary for me in this appeal to express any final opinion as to whether the order for amendment was right or wrong. I have in stating the facts assumed it for the purpose of this appeal that the amendment was correct.

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(1) 32 Ind. Cas. 744.

(2) 59 Ind. Cas. 186.

As regards the question of exemption it is obvious that the decree-holder's Vakil was bound to exempt Debi Bakhsh and Debi Sahai from the execution proceedings taken under the wrong decree. The names of these persons were not in the decree and they could not be proceeded against. That exemption, in my opinion, would not amount to an estoppel when subsequently it was discovered that the decree was wrongly prepared and was in fact amended.

The main question which I have to decide is whether the present application is barred by time. This depends on the further question whether the decree was kept alive by successive applications made in 1919, 1922 and 1923 against Bhawani Shankar whose name had been wrongly entered in the decree and not against Debi Bakhsh the true judgment-debtor. The learned Vakil for the appellant has strongly contended before me that execution proceedings taken against strangers can, in no sense, keep the decree alive and that all these applications must be deemed to have been applications not in accordance with law. He has distinguished this case from cases where execution is taken out against joint judgment-debtors. It is, no doubt, a fact that Bhawani Shankar's name was wrongly entered in the decree. But so long as the wrong decree stood, the only person against whom the decree-holder could proceed was Bhawani Shankar. He could not before amendment really proceed against Debi Bakhsh. The applications for execution which he filed were on the face of the wrong decree the only applications which he could have made and, therefore, in my opinion they must be deemed to have been made in accordance with law. The defect was not so much in the applications as in the decree sought to be executed. The applications themselves were perfectly in order. They were, therefore, proper applications under Art. 182 of the Limitation Act. If this were not the correct law then the result would be that if by a mistake the name of a wrong judgment-debtor is substituted in a decree and the mistake is not discovered for three years the decree-holder would be without any remedy. I do not consider that this is the true position. The applications were proper applications so long as the decree remained unamended with the result that the decree must be deemed to have been kept alive up to 1923. The present application having been filed within three years of the last application is also within time. In this view of the matter it is not necessary for the decree-holder to fall back on Art. 182 (4) and calculate time from the date of the amendment, namely, the 5th of January 1924. The propriety of the order of amendment has been left open by me.

There is another aspect of the case according to which also the application for execution can be held not to be time-barred. As the name of Debi Bakhsh had been omitted from the wrong decree that decree before its amendment was incapable of execution against Debi Bakhsh. It was not possible for the decree-holder to take any steps by way of execution against him. It is only since the decree has been amended and the name of Debi Bakhsh brought on the record as a judgment-debtor that a right to apply to execute the decree against him has accrued. It seems to me that under these circumstances the decree-holder is entitled to execute it against him. This view is supported to some extent by the observations in the case of *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (3) that the corresponding Article in the old Limitation Act must be deemed to necessarily contemplate the existence of a decree capable of being executed at the date of the decree and that that Article would not apply if a wrong decree incapable of execution were passed.

The appeal is accordingly dismissed. As, however, a difficult point of law arose owing to the negligence of the plaintiff in not seeing that the correct decree had been prepared, I direct that the parties should bear their own costs of this appeal.

Z. K. *Appeal dismissed.*

(3) 17 A. 39 at p. 41; A. W. N. (1894) 191; 8 Ind. Dec. (N. S.) 349.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 157 OF 1925.
November 13, 1925.
Present:—Mr. Justice Cuming and
Mr. Justice B. B. Ghose.
MANMATHA NATH SETT—DEFENDANT
No. 1—APPELLANT
versus
NAGENDRA NATH BHATTACHARJYA
—PLAINTIFF AND PURNA CHANDRA DAS
AND ANOTHER—*Pro forma* DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 6—Attachment before judgment—Past conduct of defendant.

Under O. XXXVIII, r. 6, C. P. C., the Court must be satisfied that the defendant is now about to dispose of his property with the intention of delaying and obstructing any decree that the Court might pass against him.

The mere fact that the defendant in the past mortgaged or otherwise disposed of his property is not sufficient ground for an order under O. XXXVIII, r. 6, C. P. C.

Appeal against an order of the Subordinate Judge, First Court, 24-Perganahs, dated the 7th of April 1925.

Babus *Braja Lal Chakravarti* and *Paresh Lal Shome*, for the Appellant.

Babu *Tarkeshwar Pal Choudhury*, for the Respondents.

JUDGMENT.

Cuming, J.—This is an appeal against an order of the learned Subordinate Judge of 24-Perganahs Mr. B. K. Dutt ordering under O. XXXVIII, r. 6, C. P. C., that the property of defendant No. 1 in a certain money suit should be attached before judgment. To justify an order under this rule it is necessary that the Court should be satisfied that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. Now the evidence on which the learned Subordinate Judge has apparently relied to show that defendant No. 1 is about to dispose of his property is a bare statement of the plaintiff's son on affidavit. He states on affidavit that he believes that the defendant is about to dispose of his property through two persons Bhusan Chandra Das and Mani Lal Chatterjee. No details whatever are given beyond this bare statement. It is not clear who these persons are or where they reside.

The learned Subordinate Judge has also relied on the fact that some three or four years ago the defendant and his father borrowed a sum of Rs. 25,000 and mortgaged their properties to do so. It may be here pointed out that the mere fact that the defendant in the past mortgaged his property or otherwise disposed of it would not be in itself a sufficient ground for an order under O. XXXVIII, r. 6. What we are concerned with is the present conduct of the defendant and the Court must be satisfied that he is now about to dispose of his property with the intention of delaying and obstructing any decree that the Court might pass against him. I am not satisfied on the evidence that he is about to dispose of his property. As I have pointed out the only evidence is the affidavit of the plaintiff's son. No further evidence has been produced. It is to be noted that in the affidavit it is stated that the statements made in paras. 1, 2, 3 and 4 are true to the knowledge of the deponent and all the remaining statements are true according to his information, enquiry and belief. The most important paragraphs in this affidavit are paras. 6 and 7 in which he alleges that the defendant is trying to dispose of his property; and, therefore, this portion of his statement is true according to his information, enquiry and belief. He does not inform us as to the sources of his information, enquiry and belief. Therefore this affidavit by itself is not sufficient to satisfy me that the defendant No. 1 is about to dispose of his property. As against this affidavit we have the denial of defendant No. 1. I am not, therefore, satisfied that the Court was justified in passing the order for attachment before judgment.

The appeal must, therefore, succeed and is decreed with costs. The order of the lower Court that defendant No. 1's properties (which are properties Nos. 1 and 3 and to which the appeal has been confined) should be attached before judgment must be discharged. Hearing-fee of this appeal is assessed at five gold *mohurs.*

Ghose, J.—I agree.

M. B. *Appeal decreed.*
N. H.

BOMBAY HIGH COURT.

CRIMINAL APPEALS NOS. 182 AND 183 OF 1925.
August 13, 1925.
Present:—Mr. Justice Fawcett and
Mr. Justice Coyajee.
VALLABHRAM GANPATRAM
AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 193, 381, 466—Evidence Act (I of 1872), ss. 30, 124—Removing Official file from proper custody—Dishonest intention—Theft—Abetment—Destruction and mutilation of documents—Exculpatory statement, whether confession—Official reports, whether privileged.

A correspondence file belonging to Government was in the custody of a *mamlatdar* who handed it over for safe custody to a clerk. The latter kept the file at his house, but while he was away accused No. 1, a *karkun* in the *mamlatdar's* office, obtained the key of the house from the person with whom it had been left, and removed the file Accused No. 1 then accompanied accused Nos. 2 and 3, who were interested in the property to which the file related, to the house of their Pleader who had been retained to prepare an appeal and for that purpose wanted to inspect the file. Accused No. 1 handed over the file to accused Nos. 2 and 3 at the Pleader's house and himself went away. He returned in the evening and having obtained the file from accused Nos. 2 and 3 replaced it in the house of the clerk. It was subsequently discovered that during the interval that the file had been in the possession of accused Nos. 2 and 3 one document had been abstracted and some others had been mutilated. The file contained documents of which accused Nos. 2 and 3 were not entitled to have inspection:

Held, (1) that accused No. 1 having removed the file from the possession of the clerk who had the custody of it on behalf of the *mamlatdar*, without the consent of the *mamlatdar* with intent to cause wrongful gain to accused Nos. 2 and 3, he was guilty of an offence under s. 381 of the Penal Code; [p. 883, col. 2.]

(2) that accused Nos. 2 and 3 were guilty of an offence under ss. 381/109 of the Penal Code; [p. 887, cols. 1 & 2.]

(3) that the inference was that the removal and the mutilation of the documents had been effected by one or both of accused Nos. 2 and 3; [p. 883, col. 2.]

(4) that even if it was effected by one of them in the presence of the other in furtherance of the common intention of both of them, s. 34 of the Penal Code was applicable and both of them were guilty of offences under ss. 193 and 466 of the Penal Code. [p. 887, col. 2.]

Per *Fawcett, J.*—A statement made by an accused person denying his guilt is not a "confession" within the meaning of s. 30 of the Evidence Act. [p. 886, col. 2]

Reports by one Government Officer to another written in official confidence are privileged under s. 124 of the Evidence Act and are not documents that an outsider has a right to inspect. [p. 886, col. 1.]

Criminal appeals from convictions and sentences passed by the Sessions Judge, Surat.

FACTS.—One Lallubhai Narsi, the father of accused No. 2 and the grandfather of accused No. 3, applied to the Government for the lease of a certain plot of land which was granted to him on the condition that, before taking possession of the land, he should cause to be built at prescribed places certain wells to be approved by the Local Board. As he took possession of the land before substantial compliance with the conditions imposed on the lease he was ordered to be evicted from the land by the Collector who sent the order, along with the correspondence file to the *mamlatdar* for proper compliance. The *mamlatdar* sent the order to his *aval karkun* for necessary action and himself proposed to go through the file with the help of his land correspondence clerk, Jeyshankar. The file was sent to Jeyshankar for safe custody, but when the peon took it to his house, he found it locked as the clerk was away on a private business. Jeyshankar had left the key of this house with his neighbour Premshankar with instructions to keep the file in his house when the peon brought it. Vallabhram, the accused No. 1 who was a record clerk in the *mamlatdar's* office came in the afternoon of the same day, obtained the key and removed the file, and along with accused Nos. 2 and 3 went to Bulsar at the residence of the latter's Pleader. While the Pleader was going through the file, accused No. 1 left for some other business and in the evening all the three accused came back and the file was re-placed. On Jeyshankar's return he demanded the file from accused No. 1 who had again taken it for the purpose of making certified copies of certain documents to be supplied to the accused Nos. 2 and 3 at their request and under orders of the *mamlatdar*. The accused gave back the file pointing out that certain papers were missing while others were either mutilated or altered.

Messrs. *Amin*, *M. P. Talivala*, *Velinker*, *G. N. Thakor* and *R. W. Desai*, for the Accused.

Mr. *Kanga*, Advocate-General, (with him Mr. *S. S. Patkar*), for the Crown.

JUDGMENT.

Coyajee, J.—[After stating the facts of the case His Lordship proceeded:—] On these facts, the charge Ex. I was framed. The Sessions Judge agreeing with two out of the three assessors held that accused No. 1 had removed the *tumar* from Jeyshankar's house, with the intention of helping accused Nos. 2 and 3 to utilise it for their own benefit by removing certain papers and altering some others. He, therefore, convicted accused No. 1 of an offence under s. 381, Indian Penal Code. He convicted accused Nos. 2 and 3 under s. 381 read with s. 109; and also under ss. 466 and 193 read with s. 34 in respect of the two mutilated documents Exs. 8 and 14. Punishments were awarded, as stated in the judgment.

On July 24, 1920, accused Vallabhram made a confession (Ex. 33) before the First Class Magistrate at Bulsar. He retracted it in the Court of the Committing Magistrate and maintained that attitude in the Sessions Court. Before us, however, his Counsel has relied on the facts set out in that statement. The learned Advocate-General, thereupon, revived his claim to rely upon it as against all the appellants. I, however, prefer not to take it into consideration as against accused Nos. 2 and 3.

On behalf of accused Nos. 2 and 3 it is contended that the *tumar* was not removed by them in conspiracy with accused No. 1 from Jeyshankar's house to their own Vakil Govindji's house in Bulsar, as alleged, and that the story of the prosecution is entirely false. The defence led no evidence; and the voluminous evidence adduced by the prosecution way very fully and carefully discussed before us by learned Counsel on both sides; it leaves no doubt as to the correctness of the findings recorded by the learned Judge that all the three accused persons were guilty of the offence of theft. On the morning of the 6th, accused Nos. 2 and 3 arrived in Pardi and met accused No. 1 (Exs. 34 and 57). At about noon accused No. 1 obtained from Premshankar (Ex. 65) the key of Jeyshankar's house; he opened it and removed the *tumar*. Accused Nos. 2 and 3 engaged a tonga of Mithal Ramji (Ex. 51), and they all went to the house of the Vakil, Govindji Vasanji (Ex. 24) at Bulsar. The *tumar* was shown to him. They returned to Pardi at about 9-30 at night and stayed in the house of accused No. 1 till about 11 P.M. The evidence is discussed at length in paras. 10 and 11 of the judgment of the Trial Judge, who says:—

"From what has been stated above there is no doubt to my mind and the assessors are of the same opinion that in the morning of the 6th May, Vallabhram removed the file from the house of Jeyshankar and that all the three accused handled it before they took it to Bulsar on the evening of that day. All the three accused were in possession of the file till it was brought back from the Pleader's house at Bulsar to Pardi on the night of 6th May. On the next day, *i. e.*, 7th May Vallabhram was admittedly in charge of the file because he prepared a copy of the Collector's order therefrom and handed it over to the third accused. Pranshankar (Ex. 35) and Lalbhai (Ex. 59) have stated that the three accused were seen closeted in the house of the first accused inspecting some papers on the 7th May. This evidence seems to be correct and practically speaking Vallabhram retained charge of the file till it was returned to Jeyshankar on the morning of the 8th in a mutilated condition."

The evidence completely supports this conclusion.

It is, however, contended that the removal of the *tumar* from Jeyshankar's house does not constitute the offence of theft, because (1) it was removed (it is alleged) with Jeyshankar's consent, and (2) in any case, Vallabhram did not intend to take the *tumar* dishonestly out of the possession of its custodian.

On the first point, reliance is placed on the following statement made by Jeyshankar in his cross-examination: "I admit that I told Vallabhram that if he required the key of my drawer it was in my house whose key was with my neighbour. The purpose of telling him this was that in my absence if Deva had to take away the Income Tax papers to Surat there should be no delay." We are not concerned with the Income Tax papers. Now, the *tumar* was the property of Government. On the morning of 6th May it was in the possession of the *mamlatdar* on behalf of Government. It is not suggested that he had given his consent to its removal to Bulsar. It is true that on the morning of the 6th the *mamlatdar* had entrusted it to Jeyshankar for safe custody. But the possession still continued to be the possession of the *mamlatdar*. Jeyshankar had no power to authorise its removal, and accused No. 1 who has been for many years a *karkun* in the *mamlatdar's* office presumably knew it. Indeed, it was because he knew it that he obtained the key from Premshankar under a false pretext. But however that may be, the removal of the *tumar* from Jeyshankar's house without the consent of the *mamlatdar* was sufficient to satisfy the requirements of s. 378, Indian Penal Code, provided the act was done with a dishonest intention. And, in my opinion, it would have made no difference even if Jeyshankar had consented to its removal, for such consent was outside the scope of his authority [see *Reg.* v. *Hanmanta* (1).] The object of removing the *tumar* from Jeyshankar's house was to show it to Lallubhai's legal adviser for enabling him to find therein materials for getting the Collector's order reversed; Jeyshanker could not—as indeed he did not—consent to such removal.

On the second point it was contended for Vallabhram that when he removed the *tumar* he did not intend to take it dishonestly; the Collector's order of eviction was to be carried out on or about May 15: accused Nos. 2 and 3 were in urgent need of copies of some of the documents; and the *mamlatdar's* office being closed on the 6th, such copies could not be obtained on that day in regular way; he, therefore, yielded to their entreaty to take the *tumar* to their Vakil in order that he might see the original order passed by the Collector. Accused Nos. 2 and 3 deny these allegations, and according to them this argument has no foundation in truth. They have, however, adopted the argument. The question then is one of intention. Now, direct evidence to prove a man's intention is seldom necessary and is not always available. In this case, the evidence sufficiently establishes the following facts: (1) The *tumar* was intact when Vallabhram removed it from Jeyshankar's house. (2) All the three accused persons handled it before they took it to Bulsar. (3) They were in possession of it till some time after it was brought back to Pardi at about 9-30 P. M. on the 6th. (4) On the 7th Vallabhram was admittedly in charge of the *tumar*. (5) On that day the three accused persons were seen in Vallabhram's house inspecting some papers (Exs. 35 and 59). (6) On the 6th and the 7th the *tumar* was handled by these persons and by no one else. (7) On the 8th, the *tumar* was handed over by Vallabhram to Jeyshankar in a mutilated condition—one document (being Mr. Lakhia's report) was entirely missing, and at least two documents (Exs. 8 and 9) had been mutilated, the nature of the mutilation being apparent on the face of them. In my opinion, it is unnecessary for purposes of this case to try and ascertain, as the learned Judge has done, the full extent of the damages done to the *tumar* during the time that it was available to these three persons. It is proved beyond doubt that Mr. Lakhia's report did form part of the *tumar*, and that Exs. 8 and 9 were intact, on the morning of the 6th May. The destruction of the said report, and the mutilation of Exs. 8 and 9 were clearly intended to support the petition which Lallubhai's Vakil prepared on the 8th or the 9th May and which was presented to the Commissioner on the 10th. The learned Judge has shown in paras. 13 and 14 of his judgment how this damage was calculated to advance the cause of Lallubhai. In these circumstances it was for the accused to offer an explanation as to the present condition of the *tumar*. No doubt, it would be unreasonable to expect any explanation from accused Nos. 2 and 3, for they have condemned the whole case for the prosecution as false from beginning to end. But accused No. 1 who admits the removal and his own possession of the *tumar* has offered no explanation as to its altered condition to the extent and within the period indicated above. I refer to his admission merely for the purpose of expecting an explanation from him. The attitude taken up by accused No. 1 on the one hand, and by accused Nos. 2 and 3 on the other is obviously embarrassing to all who have to deal with this case; I have, therefore, avoided all reference to Vallabhram's confessional statement, Ex. 33, in arriving at my conclusions.

In my opinion, the evidence clearly establishes the fact that Vallabhram removed the *tumar* with a dishonest intention, namely, with the intention of causing wrongful gain to Lallubhai. He mutilated or allowed accused Nos. 2 and 3 to mutilate the correspondence file with a view to enable Lallubhai to succeed in his appeal and as a result to retain possession of the land and the old well, which the Collector had called upon him to vacate. Even if his intention did not go so far, he enabled Lallubhai's advisers, including accused Nos. 2 and 3, to see and to read the *tumar* which contained, among others, documents which those persons could not lawfully have seen, and of which they knew they were not entitled to obtain copies (see Ex. 7, application of accused No. 2).

For these reasons, I would confirm the

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(1) 1 B. 610; 1 Ind. Dec. (N. S.) 405.

conviction of Vallabhram in Appeal No. 182, under s. 381, Indian Penal Code, and of accused Nos. 2 and 3 in Appeal No. 183, under ss. 381 and 109.

I would, therefore, confirm the convictions of all the three accused persons, subject to the above modification in favour of accused Nos. 2 and 3. I have considered their appeal for a reduction of sentences passed upon them. The Judge has ordered Vallabhram to suffer rigorous imprisonment for two years. To each of the accused Nos. 2 and 3 he has awarded rigorous imprisonment for two years in respect of each of the there offences—the sentences to run concurrently; there is also a fine of Rs. 500. In my opinion the reasons given by the learned Judge for awarding a deterrent punishment are sound. The offence is both serious and difficult to detect; and the case does not call for our interference.

Fawcett, J.—[After stating the facts His Lordship proceeded:—] Accused No. 1 Vallabhram agreed to the proposal of accused Nos. 2 and 3 to take the papers to their Pleader at Bulsar, and for that purpose some time in the afternoon of 6th May he got the key of Jeyshankar'a house from Premshankar on a false pretext and removed the correspondence. He then took it in a tonga with the two other accused to the house of their Pleader Govindji at Bulsar and left it with the Pleader and accused Nos. 2 and 3, or at any rate with accused Nos. 2 and 3, while he went into the town. He got back possession of it afterwards either at the Pleader's house or in the tonga, and put the papers back in Jeyshankar's house after his return. The first question to be considered on the charge of theft is whether his removal of the correspondence was without Jeyshankar's consent within the meaning of the definition of theft in s. 378, Indian Penal Code. It is clear that Jeyshankar was in proper possession of the correspondence as land correspondence clerk and *chitnisi karkun*. That is shown by the evidence of the *aval karkun* at page 21 of the paper-book, corroborated by his complaint Ex. 12 at page 43, and the evidence of the *mamlatdar* at page 144. The latter's evidence also shows that Jayshankar had permission to keep the papers temporarily in his house, and that the *mamlatdar* had given instructions that the papers should be carefully preserved in view of the likelihood of civil litigation regarding the Collector's order for evicting Lallubhai. The accused Vallabhram had no right to have possession of the correspondence except when he required it for the purpose of giving copies; or when he was required to do Jeyshankar's work in the latter's absence under the office order at page 71 of the paper-book. This is sufficiently proved by the evidence of the *aval karkun* at page 29. The evidence shows that Vallabhram could not legitimately have the papers on the 6th May for the purpose of giving copies, as that day was a holiday, and except by the special orders of the *mamlatdar* or the *aval karkun* copies could not be granted on that day. The applications for copies were in fact not made till the next day.

Therefore, as a matter of fact, I think it is clear that Jeyshankar did not give any authority to Vallabhram to remove the correspondence for such a purpose, and that the accused Vallabhram had no reasonable ground for conceiving that he had Jeyshankar's consent, either express or implied, to his removing the correspondence for that purpose. In my opinion, therefore, the removal so far as Jeyshankar is concerned, was without Jeyshankar's consent.

I think, however, that, even if Jeyshankar had consented, this would not protect the accused. The correspondence, as is admitted before us, was the property of Government. The evidence shows that the file went from office to office as the correspondence proceeded. It had come to the *malatdar*, because he had to carry out the order of the Collector for evicting Lallubhai. He was, therefore, in official possession of the correspondence on behalf of Government. The possession of Jeyshankar was merely that of a servant on account of the *mamlatdar* and of Government, as mentioned in s. 27, Indian Penal Code. It was the *mamlatdar* alone who could give authority for the removal of the papers away from Pardi. No doubt explanation 5 to s. 378 of the Indian Penal Code says consent may be express or implied, and may be given either by the person in possession or by any person having for that purpose authority, either express or implied. Thus Jeyshankar might have implied authority to consent to the removal of the papers from his house to the office by Vallabhram, or some other clerk, who could legitimately have them for the purpose of his duty. But there is nothing in the evidence to suggest that Jeyshankar had authority to consent to the removal of the papers for the purpose of having them shown to Govindji at Bulsar. Nor is it alleged that there was any such consent by the *mamlatdar*, and even if it had been given, it would not bind Government. On this point I agree with the remarks made in *Reg* v. *Hanmanta* (1). There it was held that the definition of "person" in s. 11 of the Indian Penal Code was sufficiently wide to include the Government as representative of the whole community, and that a consent, which the Forest Inspector was not authorised to give, and which was given in favour of the accomplice of his breach of trust, could not be construed into the consent of Government. The accused persons in that case were shown to have entered into a conspiracy to remove certain wood, intending thereby dishonestly to take it out of the possession of Government, without the consent of Government. The removal of the wood under those circumstances was held to be within the definition of theft in spite of the Forest Inspector's unauthorised consent to that removal. The present case is simpler, as the removal of the correspondence from Pardi was without the consent either of Government, the *mamlatdar* or Jeyshankar, who was a servant in possession of it on account of Government.

The next and the most important question is whether Vallabhram's intention in taking the correspondence out of this possession of Jeyshankar for Government was dishonest. On this point the Sessions Judge has held that his intention was dishonest, because he intended to help the second and the third accused in utilising the correspondence for their own benefit by removing some of the papers and altering others (page 330). I do not myself think that the evidence suffices to establish that his intention was to enable the other two accused to do this. The mere fact that the papers were tampered with does not show that accused Nos. 2 and 3 intended to remove or alter any of the papers, when they induced Vallabhram to take them to Bulsar; far less that Vallabhram knew of their intention to do so and intended to help them in that nefarious design. It obviously is improbable that he was a party to the mutilation of the correspondence, as it would be almost certain, as it actually did, to bring him into trouble. Nor does Vallabhram in his confession make any admission that supports this hypothesis. It is possible also that the conversation which the witness Mithal over heard in the tonga was really as to a protest by Vallabhram against their having taken advantage of their possession of the correspondence in this manner. Therefore, I do not hold that this intention is established against him. But it is clear that his intention was to give temporary possession of the correspondence to accused Nos. 2 and 3 and their Pleader. Vallabhram himself admits this in his confession, and pleads that many other clerks did the same thing (page 112). The question, therefore, is whether such an intention is dishonest within the meaning of s. 379, Indian Penal Code. I think that there is no doubt whatever that it is. First of all, the fact that he only meant to give a temporary possession to accused Nos. 2 and 3 and their Pleader is immaterial. Section 23 and ill. (*b*) to s. 378 show that a temporary keeping out of possession or giving of possession suffices to bring the case under s. 378, as ruled by this Court in *Queen-Empress* v. *Nagappa* (2). Then was there any intention of causing "wrongful gain" to accused Nos. 2 and 3 and their Pleader Govindji? Section 23 shows that their gain of the correspondence was wrongful, if it was obtained "by unlawful means." The word "unlawful" is not defined, but may be taken to correspond with the word "illegal," which is defined in s. 43; and it was explained in the Report of the Indian Law Commissioners that the two terms were intended to be used in the same sense and bear the same meaning: see Gour's Penal Law of India, Vol. I, page 202. Under s. 43 the word "illegal" is applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action. In the present case although there is no direct evidence on the point, a strong inference arises that accused Nos. 2 and 3 had bribed Vallabhram to show them the favour that he did in this case. Accused Nos. 2 and 3 are men of means, and there is no other apparent motive for Vallabhram's act. If that inference is correct, the means by which this temporary gain of the papers was obtained was an offence against the law relating to bribery in the Indian Penal Code. But leaving that aside, it is, in my opinion, clear that the conduct of Vallabhram and accused Nos. 2 and 3 would afford ground for a civil action by Government against them, since the taking of this correspondence out of the possession of Government was, in the circumstances of the case, clearly a trespass to goods, giving Government a cause of action against all three as joint tort-feasors: *cf.* Halsbury's Laws of England, Vol. XXVII, pages 487 to 489 and pages 863 to 865. As there stated, an act of trespass may be complete by unlawful taking without any conversion, and the gist of the action is the unlawful taking or removing or damaging of a personal chattel. The taking was certainly not a lawful one, because accused Nos. 2 and 3 had no right to inspect the whole correspondence, far less to have the possession of it which they obtained. They were only entitled to have copies of orders or such other documents as would come within s. 76 of the Indian Evidence Act. Reports by one Government Officer to another written in official confidence are privileged under s. 124 of the Indian Evidence Act and are not documents that an outsider has a right to inspect. Thus rule 86 of the Rules for the conduct of the Legal Affairs of Government says:—

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(2) 15 B. 344; 8 Ind. Dec. (N. S.) 234.

"86. The following important points relating to the conduct of all suits should be carefully attended to by all offices concerned, namely:............

(c) the production of documents in the possession of Government or of any Government Officer when required by the Court, or by the opposite party, should not be resisted unless for good and sufficient reasons such as are recognised by law; but the question of the *admissibility* of the documents, when produced, should be carefully considered and argued, it being borne in mind that the opinions of individual officers contained in official correspondence (which is so often called for by persons engaged in litigation with Government in order to establish their case) are, as a rule, not admissible in evidence." (*Bombay Government Gazette*, November 15, 1923, Pt. I, page 16, of the Notification No. 1778, dated August 31, 1923, Legal Department.)

Again Rule 17 of the Government Servants Conduct Rules says:—

"A Government servant may not, unless generally or specially empowered by the Local Government in this behalf, communicate directly or indirectly to Government servants belonging to other departments or to non-official persons, or to the Press, any document or information which has come into his possession in the course of his public duties, or has been prepared or collected by him in the course of these duties, whether from official sources or otherwise."

The giving of possession of the correspondence by Vallabhram to accused Nos. 2 and 3 and their Pleader was clearly an improper and forbidden act, and the fact that it was improper to his knowledge is corroborated by Vallabhram's conduct in first of all getting possession of the key of Jeyshankar's house on a false pretext, and, secondly, in his avoiding entering the tonga of accused Nos. 2 and 3 at his house, as deposed to by the witness Mithal. Neither Vallabhram nor accused Nos. 2 and 3 can have in good faith believed that they were justified in taking the correspondence to Bulsar for the use of themselves and their Pleader there, and the case is one which is similar to that contained in ill. (*m*) to s. 378 of the Indian Penal Code. It could not have been their impression that they had the implied consent of Government to the use of the correspondence in this manner. Accordingly I hold that there was a dishonest intention on the part of Vallabhram, and that he is guilty of theft. I think it is also proved that accused Nos. 2 and 3 abetted him by instigating him to take the correspondence to Bulsar for the purpose I have mentioned, and by intentionally aiding him, *e. g.*, by providing the tonga to take them to Bulsar and back. I leave out of account Vallabhram's confession in considering their case, as it denies his guilt and is not a 'confession' falling under s. 30 of the Indian Evidence Act, according to the rulings in *Empress* v. *Daji Narsu* (3) and *Sankappa Rai* v. *Emperor* (4). But the other evidence against them, which has been believed, suffices to prove their instigation, aid and guilty intention in regard to the theft by Vallabhram.

Before concluding, I shall briefly notice some other points arising on the appeal, It was contended by Mr. Amin for appellant No. 1 that the correspondence was not in the exclusive possession of Jeyshankar, but was in the possession also of Vallabhram, in as much as he had access to the house with Jeyshankar's permission. This, however, overlooks the fact that Jeyshankar's possession was only possession by a servant on account of Government under s. 27 and in any case it is not necessary that there should be 'exclusive possession'; for instance it has been held that there can be theft by a person who is in joint possession of the stolen property: *cf. Queen-Empress* v. *Ponnurangam* (5). The definition of possession in Stephen's Digest of Criminal Law, Art. 306, which was relied on by Mr. Amin, is really more applicable to the case of ownership as pointed out in Gour's Penal Law, Vol. II, page 1708. Then it was contended that Vallabhram had left the correspondence with the Pleader, who he might justly consider to be a respectable person, and therefore, he had no dishonest intention. This contention overlooks the fact that an intention to show the correspondence to the Pleader was in itself 'dishonest' for reasons already given. Also the correspondence was in fact left with accused Nos. 2 and 3: see Govindji (page 75) and the admission of Vallabhram himself to the same effect (page 117). In view of Vallabhram's admission that he left the Pleader's house, an admission which is corroborated by the witness Chandulal, and the fact that Govindji undoubtedly also left to attend Valliram's wedding ceremony, it is, I think, clear that he must have given the control of the correspondence to accused Nos. 2 and 3.

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(3) 6 B. 288; 6 Ind. Jur. 480; 3 Ind. Dec. (N. S.) 649.

(4) 31 M. 127; 18 M. L. J. 63; 3 M. L. T. 270; 7 Cr. L. J. 325.

It was also contended that his subsequent conduct was in his favour on the question of dishonesty. But his conduct prior to the removal of the correspondence, *e. g.*, in surreptitiously getting into the tonga, is really more important. The mere fact that he drew attention to some of the papers having been mutilated does not suffice to out-weigh the evidence of dishonesty. Nor does the fact that Jeyshankar did not complain about the mutilation of the papers as soon as he might have done effect the case against him. It certainly does not, in my opinion, show that Jeyshanker thought that the accused's conduct was straightforward; there is clear evidence to the contrary, and even if Jeyshankar did think so, it would not affect the proved facts.

Accordingly, I would confirm the conviction of appellant Vallabhram under s. 381 and of the other two under ss. 381 and 109. I also concur with my learned brother in confirming the conviction of accused Nos. 2 and 3 under ss. 466 and 193, Indian Penal Code, in respect of the document Ex. 8. Though there is no evidence of any eye-witness that the alteration of '400' to '4000' was done by them, the proved circumstances, in my opinion, leave no reasonable doubt that they are guilty. The suggestion that it was done by some one else to bring them into trouble is clearly opposed to the plain facts, as pointed out in my learned brother's judgment Though there is no evidence enabling the Court to say which of the two accused made the alteration, this is immaterial under s. 34, Indian Penal Code. Even if one of them did nothing but look on while the other made the alteration, this would not excuse the former, if the act was done "in furtherance of the common intention"; *cf* the remarks of the Privy Council in *Barendra Kumar Ghose* v. *Emperor* (6). Accused Nos. 2 and 3 were the persons taking the active part in the preparation of Lallubhai's appeal, and had the papers in their control. In the absence of any evidence to rebut it the presumption is that the alteration was made by one of them in the presence of the other, with a common intention that brings the case under ss. 193 and 466 of the Indian Penal Code.

I also agree that accused Nos. 2 and 3 should be given the benefit of the doubt in regard to the document, Ex. 14, and their conviction on that head of the charge reversed. This does not, however, affect the concurrent sentence of two years' rigorous imprisonment under each of the two ss. 193 and 466, which was passed for one offence under each section though there were two documents in respect of which the two accused were convicted. It is unnecessary to decide whether this is correct under sub s. (1) of s. 35 of the Cr. P. C. as amended by Act XVIII of 1923, and s. 71, Indian Penal Code. As the three sentences of rigorous imprisonment for two years have been ordered to run concurrently, all we need consider is whether this sentence, *plus* a fine of Rs. 500 is excessive.

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(5) 10 M. 186; 1 Weir 408; 3 Ind. Dec. (N. S.) 882.

(6) 85 Ind. Cas. 47; 27 Bom. L. R. 148 at p. 158; 29 C. W. N. 181; A. I. R. 1925 P. C. 1; (1925) M. W. N. 26; L. R. 6 A. (P. C.) 1; 26 P. L. R. 50; 6 P. L. T. 169; 23 A. L. J. 314; 41 C. L. J. 240; 48 M. L. J. 543; 1 O. W. N. 935; 3 Pat. L. R. 1 Cr.; 52 C. 197; 26 Cr. L. J. 431; 52 I. A. 40 (P. C.).

Accused No. 1 has also been sentenced to two years' rigorous imprisonment. We were asked to reduce these sentences, but I do not think there is any sufficient ground for our interference. I agree with the remarks made in para. 31 of the Sessions Judge's judgment. Not only was the offence a serious one, but it is also one calling for a deterrent punishment.

The appeals, therefore, fail (except in regard to the document Ex. 14). The convictions (subject to that modification) and sentences are confirmed.

Z. K. *Appeals allowed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1373 OF 1925.
January 25, 1926.
Present:—Mr. Justice Harrison.
EMPEROR—PROSECUTOR
versus
ATMA SINGH AND ANOTHER—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 160—Exchange of abuse—Offence, nature of—Criminal procedure—Technical objections by Crown.

An ordinary exchange of abuse in a public street where neither side is armed and no blows are struck is an offence too trivial to be taken notice of. [p. 889, col. 1.]

The Crown does not usually take technical objections either on the criminal or the civil side, whereby the doing of substantial justice may be defeated. [p. 889, col. 2.]

Case reported by the Sessions Judge, Rawalpindi.

FACTS.—Gurdit Singh and Sant Singh fought in the Bazar of Gujarkhan against Waryam Singh and Atma Singh and disturbed the public peace. These four persons thus committed an affray. They were brought before the Magistrate, First Class, Rawalpindi, and particulars of the offence were stated to them. In reply all four persons made an admission of having committed the offence. No question, however, was put to any of them why they should not be convicted. The Magistrate by his order of the 11th June 1925 found all four men guilty of an offence under s. 160, Indian Penal Code, and sentenced them to fines of Rs. 25 each. In his order he remarked that they had pleaded guilty to a charge under s. 160, Indian Penal Code, and he also remarked that their reputation had not been good.

GROUNDS.—Under s. 438, Cr. P. C., I report the case for the orders of the High Court with a recommendation that the sentence passed upon the four accused may be reversed or reduced.

The grounds for this recommendation are:—

(1) The accused were not asked if they had any cause to show why they should not be convicted as is required by s. 242, Cr. P. C.

(2) The Magistrate remarked in his order of conviction that the reputation of the accused had not been good, although there was no evidence on the record that the reputation of these men had not been good nor was there anything to this effect in the Police report on the basis of which the Magistrate took cognizance.

(3) The affray was not a serious one.

Diwan *Ram Lal*, for the Crown.

Dr. *Nand Lal*, for the Respondent.

ORDER.—Four men—Atma Singh, Waryam Singh, Gurdit Singh and Sant Singh—were convicted under s. 160, Indian Penal Code, and sentenced to pay a fine of Rs. 25 each. The sentence was passed by a First Class Magistrate and the Sessions Judge of Rawalpindi has reported the case for orders on three grounds:—

(1) The accused were not asked if they had any cause to show why they should not be convicted as is required by s. 242, Cr. P. C.

(2) The Magistrate imported into the case his own knowledge of the reputation of the accused and this was highly improper.

(3) The affray was not serious.

On ground No. 1 I do not think there is any reason for interference as the accused had pleaded guilty and thereby ended the matter for all practical purposes, though of course they might still have pleaded that the affray in question was a mere nothing. On the other hand the Trial Magistrate and the District Magistrate might have been expected to realise that this was so without being told.

On grounds Nos. 2 and 3 I think there is reason for taking action and I accept the application and acquit the accused.

The facts of this case were that the Police reported that there had been a technical affray in the village of Gujarkhan, words being exchanged between two men on the one side and two on the other. It is not alleged that other side was armed or any blows were struck. Apparently there was only the usual exchange of abuse such as may be heard from morning till night. On this the Police quite unnecessarily saw fit to "chalan" all four men apparently without enquiring who started the quarrel and who began to abuse. When this trivial case reached the First Class Magistrate Mr. Amin ud-Din, he proceeded to transfer it, having no authority to do so, to the Court of the *Tahsildar.* Mr. Amin-ud-Din is, I understand, a First Class Magistrate. He is neither an Additional District Magistrate, nor a Sub-Divisional Magistrate. The order in vernacular was apparently written by his Reader and is to the following effect:—"The case is transferred to the *Tahsildar. Post script.* It is to be sent up with a report under s. 107, Cr. P. C." The case had been unnecessarily started, was illegally transferred and after transfer was unnecessarily exaggerated into a case under s. 107. As proceedings under this section can only be taken by a First Class Magistrate, the *post script* was understood as an illegal cancellation of the illegal order of transfer and a further order of re-transfer to the Court of Mr. Amin ud-Din. On the accused appearing the offence was explained to them and they pleaded guilty. An order was then written into which the reputation of the accused was imported although no mention was made of it even in the Police report and acting apparently on wholly inadmissible evidence, which has never been tendered let alone admitted, the Magistrate convicted them. The Sessions Judge dismissed the first application for revision and on being moved to do so he re-opened the question and forwarded his recommendation to this Court.

Whether the action of the Sessions Judge was strictly regular or not in re-opening the matter in the form in which he did, I do not think there is any question of the competency of this Court to look into the case. The most amazing feature is that when notice issued automatically, as it does, to the District Magistrate, he saw fit to move the Crown to instruct Counsel to resist the miscarriage of justice being put right. Apart from the waste of the time and money of the Crown and Crown Counsel, which is no concern of mine, I wholly fail to understand what prompted the District Magistrate to take this action. The First Class Magistrate had behaved illegally—a point which must have struck the District Magistrate when he examined the record. Four men had been ordered to pay heavy fines without any adequate reason, and yet he questioned the sound action taken by the Sessions Judge in endeavouring to get the matter put right. Counsel for the Crown, while not attempting to support the conviction, has urged that the Sessions Judge has acted with technical irregularity and presumably the District Magistrate took up this attitude and ignored the general principle that the Crown does not usually take technical objections either on the criminal or the civil side, whereby the doing of substantial justice may be defeated.

The main ground on which I have interfered in this case is to be found in the maxim *de minimis non cur at lex:* If a prosecution were to be launched whenever two or more people exchanged abuse in a public street, the Courts would not have time for doing their necessary work, and where the Sessions Judge recommends the obvious course of acquitting people convicted of such trifling and technical misconduct, it would be better if the District Magistrate were to raise no protest.

N. H. *Application accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 137 OF 1926.

March 15, 1926.

Present:—Mr. Justice Daniels.

HUKUM SINGH—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 174—Subpœna, defective, failure to comply with—Offence.

A subpœna requiring a person to attend either at the *thana* or wherever the Inspecting Officer might happen to be is not legal subpœna as it does not require attendance at a definite place and an omission to comply with it is not an offence punishable under s. 174, Penal Code.

Empress of India v. *Ram Saran,* 5 A. 7; A. W. N. (1882) 145; 3 Ind. Dec. (N. S.) 24, referred to.

Criminal revision from an order of the District Magistrate, Etawah, dated the 12th October 1925.

Mr. *Baleshwari Prasad,* for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant has been convicted under s. 174 of the Indian Penal

Code of disobeying a subpœna requiring him to attend before the Sub-Inspector in a Police inquiry. Section 174 prescribes a punishment for any person being legally bound to attend *at a certain place and time* in obedience to a summons, notice, order or proclamation issued by a legally competent public servant, intentionally omits to attend at that place or time. The sub-poena which was issued to the applicant as issued in this case did not require him to attend at a certain place. It called on him to attend either at Sahail *thana* or wherever the Inspecting Officer might happen to be. This is not a legal subpœna, failure to comply with which can be punished under s. 174. If any authority other than the language of the section itself is needed for this proposition it may be found in the case of *Empress of India* v. *Ram Saran* (1). As the subpœna did not require the accused to attend at a definite place I set aside the orders of the Courts below and acquit the accused. The fine, if paid, will be refunded.

R. L. *Order set aside.*

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(1) 5 A. 7; A. W. N. (1882) 145; 3 Ind. Dec. (N. S.) 24.

PATNA HIGH COURT.

CRIMINAL REFERENCE NO. 63 OF 1925.
November 6, 1925.
Present:—Mr. Justice Adami and
Justice Sir John Bucknill, KT.
FIRANGI SINGH—
versus
DURGA SINGH—

Criminal Procedure Code (Act V of 1898), s. 249—Warrant cases—Magistrate's power to stop case and release accused—Starting case afresh on complaint—Legality.

Section 249, Cr. P. C., is inapplicable to warrant cases. Therefore, an order by a Magistrate stopping a warrant case and releasing the accused under the section is illegal. [p. 891, col. 1.]

Where a Magistrate stops a warrant case and releases the accused purporting to act under s. 249, Cr. P. C., the case is still on the pending file of the Magistrate and can be re-opened either by an application by the Crown or *suo motu* by the Magistrate but cannot be started *de novo* upon a private complaint, the Police case being already on the pending file. [p. 892, col. 1.]

Criminal reference made by the District Magistrate, Gaya, dated the 26th July 1925.

Mr. *Manohar Lal*, in support of the Reference.

Mr. *H. L. Nandkeolyar*, Assistant Government Advocate (with him Mr. *K. P. Jayaswal*), against the Reference.

JUDGMENT.

Bucknill, J.—This was a referrence made to this Court by the District Magistrate of Gaya under the provisions of s. 438 of the Cr. P. C. This reference came before Macpherson, J., on the 2nd of September last and that learned Judge thinking that a novel point arose in connection with it, referred the matter to a Bench; the learned Judge also considered that it was desirable that the Crown should appear.

The difficulties which have occasioned this reference arose out of some rather confused criminal proceedings; and to what appear to be some mistakes in procedure made by two Sub-Divisional Officers which under the circumstances are not perhaps surprising. The position may be thus shortly explained. Last October there was a dispute about irrigation between the inhabitants of two villages call Kunj and Chari in the Gaya District. As a result no less than three cases were started. What is called case No. 1 was a summons case; the charge was under s. 143 of the Penal Code and was against the men of both the villages. What is called case No. 2 was a warrant case drawn up against certain persons under the provisions of ss. 148 323 and 430 of the Penal Code. It was against villagers of Kunj and in connection with that case a man of Chari village had been injured. What is called the third case was also a warrant case. This was directed against the villagers of Chari. All the cases came before the Sub-Divisional Officer. He tried case No. 2 but kept cases Nos. 1 and 3 pending until the result of the trial with which he was proceeding. The upshot of case No. 2 was that he convicted the accused. He then, in respect of the case No. 1, passed an order (as he was entitled to do) under s. 249 of the Cr. P. C. stopping the proceedings and releasing the accused. In case No. 3 he also passed a similar order, purporting to act under s. 249; he also directed the case to be entered as false. No question arose as to the Sub-Divisional Officer's power to deal as he did deal with the first case. But a question does arise whether he had any power to deal with case No 3 (a warrant case) under the provisions of that section. But in case No. 2 there was an appeal and the Sessions Judge reversed the decision of the Sub-Divisional Officer, and set aside the conviction. The Sub-Divisional Officer's order of conviction took place on the 23rd March last and his two orders relating to cases Nos. 1 and 3 were made on the same day. The learned Sessions Judge's decision was on the 6th May last. The next thing which happened was that on the 16th June the person who had been the informant in the case No. 3 applied to the Sub-Divisional Officer (who was not the same individual as the Sub-Divisional Officer who had tried case No. 2) making what purports to be a complaint; at any rate he was examined on oath by the new Sub-Divisional Officer, he sent for the connected records and on the 26th of June he passed an order summoning the accused. The District Magistrate in his reference suggests that both the orders of the Sub-Divisional Officers of the 27th March, 1925, purporting to stop case No. 3 under the provisions of s. 249 of the Cr. P. C. and that of his successor of the 26th June summoning the accused on what appears to be a complaint made by the informant in case No. 3 are wrong and should be set aside. There seems no doubt that both these orders must be set aside. In the first place there appears to be no good authority of any kind for suggesting that s. 249 can be utilized in respect of a warrant case. The heading of Ch. XX of Cr. P. C. which comprises ss. 241—249 refers to the "Trial of summons cases by Magistrate," and, as has been pointed out by the learned Assistant Government Advocate, it is quite clear that, upon a perusal of ss. 247—249, the last named section is only intended to apply to summons cases instituted other than upon complaint. It is true that Mr. Sohoni on page 614 of his work on the Code of Criminal Procedure (11th Edition) seems to think that the procedure contemplated under s. 249 might be applicable to warrant cases: but it is an old section and so far as can be ascertained there is no case which lays down such a proposition. Indeed from reading the preceding sections it certainly seems evident that s. 249 only deals with summons cases instituted other than upon complaint. Section 247 relates to summonses issued upon complaint and what the Magistrate's duties are if the complainant does not appear. Section 248 contemplates the possibility of withdrawal of a complaint by a complainant whilst s. 249 contemplates the powers of a Magistrate as to stopping cases and releasing the accused in any case instituted other than upon complaint. This order, therefore, thus made by the Sub-Divisional Officer on the 23rd March last is obviously one which he could not make and although it is in effect of no value it is, I think, desirable, in order that there should be no future difficulty, that we should formally declare that it is illegal and, so far as may be, if at all necessary, set it aside.

Now, although it has been suggested that what the complainant in case No. 3 did when he came up before the new Sub-Divisional Officer with his petition on the 16th of June last amounted only really to an informal drawing of the attention of the Sub-Divisional Officer to the fact that case No. 3 was still in existence on his file and had not been disposed of. I do not think that such a suggestion can on examination be seriously entertained, nor was it, I think, very seriously put forward by the learned Counsel who in effect appeared in support of what the Sub-Divisional Officer had directed by his order of the 26th June. The fact remains that it would seem that the Sub-Divisional Officer treated the petition as a complaint; he examined the accused on oath and in this way he seems to have treated the matter as one of which cognizance was being taken under the provisions of s. 190 (1) (*b*) of the Cr. P. C; in other words as a fresh affair. It need hardly perhaps be pointed out that, as the order made by his predecessor on the 23rd March purporting to act under s. 249 was void, the case was still really on his file and cognizance had already been taken of it under s. 190 (1) (*a*). It has been suggested, somewhat tentatively, that the order in case No. 3 made by the Sub-Divisional Officer on the 27th March last, although purporting to be made under s. 249, might be regarded as one made properly under s. 253 (2) as it is argued that the upshot is really the same and that it is merely a difference of form. I am not prepared to say that there is no difference in the effect of stopping a case under s. 249 and the discharge of an accused under s. 253 (2); but in this case I do not think that such a question is material or really arises because the Sub-Divisional Officer expressly purported to deal with the matter under s. 249 and in addition ordered that the case should be entered as false. Now in his order of the 26th June the new Sub-Divisional Officer after reciting what had previously taken place and the order made in the third case observes.

"Durgi Singh who is the complainant in case No. 3 now comes up and files this petition that his case might now be taken up and dealt with according to law. His prayer seems reasonable. I accordingly summon the accused under ss. 430 and 147, Indian Penal Code. Also summon prosecution witnesses for that date."

Now the learned Assistant Government Advocate has pointed out that it was not open to the Sub-Divisional Officer to take any such action as he did in re-opening a warrant case which was already on his file on an application of a private party. It seems very clear that what the Sub-Divisional Officer actually did (although his order is not particularly lucid) was that he really started a case *de novo*; but this he could not do because case No. 3 was still really on his file. There seems no doubt that he thought that his predecessor's order with regard to case No. 3 was a valid one and that it was not was never brought to his notice. It is quite clear that he could not act as he did in re-opening the case supposing that what he did could be regarded as his having done so upon the application of a private party. The learned Assistant Government Advocate points out that the Sub-Divisional Officer could of course re-open the case either upon application by the Crown or *suo motu* but in this case he did neither. Whilst the Police case was already on his file he could not start a fresh case upon a complaint. There is no authority of any kind given to us to controvert the views which have been placed before us by the learned Assistant Government Advocate. We, therefore, consider (*a*) that the order of the Sub-Divisional Officer of the 26th March under s. 249 of the Cr. P. C. was altogether an invalid order. It is hereby set aside. The result is that the warrant case No. 3 is still on the file of the Sub-Divisional Officer. (*b*) The order of the Sub-Divisional Officer of the 26th June is also invalid; it too must be set aside. The result will be as before that the warrant case No 3 is still on the Sub-Divisional Officer's file as it stood on the 27th of March last at the time of the invalid order purporting to be made under s. 249 with regard thereto. (*c*) The reference of the District Magistrate of 25th July, 1925, is, therefore, accepted. (*d*) The Sub-Divisional Officer either of his own motion or of course upon the application of the Crown may, if he so thinks fit, proceed with the warrant case No. 3.

Adami, J.—I agree.

R. L. *Reference accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 18 OF 1925.
(CRIMINAL REVISION PETITION NO. 18 OF 1925.)
September 9, 1925.
Present:—Mr. Justice Jackson.
M. R. M. RAMASAMI CHETTY
MANAGING DIRECTOR OF M. R. M.
RAMASAMI CHETTI AND CO. LTD.—
ACCUSED—PETITIONER
versus
V. S. CHENGALRAYA PILLAI—
COMPLAINANT—RESPONDENT.

Companies Act (VII of 1913), s. 104—Allotment of shares—Agreement before formation of Company to allot shares—Ratification by Directors after registration—Liability of Company to furnish particulars—Default—Penalty.

Certain persons who purchased a business registered themselves as a Company under the Companies Act. By the terms of the contract of purchase the vendor was entitled to certain shares allotted otherwise than in cash and such allotment was, after registration of the Company, ratified by the Directors at a meeting:

Held, that there was no contract in writing constituting the title of the allottee within the meaning of s. 104 (1) of the Companies Act and the Company was bound to furnish the particulars duly stamped under cl. (2) of the section and in default to do so, the officer responsible for the default was liable to be fined under cl. (3) of the section.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Second Presidency Magistrate, George Town, Madras, in C. C. No 20052 of 1924.

Mr. *V. L Ethiraj*, for the Petitioner.

The Crown Prosecutor, for the Crown.

ORDER.—Petition to revise the judgment and sentence of the Second Presidency Magistrate, in C. C. No. 20052 of 1924.

The petitioner sold his business to certain persons under a contract dated 1st October 1922. On 7th October 1922 these persons registered themselves as a Company. The Company furnished a return of allotment of shares under s. 104, Act. VII of 1913. The Registrar acting under s. 104 (*b*) called for the contract in writing entitling the vendor of the business to certain shares allotted otherwise than in cash.

The petitioner thought that the contract entered into before the Company was registered would be sufficient; but the Registrar demanded a contract entered into by the Company and since such a contract was not in writing, he called for prescribed particulars under s. 104 (2). Instead of furnishing these duly stamped, the petitioner produced the previous contract ratified at a meeting of the Directors. The Registrar held that this was not a compliance with his demand and prosecuted the petitioner under s. 104 (3). He has been fined Rs. 100. Hence the petition. I do not think that the ratification by the Board of Directors can be described as a contract in writing constituting the title of the allottee; and in the absence of any such contract in writing the petitioner was bound to furnish the prescribed particulars duly stamped. There is, therefore no ground for revision. The petition is dismissed.

V. N. V. *Petition dismissed.*

CALCUTTA HIGH COURT.

CIVIL REFERENCE NO. 4 OF 1925.

December 4, 1925.

Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

EMPEROR—PROSECUTOR

versus

RAJENDRA KUMAR DUTTA AND ABDUL KHALEQUE—PLEADERS.

Legal Practitioners Act (XVIII of 1879), ss. 12, 13, 14—Legal Practitioner committing criminal offence—Procedure.

Where a legal practitioner is suspected of having committed a criminal offence, proceedings under the Legal Practitioners Act should not be taken, but if it is thought necessary, action should be taken by way of a criminal prosecution. [p. 894, col. 1.]

Reference made by the Additional District Judge, Second Court, Mymensingh, through the District Judge, Mymensingh, in Miscellaneous Cases Nos. 1 and 2 of 1925.

Babu *Surendra Nath Guha,* for the Crown.

Mr. *Sarat Chandra Roy Choudhury* and Babu *Debendra Narayan Bhattacharjya,* for Rajendra Kumar Dutta.

Mr. *Gopal Chandra Das,* Moulvi *Md. Nurul Huq Choudhuri* and Babu *Satyendra Kishore Ghose,* for Abdul Khaleque.

JUDGMENT.—This is a reference concerning two Pleaders of the Mymensingh Bar, Babu Rajendra Kumar Dutta and Moulvi Abdul Khaleque.

The facts appear to be these:

There was a certain Title Suit No. 265 of the Local Sub-Judge's Court (*Rani Hemanta Kumari Debi* v. *Sonaulla*).

Rajendra Kumar Dutt was the Pleader on behalf of some of these defendants though it does not appear that he had received any *vokalatnamah* on behalf of Sonaulla. In the course of this suit a certain document was filed on behalf of the defendants on the 6th July 1923 by Rajendra Kumar Dutta. The plaintiff challenged the genuineness of this document. Certain evidence was taken and on the 7th July Babu Rajendra Kumar Dutt the defendants' Pleader retired from the case and the case was decided *ex parte.* On the same day the plaintiff moved the Court to prosecute Sonaulla for forgery. Notice was issued on Sonaulla and he appeared on 8th September 1923 and showed cause. Moulvi Abdul Khaleque appeared for him on this occasion.

The Court ordered a prosecution on 12th January 1924 and wrote the usual letter to the Magistrate on 18th January 1924. The same day the Magistrate issued process. What took place in the Magistrate's Court does not appear but on the 1st April 1924 Sonaulla preferred an appeal to the District Judge against the order for prosecution which was dismissed on 9th May 1924.

On the 26th May 1924 Sonaulla came to Babu Rajendra Kumar Dutt and instructed him to apply for the return of the documents filed in the original suit including the document which was the subject of the criminal charge. It is somewhat remarkable that this document was still on the record of the civil case. It ought to have been impounded but the probable explanation is that in view of the appeal to the District Judge against the order for prosecution it had come back once more to the original suit file. The usual application for a return of the document was filed and Babu Rajendra Kumar Dutt himself went to the record room to get back the documents. Rajendra Babu himself signed a receipt for the documents on the back of the petition. He was then called away to attend to some other case and one Ali Hossain was told to instruct some other Pleader and he went and fetched M. Abdul Khaleque who took back the documents, signed receipt for them and made them over including the document the subject of the criminal case to Sonaulla.

What, therefore, the two Pleaders are charged with amounts to aiding and abetting Sonaulla in getting back this document so that he might defeat the criminal case while it was their duty to have brought to the notice of the District Judge that Sonaulla was attempting to do this.

Now it will be clear that what is alleged against these two Pleaders amounts to a charge of aiding and abetting or conspiring to commit a criminal offence, *viz.*, causing evidence to disappear with the intention of screening the offender, an offence punishable under s. 201, Indian Penal Code. Both the Pleaders have filed statement denying that they had any knowledge that the document in question was being taken back and have supported their explanation with affidavit.

In such a case it has been held that the correct procedure to be followed is that proceedings under the Legal Practitioners Act should not be taken but that if it is thought necessary to take action it should be by way of a criminal prosecution. The question has been dealt with in the case of *In the matter of Chandi Charan Mitter* (1) and the judgment of Mookerjee, J., may be with advantage referred to where he deals with the numerous authorities on the point and points out that summary proceedings under the Legal Practitioners Act may result in grave injustice to the persons concerned. We do not think we should be justified in departing from the principles laid down in the case we have just referred to.

We think, therefore, that the order of reference should be discharged. It will be open to the authorities if they think fit to criminally prosecute the two Pleaders. On that point we express no opinion. It will, of course, be open to the Additional District Judge after any action that may be taken in the Criminal Court to take action under the Legal Practitioners Act if so advised.

Z. K. *Reference discharged.*

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(1) 57 Ind. Cas. 931; 24 C. W. N. 755; 31 C. L. J. 471; 21 Cr. L. J. 691; 47 C. 1115.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 536 OF 1925.
November 9, 1925.
Present:—Mr. Justice Sulaiman.
Qazi FARIDUDDIN—APPLICANT
versus
EMPEROR THROUGH FARIDUDDIN AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 250—Informer, whether can be directed to pay compensation—Maximum compensation, amount of.

It is open to a Magistrate under s. 250 of the Cr. P. C. to pass an order directing a person, upon whose information given to a Police Officer or to a Magistrate, the proceedings were started, to pay compensation to the accused. [p. 895, col. 2.]

Under s. 250 (2) of the Cr. P. C. all that is prohibited is that compensation to the accused or each or any of them should not exceed Rs. 100 in amount. The section does not mean that if there are a number of accused persons the total amount awarded to all of them must not exceed the maximum specified in the section. [p. 896, col. 1.]

Criminal revision from an order of the Sessions Judge, Jhansi, dated the 20th August 1925.

Mr. *H. Cecil Desanges*, for the Applicant.

Mr. *Saila Nath Mukerji*, for the Opposite Parties.

JUDGMENT.—This is an application in revision from an order directing the complainant to pay compensation of Rs. 100 each to three accused and Rs. 20 to the fourth accused.

The applicant filed a complaint under s. 380 of the Indian Penal Code in the Court of a First Class Magistrate. The Magistrate did not treat this application as a mere information under s. 190 (c) and did not proceed as required by s. 191. He treated it as a complaint and sent this complaint to the Police for enquiry under s. 202. When the Police investigated the case, they came to the conclusion that the case was true but they did not merely send up a report in favour of the complainant but dealt with the case under ss. 454 and 411 and added one more accused, Muhammad Idris in the list. The prosecution evidence was tendered and several witnesses were examined. It appears that the Magistrate allowed the present applicant to engage a Vakil to look after the case and he also made him to take part in the conduct of the proceedings and in fact allowed him to file several applications from time to time. In the course of his order ultimately discharging the accused persons the Magistrate has treated the applicant as a complainant and not a mere informer. The Vakil engaged by the applicant was acting in conjunction with the Prosecuting Inspector. On the 13th of July 1925 after the evidence of the witnesses mentioned in the list sent up by the Police was closed a further application was made for summoning more witnesses which was not allowed and a second application made by the complainant that a previous Sub-Inspector should be examined was considered unnecessary. After arguments were heard as to whether a charge should or should not be made the Court postponed the case till the next day. On the 14th July 1925 the applicant presented an application before the Magistrate under s. 526 intimating to him that the case should be adjourned in order to give him an opportunity to apply for a transfer. At this stage the Magistrate took the view that the case was proceeding on a charge sheet submitted by the Police after enquiry and the present applicant was not the complainant. He asked the Prosecuting Inspector whether he wanted an adjournment or not and after the Prosecuting Inspector had stated that he did not want to apply for transfer the learned Magistrate did not grant the application. After this the accused persons were discharged and the order directing compensation to be paid was passed.

The present applicant went before the Sessions Judge in appeal, but he declined to interfere.

No final order dismissing the complaint originally filed by the complainant has been passed separately by the Magistrate, but every one seems to have understood that that complaint has been dismissed.

There seems to have been some confusion in the procedure in view of the fact that a complaint which had been treated as such by the Court was pending and the Police also sent up a charge sheet.

If the applicant was really the complainant in the proceedings as he has been described in the judgment, then his application for adjournment was bound to be granted even though it was made at the last moment. It is, however, not necessary in this case to decide definitely whether the applicant was in the position of a complainant so as to make s. 526 (8) applicable. The legality of the order discharging the accused is not in question in this revision.

Even if the applicant was not the complainant, it was open to the Magistrate under s. 250 of the Cr. P. C. to pass an order directing him to pay compensation as such an order can be passed against a person upon whose complaint *or information* given to a Police Officer or to a Magistrate the proceedings have been started. The accused, therefore, cannot get rid of the order merely because he was a mere informer and not a real complainant.

On the merits of the case, however, it seems that the findings of the Magistrate amount to this:—the complainant alleged that a number of utensils had been taken away from his house by Muhammad Idris along with other goods which belonged to him and that they were recovered subsequently from the house of Muhammad Idris. The case for the defence seems to be that some of these utensils belonged originally to the complainant but about two years ago he had given them to the mother of Muhammad Idris who handed them over to the latter. The learned Magistrate has pointed out that litigation has been going on for a number of years between the complainant and Muhammad Idris. He has also remarked 'so a sort of civil dispute does exist between the two over the subject of this case.' Then it is not to be forgotten that Idris had voluntarily given up all but one utensil and the complainant had not shown that *all* these belonged to him. The findings of the Magistrate themselves are not very clear. If really there was some dispute of a civil nature about these utensils then the case might not have been wholly groundless and frivolous. The learned Magistrate has certainly disbelieved the prosecution witnesses who were eight in number but has no where recorded a distinct finding that there was no trouble on the day when the occurrence is alleged to have taken place nor is there any clear finding that the accused did not enter the complainant's house. Under the circumstances I am of opinion that this was not a fit case in which compensation should have been ordered in the criminal proceedings. The accused persons have a remedy to sue for damages for malicious prosecution if they make out a case in the Civil Court.

The last point urged on behalf of the applicant was that the order directing Rs. 100 to be paid to each of the three accused and Rs. 20 to the 4th accused was in contravention of the provisions of s. 250 (2). I do not agree with this contention. Under that section all that is prohibited is that compensation to the accused or each of them where there are more than one or any of them should not exceed Rs. 100 in amount. The section does not mean that if there are a number of accused persons the total amount awarded to all of them must not exceed the maximum. In the view which I have taken of the facts of this case it is not necessary to discuss this last point in detail.

I accordingly allow this revision and set aside the order calling upon the complainant to pay compensation. In case any compensation has been paid it should be refunded.

Z. K. *Revision allowed.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 480 OF 1925.

January 27, 1926.

Present:—Mr. Justice Ross and Mr. Justice Kulwant Sahay.

BENGALI GOPE—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 190 (2), 201, 203, 509 (a)—*Penal Code (Act XLV of 1860), ss 211, 302—Complaint of murder—Second Class Magistrate, whether competent to take cognizance—Procedure—Complainant charged with offence under s. 211, legality of.*

Section 509 (*a*) of the Cr. P. C. saves the proceedings before a Magistrate taken on a complaint of which cognizance is taken without authority; but this will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it without power to do so.

A complaint that certain persons had committed the offence of murder was made to a Second Class Magistrate who sent the complaint to the Police for enquiry and on their reporting the case to be false dismissed the complaint under s. 203, Cr. P. C., without even examining the complainant on oath and then himself complained against the latter under s. 211 of the Penal Code:

Held, (1) that the Magistrate was not competent to take cognizance of the complaint and the proper procedure for him to adopt was that laid down in s 201, Cr. P. C., which required him to return the complaint for presentation to the proper Court with an endorsement to that effect;

(2) that the proceedings before the Magistrate were void *ab initio* and that the Magistrate had, therefore, no jurisdiction to make a complaint against the complainant for an offence under s. 211 of the Penal Code.

Mr. *G. P. Das*, for the Petitioner.

Mr. *H. L. Nandkeolyar*, for the Crown.

JUDGMENT.

Ross, J.—The petitioner has been committed to the Court of Session for trial on a charge of having presented a false complaint before the Sub-Deputy Magistrate of Dinapore. The offence alleged in the complaint was the offence of murder.

The contention on behalf of the petitioner is that the Sub Deputy Magistrate, who exercised second class powers only had no authority to take cognizance of the complaint; and that all the proceedings before him were without jurisdiction.

It appears that by an order of the District Magistrate of Patna, the Sub-Deputy Magistrate of Dinapore is authorised to entertain complaints during the absence of the Sub-Divisional Magistrate. The power to make such an order is conferred by s. 190 cl. (2) and is exerciseable with regard to cases which the Subordinate Magistrate is competent to try or to commit for trial. Section 37 and the Fourth Schedule of the Code, which also deals with this matter, must be read with s. 190 and there is nothing in these provisions to extend powers which the District Magistrate can confer. As the complaint made to the Sub-Deputy Magistrate was a complaint that certain persons were guilty of murder he was not competent to take cognizance of it: and the proper procedure for him to adopt was that laid down in s. 201 which requires him to return the complaint for presentation to the proper Court with an endorsement to that effect. Instead of doing that he sent the complaint to the Police for enquiry and on their reporting the case to be false he dismissed the complaint under s. 203 without ever having examined the complainant on oath, and then himself complained against him. The orders were throughout irregular and without jurisdiction. Nor are they protected by s. 509 (*a*). That section saves proceedings before a Magistrate taken on a complaint of which cognizance is taken without authority; but this will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it without power to do so.

In my opinion these proceedings were void *ab initio*; and there is no basis in law for the present prosecution. I would, therefore, quash the commitment under s. 213 of the Code and direct that the petitioner be discharged.

Kulwant Sahay, J.—I agree.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 464 OF 1925.

November 5, 1925.

Present:—Mr. Justice Sulaiman.

RAM NATH—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 171D, 171F—Criminal Procedure Code (Act V of 1898), ss. 196, 403—Election—Abetment of false personation, what constitutes—Sanction to prosecute, absence of—Acquittal for want of sanction—Subsequent trial after obtaining sanction, whether barred.

In the absence of a sanction by the Local Government a Court is not competent to try an accused person for an offence under s. 171F of the Penal Code. Where, therefore, an accused person who is charged with an offence under s. 171F is acquitted on the ground of want of sanction, such an acquittal does not bar a subsequent trial for the same offence after the necessary sanction is obtained. [p. 898, cols. 1 & 2.]

The expression "abets the voting by any person in any such way" in s. 171F of the Penal Code means abetment of voting at an election in the name of another person living at that date, or in a fictitious name, or a second time. [p. 899, col. 1.]

Where a candidate at an election who is not aware of the fact that a person who professes to be a particular voter is not that voter and that he is falsely personating such voter, attests his voting slip but does not profess to do so on his personal knowledge and the polling officer is aware that the candidate is not attesting on personal knowledge, the candidate cannot be held guilty under s. 171F of the Penal Code of intentionally aiding the commission of an offence as defined under s. 171D of the Code. [*ibid.*]

Criminal revision from an order of the Sessions Judge, Muttra, dated the 2nd July 1925.

Messrs. *P. L. Banerji* and *S. C. Das*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a revision from a conviction of the applicant under s. 171F of the Indian Penal Code. The applicant was a candidate at a Municipal election held at Muttra in March 1923. A person named Hari Shanker was a voter on the electoral roll but he was not living at Muttra. Some person, who has not yet been traced by the Police, came forward at the time of the election and professed to be Hari Shanker and put his thumb mark on the voting slip. The voting slip was attested by the applicant, Ram Nath, the candidate himself. After Ram Nath was elected his election was contested before the Commissioner who set aside the election and directed the prosecution of Ram Nath under ss. 419 and 465 read with s. 109 of the Indian Penal Code, that is to say, cheating and abetment of forgery. Ram Nath was convicted by a First Class Magistrate and sentenced to two years' rigorous imprisonment. On appeal the Sessions Judge acquitted him of the offence under s. 419 but maintained his conviction under s. 465 read with s. 109. Ram Nath came up in revision to this Court and Mr. Justice Mukerji set aside his conviction under s. 465 read with s. 109 also. His judgment is reported as *Ram Nath* v. *Emperor* (1). Mukerji, J., came to the conclusion that the Legislature had specifically provided for such an offence under s. 171F of the Indian Penal Code and that even if the offence could fall under s. 465/109 of the Indian Penal Code it was not open to the Criminal Court to try the offender under either of the two sections. In his opinion where there are two provisions, one specific and the other general, the specific provision ought to be applied in preference to the general one. He accordingly held that the conviction of the applicant under s. 465 read with s. 109 could not stand. He then proceeded to examine the evidence and came to the conclusion that inasmuch as Ram Nath was not aware that Hari Shanker was personated, he had no guilty knowledge and could not be said to have abetted the forgery. At page 1111* the learned Judge culled from the statements of the poling officer and his assistant passages showing that the candidate without knowing the illiterate voters used to ascertain from his men about the voters and then put his signatures on the voting slips. He accordingly held that even on the facts no charge of abetment of the offence under s. 465 had been established.

It seems to me that it would have been more proper if no further prosecution of the accused had been started. No doubt Mukerji, J., held that for want of a proper sanction the conviction could not stand inasmuch as no sanction of the Local Government for prosecution under s. 171F had been obtained. Nevertheless he also went into the facts and expressed the view that when Ram Nath was not aware of the false personation no offence has been committed.

The Local Government subsequently granted sanction to prosecute Ram Nath under s. 171F of having intentionally abetted the false personation at the election. The Trying Magistrate has convicted him and that conviction has been upheld by the Sessions Judge.

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(1) 84 Ind. Cas. 714; 22 A. L. J. 1106; L. R. 6 A. 25 Cr.; 26 Cr. L. J. 362; A. I. R. 1925 All. 230; 47 A. 268.

*Page of 22 A. L. J.—[*Ed.*]

The first question to consider is whether a second trial is legal. The applicant was first tried on the same facts under s. 465 read with s. 109 and has been acquitted. He is now being tried on the same facts under another section, *viz.*, s. 171F, on the ground that the Local Government has sanctioned the prosecution.

Section 403 (4) provides that a person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was tried was not competent to try the offence with which he is subsequently charged. The question to consider, therefore, is whether it can be said that the Court which tried the accused first was not competent to try the offence with which he is now charged. The answer to this question depends on whether it can be said that the Court is not competent to try an accused for an offence in which sanction is necessary and no sanction has been obtained. It is not necessary for me to go to other High Courts which have taken a different view on this matter In at least two cases arising under the old Act two learned Judges of this Court expressed the view that where a previous prosecution had failed on the ground that sanction had not been obtained a subsequent prosecution was not illegal. I may refer to the cases of *Emperor* v *Jiwan* (2) and *Mohan Lal* v. *Emperor* (3). It is to be noted that both these cases were cases where sanction under s. 195 had not been obtained and in spite of the fact that under s. 537 (*b*) of the old Code an absence of sanction was a mere irregularity which could be cured the learned Judges held that a second prosecution was not illegal. It is, however, not necessary for me in this case to go to that length. The sanction in the present case was required by s. 196 of the Code and that section was not specifically mentioned even in s. 537 of the old Code and is not mentioned in s. 537 of the new Code. I am, therefore, not prepared to hold that an absence of a sanction from the Local Government makes the trial merely irregular and not illegal. That being so, it must be held that the First Court was not competent to try the accused for an offence under s. 171F inasmuch as no sanction of the Local Government had been obtained by that date.

Coming now to the merits of the case, the first objection raised on behalf of the applicant is that even if the second prosecution is not illegal the view expressed by Mukerji, J., should be accepted as a ruling. It is, however, to be pointed out that in this new prosecution the witnesses have been examined afresh and, therefore, any finding on that evidence cannot now be accepted as final. The evidence, however, is much the same. The polling officer, Babu Keshab Deo, in his statement has distinctly stated that before attesting the voting slip, Babu Ram Nath used to enquire from the voter and his own workers who the man was and after having ascertained the fact he used to attest the slip. Rule 43 (3) of the Municipal Election Rules requires that where a voter is illiterate he shall affix his mark or thumb impression thereto and any mark so made shall be attested by any candidate or his agent who may be able to recognise the voter or by the returning officer or one of his assistants. It is obvious that the intention is that the person who attests the sheet should be one who recognises the voter as being the right person. If the polling officer had not been aware of the fact that Ram Nath was identifying voters not on his personal knowledge then it might have been urged with force that it was the duty of Ram Nath to disclose the fact that he did not recognise the voters to the polling officer and that if in fact he concealed his ignorance from the polling officer and professed to identify the voters before him, he did by wilful misrepresentation or by wilful concealment of a material fact which he was bound to disclose, voluntarily cause or procure or attempt to cause or procure a thing to be done. Provision is made for such cases in explanation 1 to s. 107 which was not stated before the learned Judge in the case on the previous occasion. In this particular case, however, the polling officer was fully aware of the circumstances under which

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(2) 27 Ind. Cas. 208; 37 A. 107; 13 A. L. J. 4; 16 Cr. L. J. 144.

(3) 64 Ind. Cas. 142; 19 A. L. J. 813; 22 Cr. L. J. 750

Ram Nath was putting his signatures on the voting slips. The polling officer saw that when voters came to vote, Ram Nath did not know them and he used to enquire about their names and parentage from the voters themselves and from his own workers and agents and it was on the assurance given to him by his workers and agents that he used to attest the voting slips. This obviously was an irregularity and a breach of the Municipal Election Rules, but for this breach to be committed the polling officer himself was partly responsible. When, however, the officer was fully aware that the attestation by the accused was not necessarily based on his personal recognition of the voters, can it be said that he abetted a false personation? The officer certainly was in no way deceived by the attestation nor did the accused intend to deceive him intentionally. The learned Assistant Government Advocate has argued before me that s. 171D which contains the definition of the offence makes a mere abetment of the offence by any person in the way mentioned an offence, and that it is not necessary that the person abetting should have an actual knowledge of the fact that the voter was voting in the name of another person. But the expression 'abets the voting by any person in any such way' must mean the abetment of the voting at an election in the name of another person living at that date, or in a fictitious name, or a second time. Abetment is defined in s. 107 of the Indian Penal Code Admittedly the first and the second portions of the section are not applicable. The third can only be applicable if the aiding was intentional. When, therefore, Ram Nath was not aware of the fact that the person who professed to be Hari Shanker was not Hari Shanker and that he was falsely personating him and that when he did not profess to attest his voting slip on his personal knowledge and when the polling officer also was aware of the fact that Ram Nath was not attesting on personal knowledge; it is very difficult to hold that Ram Nath was guilty of intentionally aiding the commission of an offence as defined in s. 171D. The conduct of Ram Nath was highly reprehensible and improper. His action was contrary to the Municipal Rules and might have vitiated the election on that ground also. I have, however, not to consider the case from this point of view. In my opinion, on the admitted facts, no offence of abetment, that is intentional aiding of false personation, was committed by the accused. I accordingly allow this application and setting aside the conviction and the sentence order that the accused be acquitted. The fine if paid should be refunded.

Z. K. *Application allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 219 OF 1925.

August 27, 1925.

Present:—Mr. Findlay, Officiating J. C.

WAMANRAO—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 124—Criminal Procedure Code (Act V of 1898), s. 439—State document—Rejection by Court—Interlocutory order—Revision.

It is under very rare and exceptional circumstances that the Judicial Commissioner's Court would interfere on the revisional side with an interlocutory order of a Magistrate rejecting a piece of documentary evidence. [p. 900, col. 1.]

Choa Lal Dass v. *Anant Pershad Misser*, 25 C. 233; 13 Ind. Dec. (N. S.) 157, relied on.

Krishnarao v. *Emperor*, 73 Ind. Cas. 335; 6 N. L. J. 119; 24 Cr. L. J. 591; A. I. R. 1924 Nag. 47, distinguished.

It is incumbent upon a Court to prevent the disclosure of State documents in proceedings before it. No sound distinction can be drawn between the duty of the Judge when objection is taken by the responsible officer of the Crown, or by the party, or when, no objection being taken by anyone, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information sought. [p. 900, col. 2.]

Appeal against an order of the Magistrate, First Class, Nagpur, dated the 19th of August 1925.

Mr *M. R. Bobde.* for the Applicant.

JUDGMENT.—The grounds of the present application for revision are set forth sufficiently clearly in the application itself. It would appear that during the trial of a criminal case under s 325, Indian Penal Code, against the applicant and another accused in the Court of the Assistant Commissioner and First Class Magistrate, Nagpur, a certain document was produced by the Pleader for the defence in the course of the examination of a prosecution witness. The Magistrate, after the witness had admitted that the document in question bore his signature found that it appeared to be part of an unpublished official record relating to an affair of State. He accordingly after consulting the District Magistrate, Deputy Commissioner, declined to allow the document to be produced and confiscated it. It is particularly noticeable that the Counsel, who had produced it, refused to make any statement as to the circumstances under which the document had come into his possession. I am, therefore, asked to revise the connected order of the Magistrate, dated the 19th August 1925 and to admit this document in evidence.

In the first place, I would point out that it would be under very rare and exceptional circumstances that this Court would interfere on the revisional side in connection with an interlocutory order such as that we are concerned with. The circumstances of the decision in *Krishnarao* v. *Emperor* (1), decided by Batten, J. C, were wholly different. There it was obvious, and so it was then indeed admitted by the Standing Counsel for the Crown, that there was no element of dishonesty involved in a case purporting to be one of criminal breach of trust. Here the facts and circumstances are wholly different and the case quoted is quite inapposite. Here we have, at the best for the applicant, a piece of documentary evidence rejected by the Magistrate on grounds which may or may not be sound, but this matter can, in the event of a conviction and of an appeal, be agitated afresh. It would lead to an impossible state of affairs if this Court were to interfere on the revisional side with each and every order of a Magistrate of the kind we are considering, even if that order were an improper and illegal one.

I fully concur with the principles laid down by Banerjee and Wilkins, JJ., in *Chou Lal Dass* v. *Anant Pershad Misser* (2). It is highly undesirable that this Court should, on any or every pretext, interfere with proceedings in the subordinate Courts unless on very exceptional grounds. On the contrary, however, an effort should be made to allow the proceedings in these Courts to take their natural course. It would only, therefore, be in very exceptional circumstances that this Court would interfere in a matter like the present one.

Coming to the merits of the application, these seem to me to be non-existent Here we have a document which, not only the Magistrate but the District Magistrate, and Deputy Commissioner as well, believed to be one which has been improperly produced before the Magistrate as containing a communication between public officials in the discharge of their public duties. The document, on the material before me, would *prima facie* appear to be a document of State, and under s. 124, of the Evidence Act, no public officer can be compelled to disclose it. The fact that this document came from the custody of the Pleader for the applicant and that this Pleader has apparently declined to disclose the method by which, or the circumstances under which, the document came into his possession, can surely not better the position of the applicant in this connection.

For my own part I fully concur with the *dictum* of Wills, J., in *Hennessy* v. *Wright* (3) which is as follows:—

"I think the above cases abundantly shew that no sound distinction can be drawn between the duty of the Judge when objection is taken by the responsible officer of the Crown, or by the party, or when, no objection being taken by anyone, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information sought."

Here, the Magistrate, after having obtained the sanction of his superior officer on the point, came to the conclusion that a rule of public policy made it incumbent upon him to prevent the disclosure of the said document. His action in the matter, therefore, assuming the document, as I must do, to be a document of the State, was undoubtedly correct and the Magistrate would have failed in his duty if he had done otherwise than he did.

I see no cause at all for interference and dismiss the application without notice to the Crown.

N. H. *Application dismissed.*

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(1) 73 Ind. Cas. 335; 6 N. L. J. 119; 24 Cr. L. J. 591; A. I. R. 1924 Nag. 47.

(2) 25 C. 233; 13 Ind. Dec. (N. S.) 157.

(3) (1888) 21 Q. B. D. 509 at p. 521; 57 L. J. Q. B. 530; 59 L. T. 323; 53 J. P. 52.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 855 OF 1925.

January 12, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Addison.

RANNUN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Interpretation of Statutes—General Statute v. particular Statute—Repeal, constructive—Evidence Act (I of 1872), s. 27—Criminal Procedure Code (Act V of 1898), ss. 162, 237—Evidence Act v. Cr. P. C.—Relative scope of s. 27, Evidence Act and s. 162, Cr. P. C.—Circumstantial evidence—Inference of guilt—Motive, value of—Accused, producing body of deceased—Offence—Charge under s. 302, Penal Code—Conviction under s. 201, Penal Code.

It is a cardinal rule of interpretation that a general Statute is to be construed as not repealing a particular one. [p. 902, col. 2.]

A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together. [p. 902, col. 1.]

The Evidence Act is a separate Statute dealing with an important branch of law and its provisions are independent of the rules of procedure contained in the Cr. P. C., and must have full scope unless it is clearly proved that they have been repealed or altered by another Statute. [p. 901, col. 2: p. 902, col. 1.]

Section 162, Cr. P. C., applies to the statements of persons examined as witnesses by the Police in the course of investigation and not to the statement of an accused person and does not override or modify the provisions of s. 27 of the Evidence Act. [p. 902, col. 2.]

In order to justify the inference of guilt, on circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [p. 903, col. 1.]

Motive for a crime while it is always a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of an accused person can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged. [p 902, col 2.]

Where the sole evidence against an accused is that in consequence of information supplied by him the body of a murdered person was recovered from his field he cannot be convicted under s. 302, Penal Code, but he can be convicted of an offence under s. 201 of the same Code [p. 903, col. 1.]

A person charged with an offence of murder can be convicted under s. 201, Penal Code, without a further charge being made against him under that section. Such a conviction is warranted by s. 237, Cr. P. C. [*ibid.*]

Appeal against an order of the Sessions Judge Ludhiana, dated the 19th August 1925.

Mr *C. L. Gulati*, for the Appellant.

Mr. *Desraj Sawhney*, for the Respondent.

JUDGMENT.—On or about the 6th March 1925, one Harya, a Jat of the village Todarpur in the District of Ludhiana, disappeared from his house, and it was not until the 6th April 1925, that his corpse was disinterred from the field of the appellant Rannun. The Sessions Judge of Ludhiana has convicted Rannun of the murder of Harya, and has sentenced him under s. 302, Indian Penal Code, to suffer the penalty of death. The medical evidence shows that Harya's death was due to asphyxia caused by strangulation, and the question for determination is whether the murder was committed by the prisoner Rannun.

Now, there is no eye-witness of the affair and the conviction rests on the following pieces of evidence:

(1) On the 6th April 1925, the prisoner stated to the Police that he had buried the body of Harya in his own field.

(2) In consequence of the information supplied by him the body was recovered from the field.

(3) A cloth called *daula* was found on the corpse, and a weaver Sher Muhammad deposes that he made the *daula* in question with another *daula* for the prisoner's brother Santu, who too was tried for the murder, but has been acquitted by the learned Sessions Judge.

It appears that Santu himself subsequently produced from his house another *daula* which has been identified by Sher Muhammad as one of the pair manufactured by him. The circumstance that a *daula* belonging to Santu was found on the corpse does not, in our opinion, materially advance the case for the prosecution so far as the guilt of the prisoner is concerned.

The learned Counsel for the appellant, while conceding that the confessional statement made by his client which led to the discovery of the body, is admissible under s. 27 of the Evidence Act, contends that s. 162 of the Cr. P. C. prohibits the use of the statement in an enquiry or trial in respect of the offence which was under investigation at the time when the statement was made to the Police Officer. Our attention has been invited to the language of the section which, it is urged, forbids the use of a statement made by "any person" to a Police Officer in the course of an investigation, and it is argued that the words "any person" include an accused person. This contention, if accepted, would virtually repeal s 27 of the Evidence Act, and we do not think that such result was ever intended by the Legislature. The Evidence Act is a separate Statute dealing with an important branch of law, and its provisions are independent of the rules of procedure contained in the Cr. P. C., and must have full scope unless it is clearly proved that they have been repealed or altered by another Statute. It must be remembered that s. 27 of the Evidence Act embodies a very important rule of evidence applicable to criminal cases, and one would expect that a repeal or alteration of that rule involving such far reaching consequences would be carried out not by a mere implication, but by an express provision to that effect. "It is in the least degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have that meaning when used either in their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however, wide and comprehensive they may be, in their literal sense, must, usually, be construed as being limited to the actual objects of the Act, and as not altering the law beyond." Maxwell on the Interpretation of Statutes, 6th Edition, page 149. In wiew of this principle it was held in England in the case *R.* v. *Harrald* (1) that the enactment which gave a vote for the election of Town Councillors to every "person" of full age who had occupied a house for a certain time, and provided that the words importing the masculine gender would include females for all purposes relating to the right to vote, was intended, having regard to the general scope of the Act, to remove only that disability which was founded on sex, but not to affect that which was the result of marriage as well as sex, and, therefore, not to give the right of voting to married women.

As observed by Smith, J., in *Kutner* v. *Phillips* (2), a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with, or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim "*leges posteriores priores contrarias abrogant*" applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied. The language of every enactment must be construed, as far as possible, in accordance with the terms of every other Statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a Statute by construction when the words may be capable of proper operation without it.

Moreover, it is obvious that, while s. 27 of the Evidence Act is confined in its operation to an incriminating statement made by an accused person in Police custody, s. 162 of the Cr. P. C. contains a general provision embracing all statements made by persons examined during the Police investigation; and it is a cardinal rule of interpretation that a general Statute is to be construed as not repealing a particular one, that is, one directad to a special object or a special class of objects. "Now if anything be certain," observes Lord Selborne in *Seward* v. *The Vera Cruz* (3), "it is this, that where there are genernal words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."

Having regard to the above rules of interpretation we are of opinion that s. 162 of the Cr. P. C. applies to the statements of persons examined as witnesses by the Police in the course of an investigation, and not to the statement of an accused person; and that it does not everride or modify the provisions of s. 27 of the Evidence Act. We must, therefore, hold that the prosecution can rely, not only upon the discovery of the corpse in the field of the prisoner, but also upon the statement made by him in consequence of which that discovery was made. There is also some evidence bearing upon the motive for the murder. But motive for a crime while it is always a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of an accused person, can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged. Now, the question is whether the two pieces of evidence mentioned above necessarily point to the conclusion that the appellant committed the murder. The fundamental rule by which the effect of circumstantial evidence is to be estimated is well established. In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Can we say that these facts are incapable of explanation upon any hypothesis other than that the prisoner committed the murder? It seems to us that, while they certainly prove that he made away with the evidence of the murder by concealing the body, they do not necessarily suggest the inference that he himself committed the murder. He cannot, therefore, be convicted under s. 302, Penal Code; but he is clearly guilty of an offence described in s. 201, Penal Code. It is true that he was not charged with the commission of the latter offence but, as laid down by their Lordships of the Privy Council in *Begu* v. *Emperor* (4), a person charged with an offence of murder can be convicted under s. 201, Penal Code, without a further charge being made against him under that section, and that such a conviction is warranted by s. 237 of the Cr. P. C.

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(1) (1872) 7 Q. B. 361; 41 L. J. Q. B. 173; 26 L. T. 616; 20 W. R. 328.

(2) (1891) 2 Q. B. 267; 60 L. J. Q. B. 505; 64 L. T. 628; 39 W. R. 526; 56, J. P. 54.

(3) (1885) 10 A. C. 59; 54 L. J. P. 9; 49 J. P. 324; Asp. M. C. 386; 33 W. R. 477; 52 L. T. 474.

We accordingly accept the appeal, so far as to alter the conviction under s. 302, Indian Penal Code, to one under s. 201 and setting aside the sentence of death we direct that the prisoner shall suffer rigorous imprisonment for a period of seven years.

R. L. *Appeal partly accepted.*

(4) 88 Ind. Cas. 3; A. I. R. 1925 P. C. 130; 48 M. L. J. 643; 2 O. W. N. 447; 41 C. L. J. 437; 27 Bom. L. R. 707; 3 Pat. L. R. 95 Cr.; 6 L. 226; 23 A. L. J. 636; (1925) M. W. N. 418; 26 Cr. L. J. 1059; 7 L. L. J. 324 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 21 OF 1925.

October 20, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

M. H. CROWDER—APPLICANT

versus

L. A. MORRISON—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 200, 201, 202, 203—Preliminary inquiry—Magistrate, duty of—Procedure—Accused, whether can be called upon to show cause.

The procedure which a Magistrate is required to adopt on a complaint being lodged before him is laid down by ss. 200 to 203 of the Cr. P. C. Section 200 of the Code makes it incumbent on a Magistrate to examine the complainant forthwith at sufficient length to satisfy himself as to his veracity and as to any points on which the complaint is silent. If the result of such examination is that he finds no *prima facie* reason to distrust the complaint and he is satisfied that the facts alleged before him constitute a criminal offence, it is incumbent on him to issue process forthwith. If, on the other hand, he distrusts the complaint altogether or comes to the conclusion that no offence is made out, it is equally his duty to dismiss the complaint. It is only in a case where he distrusts the complainant, but his distrust is not sufficiently strong to warrant him to act upon it, that it is open to him to postpone the issue of process pending further inquiry as contemplated by s. 202, Cr. P. C., provided he records his reasons in writing for adopting this intermediate course. [p. 905, col. 1.]

Baidya Nath Singh v. *Muspratt*, 14 C. 141; 11 Ind. Jur. 226; 7 Ind. Dec. (N. S.) 93, relied upon.

The procedure of calling upon an accused person to render an explanation to enable the Magistrate to decide if he should issue process is undesirable. It is not fair to the accused that he should be called upon to state his defence before the prosecution have laid all their cards on the table. Though there is no obligation on him either to appear or to render an explanation in the preliminary inquiry, a refusal or failure on his part to attend in answer to a rule *nisi* issued by a Magistrate is likely to prejudice the mind of the Magistrate and a compliance therewith to expose him to serious risks. [p. 905, col. 2.]

Balai Lal Mookerjee v. *Pashupati Chatterjee*, 35 Ind. Cas. 828; 21 C. W. N. 127; 17 Cr. L. J. 396; 25 C. L. J. 606 and *Chandi Charan Mitra* v. *Manindra Chandra Roy Chowdhury*, 72 Ind. Cas. 173; 27 C. W. N. 196; A. I. R. 1923 Cal. 198; 36 C. L. J. 414; 24 Cr. L. J. 333, relied upon.

In determining whether he should exercise his criminal jurisdiction, a Magistrate should apply his mind to see if there is "*prima facie* evidence for the alleged offender to answer" irrespective of what the motive of the complainant was. [p. 907, col. 1.]

R. v. *Adamson*, (1876) 1 Q. B. D. 201 at p. 206; 45 L. J. M. C. 46; 33 L. T. 840; 24 W. R. 250 and *In the matter of the petition of Ganesh Narayan Sathe*, 13 B. 590 at p. 598; 7 Ind. Dec. (N. S.) 391, relied upon.

Application to revise an order of the City Magistrate, Karachi, dated the 20th July 1925.

Mr. *Motiram Idanmal*, for the Applicant.

Mr. *Tahilram Maniram*, for the Opponent.

Mr. *Parsram Tilaram*, for the Crown.

ORDER.—This is a Rule calling upon the accused Morrison and the Crown to show cause why the order passed by the learned City Magistrate of Karachi on July 20, 1925, dismissing the complaint filed by the applicant Crowder should not be set aside and a further inquiry ordered.

The complainant has described himself as the Director of a private Limited Company carrying on business in the name of Messrs. W. Crowder & Co., Ld., having its head office at Bombay and a branch office here. It is said that its share capital is chiefly owned by the Crowder family group. The Managing Agents of this Company are said to be Messrs. W. Crowder & Co, a firm bearing the same name consisting of a few individuals who form a private partnership, and are not to be mixed up with the Company.

The complainants' case is that the accused was a paid servant of the Managing Agents and in charge of their business at Karachi upto the year 1920, when he was admitted as their partner and was to be paid in addition to his salary a certain commission on the net profit of the local business of the Company, such commission being payable only in such of the years in which there was a profit, and that during the years 1922 to 1924, the accused had committed criminal breach of trust by misappropriating large sums of money belonging to the Company to his own use. The complaint which is full of details refers to the means employed by the accused to misappropriate such large sums of money without detection and to the cause which led to the detection of his crime. Briefly stated, the means employed by the accused was to open an account in the name of the Company with the National Bank of India Ld., Karachi, though the official bankers of the Company were different. The opening of the account enabled the accused to cash cheques made payable to the Company and have them credited in this account and then to draw upon it for his private purposes. The payments made into this account and moneys drawn from it are said not to have been entered in the official account books of the Company, and the whole affair kept secret in every way from the head office. The fact that the local branch made no profit during the years 1922 to 1924 is said to have created a suspicion in the mind of the complainant, who sent down at first one Warren Smith from Bombay to look into the matter. The business of the Company consisted *inter alia* of looking after the interests of another cognate private Company owned by the same family group called the Crowder Engineering Works Ld., and of certain export agencies, one of which is referred to as The Jallo Resin & Turpentine Factory Ld., Lahore, or The Jallo Company. It is said that within four days of Smiths' taking in hand the inspection of the accounts of the Engineering Works, the account books and vouchers of that concern were destroyed by a mysterious fire in the afternoon of Saturday November 24, 1924, with the result that the complainant's suspicions being confirmed, he came down personally to investigate into the matter leading to the services of Morrison being dispensed with, the detection of the frauds complained of and the institution of the present criminal proceedings before the learned City Magistrate.

The complaint was instituted on April 8, 1925 and on that day the learned City Magistrate, after recording the most formal examination of the complainant ordered notice to issue to the accused to show cause why process should not be issued against him. Though the defalcations complained of amounted to about one lac and thirty thousand rupees, the inquiry was limited to the following items:—

1.	Rs.	9,000-0-0	dated	5-3-1924.
2.	„	5,500 0-0	„	18-11 1924.
3.	„	3,227 14-6	„	30-12-1924.
4.	„	9,711-0-0	„	28-11 1924.
5.	„	6,180-15-0	„	30-12-1924.
6.	„	25,000-0-0	„	4-12-1924.
7.	„	1,624-2 0	„	1-1925.
8.	„	41,000-0-0	„	1-1925.

Except the first item, the other items forming the crux of the investigation were all said to have been appropriated by the accused to his own use about the time when his management of the business was being scrutinized.

After a protracted inquiry lasting for about three months, and without examining the complainant further, or examining any of his witnesses, the learned City Magistrate passed the order complained of, and in doing so, he has mainly relied on the explanation tendered to him on behalf of the accused. The hearing of this rule has been considerably delayed as within five days of the order of dismissal of the complaint, the accused left British India and has not upto now returned. My brother Raymond dispensed with personal service of the notice on the accused and the rule was set down for hearing on September 4, 1925. In view of the cable sent by the accused asking for one month's adjournment to enable him to appear and/or engage Counsel, I postponed the hearing of the case to October 14, 1925. An application was made to move this Court on its High Court Side to order fresh personal service on the accused, but was dismissed by Kennedy, J. C., and Tyabji, A. J. C. on September 21, 1925. Mr. Tahilram has again asked for a further adjournment on the ground that the accused was not able to secure a return passage and had not sent down the necessary papers. The impossibility of the accused to secure a passage is a matter of considerable doubt and his failure to send down the necessary papers and instructions is inexplicable. I have refused the adjournment and have proceeded with the case.

The learned Pleader for the complainant has attacked the order of the learned Magistrate on a two-fold ground: firstly, that the whole procedure of the learned Magistrate is extremely irregular and wrong, and secondly, that the conclusions arrived at by the learned Magistrate as to facts are not only based on no legal evidence, but are not even warranted by the assumptions of fact which were neither admitted nor proved.

The learned Pleader for the opponent has confined his arguments to the first ground. He has pleaded his inability to meet the second ground in the absence of the necessary papers and instructions. I am of opinion that both the grounds are well-founded. The learned Assistant Public Prosecutor has franky admitted that he is unable to say any thing in support of the first ground. The procedure which a Magistrate is required to adopt on a complaint being lodged before him is laid down by ss. 200 to 203 of the Cr. P. C. Section 200 of the Code makes it incumbent on a Magistrate to examine the complainant forthwith at sufficient length to satisfy himself as to his veracity, and as to any points on which the complaint is silent. If the result of such examination is that he finds no *prima facie* reason to distrust the complaint and he is satisfied that the facts alleged before him constitute a criminal offence, it is incumbent on him to issue process forthwith. If, on the other hand, he distrusts the complaint altogether or comes to the conclusion that no offence is made out, it is equally his duty to dismiss the complaint. It is only in a case where he distrusts the complainant, but his distrust is not sufficiently strong to warrant him to act upon it, that it is open to him to postpone the issue of process pending further inquiry as contemplated by s. 202, Cr. P. C., provided he records his reasons in writing for adopting this intermediate course: *Baidya Nath Singh* v. *Nuiparatt* (1). The complaint filed in the present case indubitably disclosed facts which, if true, amounted to a criminal offence If the learned Magistrate doubted the *bona fides* of the complainant, it was incumbent on him to examine the complainant at some length to test his veracity, and to ascertain if his statements had a substantial foundation. If such examination created a doubt or distrust in his mind as to the *bona fides* of the complaint, it was his duty to record his reasons for postponing the issue of process till further inquiry. He has done neither; and, therefore, there are no *data* for the higher Court to hold that his action in postponing the issue of process was justified.

The preliminary inquiry held by the learned Magistrate is equally not one contemplated by s. 202, Cr. P. C. No attempt was made to examine the complainant and his witnesses in the light of any information supplied to him by the accused; even the request of the complainant to examine Mr. Hoshang, one of the principal prosecution witnesses, on whose evidence a good deal depended, was not acceded to. The inquiry was limited to explanations and counter-explanations by the learned Pleaders of both sides, to certain documents being filed and commented upon, and to an important document which is not now before this Court, said by the complainants' Pleader to have been the written explanation of the accused, and by the accused's Pleader as rough notes of his arguments. The procedure of calling upon an accused person to render an explanation to enable the Magistrate to decide if he should issue process, has been condemned on several occasions. It is not fair to the accused that he should be called upon to state his defence before the prosecution have laid all their cards on the table. Though there is no obligation on him ~~either~~ to appear or to render an explanation in the preliminary inquiry a refusal or failure on his part to attend in answer to a *rule nisi* issued by a Magistrate, is likely to prejudice the mind of the Magistrate and a compliance therewith to expose him to serious risks, as is fairly illustrated by the present case. The very first item complained of was a sum of Rs. 9,000 drawn by the accused from the

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(1) 14 C. 141; 11 Ind. Jur. 226; 7 Ind. Dec. (N. S.) 93.

National Bank account. The explanation of the accused offered on his behalf at the inception of the inquiry was that he had drawn it to pay on behalf of the Company certain *dastoori* commissions or bribes to secure contracts for the Company. The prosecution was, however, able to place materials on the record to show that the specific sum drawn from this account was repaid to the Company to wipe off the indebtedness of the accused to the Company for certain past overdrawals for his personal use which he was being pressed to repay, and that no part of it could possibly have been paid as *dastoori*. A second explanation was offered on behalf of the accused and which prevailed with the learned Magistrate. How far the second explanation is true, or will be adhered to by the accused after all the prosecution evidence is recorded, or will be accepted by the Magistrate who tries the case, is another matter. But it cannot possibly be denied that the first explanation is likely to raise an adverse inferance against him.

In *Balai Lal Mookerjee* v. *Pashupati Chatterjee* (2) Sanderson, C. J., observed as follows:—

"The second irregularity which is relied upon was that the learned Magistrate did not confine himself to the evidence of the complainant and the report which was made by the Police Officer, but that he allowed the accused to be represented by a learned Pleader and to address him to argue the points which arose in the case and to put in a detailed statement of the points and the facts upon which the defence relied.

"To my mind, this procedure is quite inconsistent with the scheme of this legislation: I do not understand how the accused person ever goes before the Magistrate has made up his mind to issue process. The Magistrate is directed by the Statute to inquire into the case in certain specified ways, he is to decide whether process ought to issue, and then if he thinks that process ought to issue, he should direct process to issue. Then the accused person appears and if he has got a defence, his defence is investigated as well as the case for the prosecution. That being so, it appears to me that the learned Magistrate has not acted in this case in accordance with the procedure which is laid down by the Criminal Procedure Code".

In *Chandi Charan Mitra* v. *Manindra Chandra Roy Chowdhury* (3) the learned Chief Justice after referring to and reemphasizing the aforesaid observations, expressed a hope that the two judgments delivered by him would be brought to the notice of the Magistrates, and that they would in this respect observe the plain provisions of the law, and thereby prevent unnecessary waste of time which is likely to result by their action being challenged in a superior Court. I respectfully endorse every word of what has been said by his Lordship and express the same hope that the Magistrates in this Province would likewise adhere to the rules laid down by the Legislature for their guidance.

The order of dismissal passed by the learned Magistrate is not only based on certain assertions of fact which were neither admitted nor proved, but on a misconception of the very nature of the complaint. Evidently it was urged on behalf of the accused that a separate account with the National Bank was opened by him in connection with a building which Mr. Hoshang was constructing as offices of the Company and that certain moneys paid by him for purposes of construction were credited in this account. It was further urged on his behalf that the Company had no capital of their own at Karachi, and that they traded on the moneys of Mr. Hoshang and the Jallo Company. Both these statements were accepted by the learned Magistrate as true. Mr. Hoshang was one of the witnesses for the prosecution, and it was unfair to the complainant that he should not have been allowed to examine Mr. Hoshang or afforded an opportunity of refuting both these statements if they were being relied on for throwing out his complaint. The reasoning of the learned Magistrate that as the moneys paid into this account came either from Mr. Hoshang or from the Jallo Company, and as neither of them had complained against the accused "there was nothing dishonest in the accused transferring the amount from it to his personal account so long as he does not deny his liability to account for the money" does not appeal to me as sound. If Mr. Hoshang and the Jallo Company had given credit to the Company, it was the Company's money which was drawn out of the account. The learned

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(2) 35 Ind. Cas. 828; 21 C. W. N. 127; 17 Cr. L. J. 396; 25 C. L. J. 606.

(3) 72 Ind. Cas. 173; 27 C. W. N. 196; A. I. R. 1923 Cal. 198; 36 C. L. J. 414; 24 Cr. L. J. 333.

Magistrate seems to have been informed by the accused that a civil suit had been filed by him which was pending and that this complaint was a counterblast to that suit. He has been considerably influenced by what he believed to be the motive underlying the complaint. In the concluding part of his judgment he has stated that in his opinion the whole complaint was a dispute between partners about accounts, and that he, therefore, declined to allow them to settle it in a Criminal Court.

The information supplied to the learned Magistrate about the pending civil litigation does not seem to be supported by any document filed in the case and it is not certain if the civil suit was not a counterblast to the complaint. The complainant, no doubt, occupied a dual position of the Director of the Company and a partner of the accused in the firm of the managing agents. The complaint filed by him was on behalf of the Company and not by him as a partner. And even if it was a complaint filed by him as partner of the accused, there was nothing in law to prevent him from taking a criminal action against the accused, if he was entitled to both the civil and the criminal remedy. In determining whether he should exercise his criminal jurisdiction, the learned Magistrate should have applied his mind to see if there was "*prima facie* evidence for the alleged offender to answer" irrespective of what the motive of the complainant was: see the observations of Field, J., in the *R.* v. *Adamson* (4) referred to with approval by Sargent, C. J. in *In the matter of the petition of Ganesh Narayan Sathe* (5).

As I am ordering a further inquiry into the matter I do not propose to deal with the specific items referred to in the order, as any observations made by me are likely to affect the mind of the Trying Magistrate. All that is necessary for me to say is that I have carefully considered the order of the learned Magistrate, and I am not at all satisfied that the complaint was one which deserved such summary dismissal.

One further point which requires special mention is that the written explanation or notes of arguments of the accused's Pleader which evidently formed the basis of the learned Magistrate's order, is not now on the record. The notes were handed over to the learned Magistrate in open Court on July 6. A copy of these notes was applied for by the complainant on July 9. He was not able to get it, and the explanation offered by the learned Assistant Public Prosecutor on behalf of the Magistrate is, that these notes were not treated by the learned Magistrate as part of the record, and were not preserved. Though I accept the explanation of the learned Magistrate that the notes were not preserved by him under the belief that they did not form part of his record, I must express my disapproval of his action. It was open to the learned Magistrate not to accept notes of arguments of the learned Pleader for the accused, but if they were accepted by him, they should, in my opinion, have formed part of his record, and should not have been destroyed till the time for challenging his order in a higher Court had expired.

I set aside the order of the learned Magistrate, and in the circumstances of the case I direct the District Magistrate, Karachi, to hold a further inquiry either by himself or by a Magistrate subordinate to him other than the learned City Magistrate. I further direct that in view of the fact that the complaint is over six months old by now, and the offence complained of is of a serious nature, the inquiry should be conducted with as much expedition as possible.

P. B. A.
Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

Criminal Revision No. 895 of 1925.
November 26, 1925.
Present :—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir George Rankin, Kt.

BENI MADHAB SAPUI and another—
Petitioners
versus
JADU NATH SAPUI and others—
Opposite Party.

Criminal Procedure Code (Act V of 1898), ss. 69, 70, 71, 133, 134 (1)—Nuisance—Conditional order—Service of notice—Procedure.

The procedure for service of summons which is provided by s. 71 of the Cr. P. C. cannot be made use of unless service in the manner mentioned in ss 69 and 70 cannot be effected by the exercise of due diligence. [p. 908, col. 2.]

Where the report of a peon shows that service cannot be effected in the manner provided by s. 69, but it does not show that service cannot be effected in the manner provided by s. 70, the peon is not justified in effecting service in the manner provided by s. 71. [p. 908, col. 2.]

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(4) (1876) 1 Q. B. D. 201 at p. 206; 45 L. J. M. C. 46; 33 L. T. 840; 24 W. R. 250.

(5) 13 B. 590 at p. 598; 7 Ind. Dec. (N. S.) 391.

A return of service of notice of a conditional order made under s 133 of the Cr. P. C. showed that the person to be served was not found in his house and that two copies of the notice were affixed to the door of the house:

Held, that there being nothing to show that service could not be effected in the manner provided by s. 70 of the Code, the service effected in the manner provided by s. 71 was not sufficient. [*ibid.*]

Criminal revision against an order of the Additional District Magistrate, Alipur, dated the 18th September 1925, affirming that of the Magistrate, Alipur, dated the 27th June 1925.

Babu *Satindra Nath Mukerji*, for the Petitioners.

Babu *Suresh Chunder Taluqdar*, for the Opposite Party.

JUDGMENT.

Sanderson, C. J.—This is a Rule calling upon the District Magistrate and the opposite party to show cause why the order complained of should not be set aside on ground No. 1 of the petition and also on the facts stated in para. 9.

The order complained of was an order made by a Deputy Magistrate of Alipore by which the petitioners were directed to remove an alleged obstruction from a certain waterway or canal.

Ground No. 1 was as follows: "That the learned Additional District Magistrate was wrong in holding that the notice of the conditional order under s. 133, Cr. P. C., was legally served upon the petitioners and that ss. 134 (1) and 71, Cr. P. C., render such service valid." The facts stated in para. 9 of the petition were that there was no personal service upon the petitioners nor was there any proclamation as prescribed by law.

The point upon which the learned Vakil, who appeared for the petitioners relied, is not that which was stated in para. 9 of the petition; but, in my judgment, he is entitled to rely upon it having regard to the terms appearing in ground No. 1.

A return of the service of the notice of the conditional order, was made by the peon and it was to the effect that the petitioners were not found in their house and that two copies of the notice were hung up on the *sadar* door of their house.

The Magistrate in his explanation given in answer to the Rule said: "This service is legal according to s. 134 (1) read with s. 71, Cr. P. C."

Section 134 (1) of the Code provides: "The order shall if practicable, be served on the person against whom it is made, in manner herein provided for service of a summons."

In order to ascertain the manner in which the summons may be served it is necessary to refer to ss. 69, 70 and 71. Section 69 provides, "The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons." Section 70 provides, "Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family" (then there are provisions with regard to the persons signing a receipt therefor). Then s. 71 says: "If service in the manner mentioned in ss. 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served."

It is plain that the procedure, which is provided by s. 71, cannot be made use of unless service in the manner mentioned in ss. 69 and 70 cannot be effected by the exercise of due diligence.

It was admitted by the learned Vakil, who appeared to show cause, that the return of the peon was defective. The return of the peon showed that service could not be effected in the manner provided by s. 69 but it did not show that service could not be effected in the manner provided by s. 70. Consequently in my judgment it was not proved that service of the notice of the conditional order had been duly effected; in other words, it was not proved that the order which is referred to in s. 134 (1) had been served in the manner provided for service of summons.

The Magistrate seems to have thought that if service of the notice was effected in the manner provided by s. 71, regardless of the question whether it could be served in the manner provided by s. 69 or by s 70, that would be sufficient. In my judgment, that conclusion is not correct, and I am of opinion that the service of the notice of the conditional order was defective

The question remains whether this Rule should be made absolute. The learned Vakil who appeared for the opposite party argued that the petitioners had not alleged that there were any adult members living in the house upon whom the notice could have been served. It seems to me that it is not necessary for them to allege that they were entitled to rely upon the argument that the return of service was defective.

It appears that in some previous proceedings relating to the same matter, the petitioners had appeared and had succeeded in getting the order made in those proceedings set aside. There is, therefore, no reason for assuming that the petitioners were willing to allow the present proceedings to go by default.

For these reasons, in my judgment, this Rule should be made absolute and the order absolute could be set aside. The conditional order will remain: the order absolute being set aside on the ground that service of the notice of the conditional order had not been duly and properly made.

Rankin, J.—I agree.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 318 OF 1926.
April 23, 1926.
Present:—Mr. Justice Martineau.
EMPEROR—PETITIONER
versus
CHHOTU—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 411—Stolen ornament found in house occupied by accused and his mother—Offence.

Where an ornament called *kangni* stolen in a burglary is found by the Police in a jar of chillies in a house occupied by the accused and his mother and there is nothing to show that he put it there or knew that it was there, an offence under s. 411, Penal Code, has not been established. [p. 910, col. 2.]

Case reported by the Sessions Judge, Delhi.

FACTS.—It is admitted that a serious burglary occurred at the house of Gugan (P. W. No. 2), during the night of the 24th-25th November, 1924 when a considerable quantity of clothing and jewelry was stolen. On the 17th January 1925, a house occupied by Chhotu accused and his mother *Musammat* Mankaur was searched by the Police, and it is alleged that a silver *kangni* which was identified by the complainant as part of the stolen property, was recovered from an earthen pitcher containing chillies in which it had been concealed. Chhotu and his mother were challaned by the Police under s 457, Indian Penal Code. The Magistrate has acquitted *Musammat* Mankaur but has convicted Chhotu under s. 411, Indian Penal Code, holding it as proved that the *kangni* is a portion of the stolen property and was recovered from Chhotu's possession.

GROUNDS.—For reasons which I am unable to appreciate the Honorary Magistrate has sentenced Chottu to a fine of Rs. 20 only. If Chhottu's guilt is open to doubt, as is contended by his Counsel whom I have heard in revision, he is entitled to an acquittal. If, however, his guilt is proved whether under s. 457 or s. 411, Indian Penal Code, (he was charged in the alternative), a sentence of Rs. 20 is wholly inadequate. The Public Prosecutor who in view of the peculiar circumstances of the case, was called upon by me to appear has argued in support of the conviction and has formally asked for enhancement of sentence.

In any case the sentence of Rs. 20 fine cannot possibly be allowed to stand. In forwarding the case to the High Court, for orders, it is unnecessary for me to deal with facts in detail. I will confine myself to dealing briefly with the arguments advanced on behalf of the petitioner by his Counsel.

I must observe in the first instance that the position taken by accused's Counsel before me in argument was substantially different from the allegation apparently made before the lower Court. The accused then though denying that the *kangni* had been found in his house, adduced evidence intended apparently to show that the *kangni* recovered did belong to him, or to his relatives; and this was the trend of the cross-examination of prosecution witnesses. In revision his Counsel has argued that the *kangni* had no connection with the accused at all, he has not seriously attacked the evidence proving that the *kangni* is a portion of the stolen property, he has confined himself to trying to show that the (*kangni* recovered as is now admitted during the search) was placed in the house by accused's enemies (of whom there are many owing to party faction in the village) a fraud which he argues was facilitated by alleged irregular procedure on the part of the Police in searching the house.

The circumstance that the First Information Report though mentioning some of the stolen property does not specifically mention a *kangni* or the names of the thieves, is immaterial because the First Information Report was made by a person who admittedly had no personal knowledge of the facts of the burglary.

I see no force in the plea that there was any irregularity on the part of the Police in conducting the search. The search was arranged by Sub-Inspector Chiranji Lal (P. W. No. 7) and Inspector Milchem (P. W. No. 9) both of whom were present. It was actually made by Chandgi, constable (P. W. No. 8) and Devi Dat *lambardar* (D. W. No. 15). It is stated definitely and unequivocally by the Inspector, Sub-Inspector and the constable that the person of the searchers were searched in the presence of the accused before they entered the house, and that the *kangni* was found concealed in a pitcher of chillies inside a room. An element of doubt has been introduced by the statements of Devi Dat *lambardar*, who, having, apparently been won over by the accused now denies, (1) that he and his companions were searched before entering accused's house; (2) that the *kangni* was found concealed in the pitcher. He asserts that it was picked up from the floor by the constable Chandgi and he implies that the constable introduced it himself. It is to be noted that Devi Dat *lambardar* made no such allegation to the Inspector of Police at the time of search, and his equivocal statement now should, in my view, be disregarded, I would hold it proved that the *kangni* was found in the house of the accused concealed in a pitcher of chillies.

There is ample evidence that the *kangni* belongs, as alleged, to the complainant and this evidence has not been attacked in arguments by accused's Counsel.

The house from which it was recovered admittedly belongs to the accused and his mother (acquitted), and there is no evidence that any other persons usually live in the house or were living in the house at the time. The accused's elder brother, (said to be a graduate), is stated to have a share in the family property, but it is not alleged that he was living in the house at the time, though it appears that he came down during the investigation of the case.

The defence evidence deals mostly with the alleged respectability of accused and his family. So far as it deals with the facts it is clearly worthless.

Finally, though not mentioned in the grounds of revision, Counsel urged the plea that the trial had been vitiated by an infringement of the provisions of s. 256, Cr. P. C. The Magistrate called on the accused to name the prosecution witnesses required for cross-examination immediately after framing the charge without the statutory interval. This was an irregularity which in my view does not vitiate the trial because the accused was obviously not prejudiced. He was through out represented by Counsel, and when questioned asked that all the prosecution witnesses should be re-called, and all were in fact re-called for an adjourned date, obviously therefore, the failure to allow the required interval made absolutely no difference to the course of the trial. The latest authority on this point, [*viz.*, *Phuman Singh* v. *Emperor* (1)] indicates that under such circumstances the irregularity should be held curable under s. 537, Cr. P. C.

It is proved, in my opinion, that the accused was found in possession of stolen property shortly after the theft; and having regard to the manifestly contradictory and unsatisfactory explanations offered by the accused which are hardly consistent with the possibility of his innocence, the conviction should be in my view affirmed, and the sentence enhanced.

I forward the case, accordingly, to the High Court for decision.

Mr. *Shamair Chand*, for the Respondont.

ORDER.—The learned Sessions Judge has sent this case up for the enhancement of the sentence of fine imposed on Chhotu for an offence under s. 411, Indian Penal Code. It appears to me, however, that the conviction should be set aside.

The finding is that an ornament called a *kangni*, stolen in a burglary committed on the 24th November 1924, was found by the Police on the 17th January following in a jar of chillies in a house occupied by Chhotu and his mother Mankaur. There is, however, nothing to show that Chhotu put the *kangni* in the jar or knew that it was there. A *kangni* is an ornament worn by women, and it is quite likely that Mankaur may have received it from the thieves and hidden it in the jar without her son knowing anything about it.

I must accordingly set aside the conviction and sentence and acquit Chhotu.

The fine, if paid, will be refunded.

R. L. *Conviction set aside.*

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(1) 89 Ind. Cas. 518; A. I. R. 1923 Lah. 339; 26 Cr. L. J. 1158; 7 L. L. J. 114.

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 48 OF 1926.

April 30, 1926.

Present:—Mr. Justice Jai Lal.

DHARI MAL—ACCUSED—PETITIONER

versus

EMPEROR THROUGH RAJ RAM—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526 (e)—Complaint dismissed in default—Fresh complaint in another Court—Transfer to Court dismissing original complaint.

Where a case has been dismissed in default by a particular Magistrate, a fresh complaint based on the same facts should be transferred to the same Magistrate for trial.

Petition for transfer of the case from the Court of the City Magistrate, Hoshiarpur, to some other Court of competent jurisdiction.

Mr. *Mehr Chand Mahajan*, for the Petitioner.

ORDER.—On the 23rd January 1926 one Raja Ram filed a complaint under s. 323/504, Indian Penal Code, against the petitioner in the Court of the City Magistrate, Khan Sahib Mian Hakim Din, of Hoshiarpur, who transferred it to Sardar Gurdial Singh, Magistrate First Class. On the 28th January this complaint was dismissed as the complainant did not appear. The accused was present with his Counsel on that date. Later on the same day Raja Ram filed another complaint in the Court of Sardar Gurdial Singh on the same allegations and under the same sections. Sardar Gurdial Singh returned this complaint to be presented to the City Magistrate. The City Magistrate took cognizance of the case and issued processes for the appearance of the accused, the petitioner. On the date of hearing an application was presented on behalf of the accused that the case may be sent to Sardar Gurdial Singh for trial, as the previous one had been dismissed by him. This petition was dismissed with the remarks by Mian Hakim Din, the City Magistrate, that the case being of special importance it was necessary that he should himself hear it.

This is a petition by the accused for transfer of the case from the Court of Mian Hakim Din. Several allegations are made in support of the petition from which an inference is sought to be drawn that the accused has reasonable grounds to apprehend that he will not receive justice in the Court of Mian Hakim Din. I have examined the explanation of Mian Hakim Din, and am satisfied that there is no ground for the petitioner to entertain an apprehension that he will not get a fair trial in his Court. At the same time I consider that as the case was originally transferred for trial to Sardar Gurdial Singh and was once dismissed by him for default, it is desirable that the fresh complaint based on the same facts should be sent to him for trial. Under s. 526 (e) I order that the case be transferred from the Court of Mian Hakim Din, City Magistrate of Hoshiarpur, to that of Sardar Gurdial Singh, Magistrate First Class, Hoshiarpur.

R. L. *Case transferred.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 166 OF 1926.

March 23, 1926.

Present:—Mr. Justice Daniels.

RAMMU—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—Non-compliance with provisions—Absence of prejudice—Effect.

An omission to comply fully with the provisions of s. 342, Cr. P. C., does not vitiate the trial unless the accused has been prejudiced. [p. 912, col. 1.]

Bechu Chaube v. *Emperor*, 71 Ind. Cas. 115; 45 A. 124; 20 A. L. J. 874; A. I. R. 1923 All. 81; 24 Cr. L. J. 67, *Mohiuddin* v. *Emperor*, 86 Ind. Cas. 459; 4 Pat. 488; 6 P. L. T. 154; (1925) Pat. 112; A. I. R. 1925 Pat. 414; 3 Pat. L. R. 110 Cr.; 26 Cr. L. J. 811 and *Nga Hla U* v. *Emperor*, 89 Ind. Cas 312; 3 R. 139; A. I. R. 1925 Rang. 258; 26 Cr. L. J. 1336, referred to.

Criminal revision from an order of the Sessions Judge, Muttra, dated the 24th of November 1925.

Mr. *Akhtar Husain Khan*, for the Applicant.

JUDGMENT.—I think it would be absurd to re-open a petty case in which the accused has been fined Rs. 20 and in which it is not even suggested that he has been in any way prejudiced merely because some prosecution witnesses were examined after the accused's statement was taken. The Court appears to have examined two witnesses for the prosecution, then taken the statement of the accused and then framed a charge. This is what appears from the order-sheet, though it is pointed out that in the heading of the witnesses' evidence which is not written by the Court but in the hand-writing of a clerk the date of the second witness in given as 14th. The accused made a full statement of this case. On the charge being framed he did not desire to re-call any of the prosecution witnesses. A further prosecution witness appears to have been called on a subsequent date. I adhere to the view taken by this Court in *Bechu Chaube* v. *Emperor* (1) and by me in several subsequent cases as well as by the Patna and Rangoon High Courts in *Mohiuddin* v. *Emperor* (2) and *Nga Hla U* v. *Emperor* (3) respectively that an omission to comply fully with the provisions of s. 342 does not vitiate the trial unless the accused has been prejudiced. As there has been no prejudice in this case I reject the application.

R. L. *Application rejected.*

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(1) 71 Ind. Cas. 115; 45 A. 124; 20 A. L. J. 874; A. I. R. 1923 All 81; 24 Cr. L. J. 67.

(2) 86 Ind. Cas. 459; 4 Pat. 488; 6 P. L. T. 154; (1925) Pat. 112; A. I. R. 1925 Pat. 414; 3 Pat. L. R. 110 Cr.; 26 Cr. L. J. 811.

(3) 89 Ind. Cas. 312; 3 R. 139; A. I. R. 1925 Rang. 258; 26 Cr. L. J. 1336.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 157 OF 1926.

April 30, 1926.

Present:—Mr. Justice Addison.

KURA AND ANOTHER—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 256—Prosecution witnesses coming from Native State—Accused, whether can be asked forthwith about cross-examination.

The fact that the prosecution witnesses come from a Native State and it would take a long time to again secure their attendance, is a sufficient reason under s. 256, Cr. P. C., for requiring the accused to state forthwith whether he wishes to cross-examine any of the witnesses.

Appeal from an order of the Magistrate First Class, exercising enhanced powers under s. 30, Cr. P. C., Ludhiana, dated the 21st December 1925.

Mr. *Bishen Narain*, for the Appellant.

Mr. *C. L. Mathur*, for the Government Advocate, for the Respondent.

JUDGMENT.—Mohamda has been convicted under s. 457/75, Indian Penal Code, and sentenced to five years' rigorous imprisonment, while Kura has been sentenced under s. 457, Indian Penal Code, for the same offence to two years' rigorous imprisonment. Mohamda has appealed through Jail and Kura through Counsel.

The house of Sampuran Singh of village Malmazra, District Ludhiana, was broken into and a camel stolen on the night of the 18th-19th March 1925. The offence was reported next day at the Police Station and it was mentioned that Mohamda and a companion of his who was not named, were suspected as they had been coming before this to the house of one Hardit Singh. Both the appellants were seen some two or three days later riding the camel by Mehr Singh and Natha Singh. They asked the appellants whose camel it was and received the reply that it was their own. These witnesses then pointed out that they knew it to be the property of Sampuran Singh whereupon the reply made by Mohamda was that he had bought it from Sampuran Singh through Hardit Singh. The camel was actually caught in the possession of the two appellants in Patiala State territory on the 26th March 1925. One Sant Ram saw them on it and chased them as he knew the camel. He was struck a blow with a *lathi* and the appellants rode off pursued by Man Singh and Arjan who caught the camel. The two appellants, however, succeeded in getting off it and running away and were caught by Ude Singh and Bir Singh. All these facts have been satisfactorily established.

It was argued on behalf of Kura that he might have been an innocent companion of Mohamda. On the facts established, however, it must be held that both had stolen the camel.

It was next argued on his behalf that the procedure laid down in s. 256 of the Cr. P. C. had not been followed. This is not correct. The Magistrate did ask the appellants forthwith whether they wished to cross-examine any of the prosecution witnesses but he did do so for an excellent reason, namely, because the witnesses had come from Patiala State and it would have taken long time to have again secured their attendance.

The appellants produced no evidence in their defence and gave no explanation worthy of mention. I have no hesitation in maintaining the conviction of both the appellants.

Kura, however, is a first offender and it should be presumed that he was led by Mohamda. That being the case the sentence passed upon him is much too severe. I accept his appeal to the extent of reducing the sentence to nine months' rigorous imprisonment. I dismiss the appeal of Mohamda.

N. H. *Appeal partly dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 101 OF 1924.

February 2, 1926.

Present:—Mr. Justice Wallace.

GODAN NAMBUDRIPAD—APPELLANT

versus

KRISHNAN NAMBUDRIPAD AND OTHERS—PETITIONERS—RESPONDENTS.

Malabar Compensation for Tenants Improvements Act (I of 1900), s. 6 (3)—Re-valuation of improvements, method of - Commissioner, duty of—Burden of proof.

On an application for re-valuation under s. 6 (3) of the Malabar Compensation for Tenants Improvements Act the valuation of the improvements as embodied in the original decree cannot be disturbed and must be accepted. The Commissioner on such re-valuation has to consider (1) if any and what compensation is to be given for new improvements subsequent to the date up to which compensation for improvements has been adjudged in the decree and (2) whether any improvement, which has already been adjudged has to be re-valued, in consequence of some change in its condition since the adjudication of it in the first decree. It is not his business to make a valuation *de novo*. The starting point of the second valuation is the point where the first was left off, and on the tenant rests the onus of putting before the Commissioner evidence on which he has to make his decision. [p. 913, col. 2.]

Appeal against an order of the Court of the Subordinate Judge, Ottapalam, dated the 6th of December 1923, in A. S. No. 57 of 1922, preferred against that of the Court of the District Munsif, Alatur, in E. P. No. 946 of 1921 in O. S. No. 282 of 1916.

Mr. *D. A. Krishna Warier*, for the Appellant.

Messrs. *S. Ranganatha Iyer* and *A. V. Krishna Menon*, for the Respondents.

JUDGMENT.—This is an appeal against the order of the lower Appellate Court declining to give effect to a re-valuation held under s. 6 (3) of the Malabar Tenants Improvements Act. The decree of the first Court was passed on 18th February 1918. For the purpose of the suit there had been a valuation of the "improvements" by a Commissioner in 1916. The suit went up on appeal and second appeal and the second appeal decree was passed on 16th November 1920. On an application for re-valuation under s. 6 (3) of the Act a second Commissioner was sent in September 1921 and he reported his valuation of the improvements.. This valuation both the lower Courts have declined to accept and appellant appeals.

The method followed by the second Commissioner apparently was not to value how much the property had improved since the first valuation in 1916, but how much it had improved since the date of the *kanom, i. e.*, as if he was carrying out a first valuation and not a re-valuation. As his total figure is much larger than the figure of the first Commissioner, appellant claims compensation at that figure. Needless to say if the second figure had been less than the first, appellant would have claimed contrary. This indicates that his line of reasoning is wrong. The first figure is already embodied in the final decree and cannot be disturbed, and must be accepted so far as it goes. That is, the duty of the second Commissioner was to accept it as the compensation payable up to the date up to which the final decree said compensation had been fixed and decreed and consider whether, after that date there had been further improvements which would entitle the *kanomdar* to further compensation. This principle is enunciated in a case reported as *Kunhammad Kutti* v. *Panchara Alleema* (1) and seems to me to follow clearly from the wording of s. 6 (3) of the Act. As I understand the section, the Commissioner has to consider (1) if any and what compensation is to be given for new improvements *subsequent* to the date up to which compensation for improvements has been adjudged in the decree, and (2) whether any improvement, which has already been adjudged, has to be re-valued, in consequence of some change in its condition since the adjudication of it in the first decree. It is not his business to make a valuation *de novo*. The starting point of the second valuation is the point where the first was left off, and on the appellant rests the onus of putting before the Commissioner evidence on which he has to make his decision.

The method of the Commissioner was, therefore, wrong. But I am not prepared to direct a fresh re-valuation, as it is clear that his error was due to the laches of appellant. His Kariasthan, P. W. No. 3 who accompanied the Commissioner, does not appear to have furnished him with any copy of the first valuation and to have taken any steps to see that it was furnished to him. The original valuation was not produced even at the hearing of this application before the Court of first instance. It was clearly appellants' duty to see that the second Commissioner was provided with information as to each item for valuation as to its condition at the time of first valuation and its value as adjudicated by the final decree. Vague evidence, which is all that is now given, that some trees have increased in growth is of no use. Other trees have probably disappeared altogether and some new ones may have grown up. Appellant has not even examined either of the Commissioners. Appellant in this faild to supply the necessary information to enable the re-valuation to be properly conducted by the Commissioner and tested by the Courts. I do not subscribe to all the reasons given by the lower Appellate Court for rejecting the re-valuation, such as, *e. g.*, that no compensation is permissible for trees of spontaneous growth. But even so, appellant has failed to adduce evidence to justify the award of any additional compensation. I decline to interfere and dismiss this appeal with costs.

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(1) 33 Ind. Cas. 746; 30 M. L. J. 203.

V. N. V.
Z. K. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEALS NOS. 233 AND 243 OF 1925.

December 22, 1925.

Present:—Mr. Justice Misra.

Musammat SHEO BHAGU—DEFENDANT —APPELLANT.

versus

Musammat JANKI MISTRESS OF BHAGWAN DIN BAQQAL—PLAINTIFF —RESPONDENT.

Custom—Right of privacy—Right, whether attached to property.

It is settled law in the United Provinces that there is a customary right of privacy existing in them and that a substantial interference with such a right would afford a person, whose such right has been invaded, a good cause of action. This right is not only personal but attaches to the property in respect of which that right is claimed [p. 915, col. 1.]

Gokal Prasad v. *Radho*, 10 A. 358; A. W. N. (1888) 135; 6 Ind. Dec. (N. S.) 241, *Abdul Rahman* v *D. Emile*, 16 A. 69; A. W. N. (1893) 217; 8 Ind. Dec. (N. S.) 45, *Abdul Rahman* v. *Bhagwan Das*, 29 A. 582; 4 A. L. J. 445: A. W. N. (1907) 183, *Jamiluddin* v. *Abdul Majid*, 28 Ind. Cas. 671; 13 A. L. J 361 and *Lala Bhagwan Das* v. *Shahzada Mirza Masud Quader*, 7 O. C. 126, referred to.

Appeal against the judgment and decree of the Subordinate Judge, Sitapur, dated the 30th of January 1925, upholding that of the Munsif, Sitapur, dated the 3rd of October 1924.

Mr. *N. C. Dutt*, for the Appellant.

Mr. *Hardhianchandra*, for the Respondent.

ORDER.—These two appeals arise out of a suit brought by the plaintiff, *Musammat* Janki, against the defendant, *Musammat* Subhaga, for closing up of certain water spouts and sky lights opened by the defendant in a wall of her house built in February 1923. The suit was brought in July 1924 in the Court of the Munsif, Sitapur. The plaintiff alleged that the defendant's house was adjacent to that occupied by her, and that at the above mentioned time, *i. e.*, February 1923, the defendant opened in the newly built wall of her house certain water spouts and sky-lights, the effect of which was that the water from her house flowed on to the courtyard of her (plaintiff's) house, and that her privacy was affected thereby. The defence was to the effect that the water spouts and the sky-lights complained of had been in existence for a long time since before the construction of the house occupied by the plaintiff, and that, therefore, she had no right to have either of them closed up. On the day when issues were struck the learned Pleader for the defendant confined his defence only to this point and did not raise any question regarding the existence of any easement raised in the case. It was further contended that the plaintiff being merely a mortgagee of the house occupied by her, she was not competent to maintain the suit.

The two issues, therefore, which were framed by the learned Munsif for trial related to the following points:—

(1) The plaintiff's right to maintain the present suit.

(2) The length of time during which the water spouts and the sky-lights had been in existence.

The Trial Court, the Munsif of Sitapur, on evidence produced in the case, held that the plaintiff was competent to maintain the suit and that the water spouts and the sky-lights complained of, were not old but had been put up by the defendant only in 1923, when she built the new wall of her house by making it *pucca* in place of the old one which was *kochcha*. The learned Munisf, therefore, decreed the plaintiff's claim in so far as it related to the water spouts, and directed the defendant to take steps that the water through them may not pour into the plaintiff's courtyard. In regard to the sky-lights he, however, found that it was not established that they in any way invaded the right of privacy of the plaintiff, and consequently on that finding he dismissed the plaintiff's suit in respect thereof.

Both the parties appealed against the decree of the learned Munsif to the learned Subordinate Judge who, having agreed with both the findings of the former, dismissed the plaintiff's appeal as well as that of the defendant.

The parties have come up in appeal to this Court. The Appeal No. 233 of 1925 is that filed by the plaintiff, *Musammat* Janki.

I take up the defendant's appeal first. The finding arrived at by the lower Appellate Court in regard to the water spouts to the effect that they were not old one, but had been put up only recently about the time stated by the plaintiff in her plaint, is enough to dispose of that appeal. The finding is one of fact, and nothing has been shown to me which could induce me to distrub that finding in second appeal. The learned Counsel for the defendant-appellant asked me to admit certain additional evidence, which would go materially to effect the finding of fact arrived at by the lower Appellate Court. At this stage while the case is in second appeal I am not prepared to admit any additional evidence. No application was filed by the defendant-appellant either at the time of finding the appeal or subsequently requesting this Court to admit any additional evidence Under those circumstances I am not inclined to entertain any oral request on the part of the Counsel to admit such evidence at this stage. The defendant's appeal, therefore, fails and is dismissed with costs.

Regarding the plaintiff's appeal, the matter, in my opinion, has not been looked at from the correct point of view, it is settled law in the United Provinces that there is a customary right of privacy existing in them, and that a substantial interference with such a right would afford a person whose such right has been invaded, a good cause of action. The position is so clear that it was not even disputed by the Pleader who represented the defendant in the Trial Court, as will be apparent from the issues struck in the case. The only point on which the parties went to Court for trial was the exact duration during which the sky-lights and the water spouts had been in existence. It was clearly recorded in the proceedings that no question of any right of easement whether customary or otherwise was raised in the case. It is, therefore, unnecessary for me to go at length and discuss the question of existence of the customary right of privacy just referred to. If it were necessary I would only refer in support of the proposition stated above, to the rulings reported as *Gokal Prasad* v. *Rahdo* (1); *Abdul Rahman* v. *D. Emile* (2), *Abdul Raman* v *Bhagwan Das* (3 ; *Jamiluddin* v. *Abdul Majid* (4) and *Lala Bhagwan Das* v. *Shahzada Mirza Masud Quuuar* (5).

It is also established from these authorities that such a customary right of privacy is not only personal but attaches to the property in respect of which that right is claimed. It is, therefore, clear to me that the plaintiff possesses a right of privacy in respect of the house occupied by her as a mortgagee. I have not been able to follow the learned Subordinate Judge in the view stated in his judgment that the plaintiff has not succeeded in establishing that any right exists in connection with the house occupied by her because she has not been able to show that the house in dispute has been occupied for more than 20 years by *pardanashin* laides, nor have I been able to follow him in the view as to whether the decision of the case can in any way be affected by good or bad character of the plaintiff in the present case. In my opinion it is clearly established from the evidence on the record that the house occupied by the plaintiff is a residential house in which respectable Hindus of the locality have constantly been living, and if for some time the house has not been occupied by *pardanashin* ladies, the right of privacy enjoyed by the owner of the house could not in any way be affected by that circumstance.

The only point, therefore, on which the decision of this case turns is the sole question whether the sky-lights opened by the defendant, *Musammat* Subhaga, have been put up at such a height that they would look over the courtyard of the plaintiff's house, and thereby affect her right of privacy. There is no clear finding of the lower Appellate Court on that point. The learned Subordinate Judge has looked at the case from an entirely erroneous point of view, and I cannot accept his finding in second appeal. I asked the parties in the course of arguments to point out to me as to whether there was satisfactory evidence on the record to show that the sky-light constructed by the defendant really invaded the plaintiff's witness No. 8, Sheo Shankar. It was elicited from him in cross-examination that the sky-lights were at a height of about one and a half yard from the floor. It is stated by the learned Pleader for the defendant that that statement alone would not be sufficient to decide the point in favour of the plaintiff. It is quite possible that although the sky-lights may be at such height from the floor of the room as stated above, yet they may be at a position from which the apartments of the plaintiff's house or her courtyard may not be looked on. I am, therefore, compelled to send down an issue for trial to the learned Subordinate Judge to the following effect:—

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(1) 10 A. 358; A. W. N. (1888) 135; 6 Ind. Dec. (N. S.) 241.

(2) 16 A. 69; A. W. N. (1893) 217; 8 Ind. Dec. (N. S.) 45.

(3) 29 A. 582; 4 A. L. J. 445; A. W. N. (1907) 183.

(4) 28 Ind. Cas. 674; 13 A. L. J. 361.

(5) 7 O. C. 126.

Are the sky-lights constructed by the defendant, placed at such a height so as to affect the privacy of the plaintiff's house.

In order to decide this issue I would direct the learned Subordinate Judge to appoint a Commissioner who can go to the spot and report as to the exact situation and position of these sky-lights. No further oral evidence will be recorded in the case. If necessary the learned Subordinate Judge will examine the Commissioner in regard to this matter. The finding should be returned to this Court within two months from this date. Ten days will be allowed to the parties for filing objections, the time being counted from the date when the finding is notified to them by the lower Appellate Court.

G. H. *Order accordingly.*

PRIVY COUNCIL.

APPEAL FROM THE RANGOON HIGH COURT.

January 28, 1926.

Present:—Viscount Dunedin,

Mr. Ameer Ali and Sir Arthur Channell.

MAUNG KYI OH AND ANOTHER—APPELLANTS

versus

MA THET PON—RESPONDENT.

Privy Council Appeal—High Court, judgment of—Mis-statement of fact—Review—Appeal—Witness, demeanour of—Rejection of testimony—Appellate Court, when would interfere.

If a High Court in its judgment makes an absolute mis-statement of fact in a perfectly plain question, it is the duty of the person aggrieved to go to that Court and say "your judgment is vitiated by an obvious error on a pure question of fact" and to ask it to correct the mistake. If this remedy is not availed, the Privy Council will not go behind it. [p. 917, col. 2.]

A Court of first instance sees a witness and can, therefore, better judge his demeanour than a Court of Appeal; and, therefore, the rejection by the former Court of the testimony of a witness is not disturbed in a Court of Appeal. But if such rejection is based on the inherent probabilities of the story told by the witness, then it is open to the Appellate Court to consider the inherent probabilities of the story and come to a different conclusion. [p. 918, col. 1.]

Mr. *E. B. Raikes*, for the Appellants.

Mr. *Gerard S. Sanders* and Prince *Fateh Singh*, for the Respondents.

JUDGMENT.

Viscount Dunedin.—The lands, the contention as to which is the matter of this suit, belonged originally to one U Laik, who died somewhere about the year 1893. He left the land burdened with a mortgage. U Laik was survived by a large family; to most of the family there is no reason that any particular reference should be made, but the youngest daughter married U Bauk. That lady died and U Bauk married again. The lady had before her death a daughter called Ma Thet Pon, and Ma Thet Pon is the plaintiff in the present suit. After her death and his second marriage U Bauk had certain children, and one of them and her husband are the administrators of U Bauk's estate and are the first two defendants in the present suit. In the year 1909 there was brought a redemption suit to redeem the land from the mortgage with which they had been encumbered by U Laik during his life. What happened in that redemption suit was that the money which was paid into the Court to effect the redemption was paid in by the hand of U Bauk. The decree for redemption decreed the land in the name of the heirs of U Laik but there is a controversy as to whether U Bauk immediately entered into possession or whether the heirs entered into possession. At any rate U Bauk was eventually in possession, whether as agent or on his own account as has been said, is a matter of controversy and at the time of the institution of this suit U Bauk was in possession. The suit as instituted by Ma Thet Pon is in right of her mother, Ma Saw Ma, and, as such, as heir of U Laik. She avers, and a certain agreement has been referred to in the judgment of the High Court and put in before this Board which bears out her averment, that the other heirs, that is to say, the elder brothers and sisters of her mother, Ma Saw Ma, had agreed to renounce their rights upon certain terms. She says that, first of all, she is the heir, and, secondly, that it was her money which effected the redemption, although the actual hand that paid the money into Court was that of her father, U Bauk. The defendants, who are the administrators of U Bauk, say that U Bauk himself was an heir, in right of his first wife, and it was his own money which he paid for the redemption. It is apparent that one of the crucial facts in this matter is, was U Bauk an heir of U Laik or not? Their Lordships recognise that in a case from a District Court in Burma pleadings, and, indeed the whole conduct of the case, can scarcely be scrutinised with the strictness with which a case would be scrutinised in this country. That allowances must be made is abundantly clear from the history of the proceedings in this case, because it is apparent when the pleadings are looked at that really both the plaintiff and the defendants floundered as to their real case, and that the Court quite rightly took upon itself to straighten out the whole matter and try to discover what the real question between the parties was.

As their Lordships have already said, one crucial fact is, was U Bauk an heir or was he not? That depended necessarily upon whether his first wife, Ma Saw Ma, survived or did not survive her father. If she did not survive her father, then U Bauk had no status as an heir at all, if she did survive her father then the Burmese Law is that. U Bauk, being the surviving husband of a person who *ex hypothesi* is the then surviving daughter, is treated as one of the heirs of the father. Their Lordships cannot say that the matter is altogether satisfactory in this respect, but it is the fact that the High Court setting forth the family of U Laik in the very next sentence say that his family comprised a daughter, Ma Saw Ma, who predeceased him, and then they go on to say that in the redemption suit U Bauk with another person were unnecessarily made plaintiffs since their respective spouses had died before they were within reach of the inheritance. It has been very properly argued by Mr. Raikes that there is no real proof of this statement, and he has also called the attention of their Lordships to the fact that in the redemption suit and indeed in this plaint it was alleged by the plaintiff that when U Laike died he was succeeded by his children, among whom Ma Saw Ma is mentioned as one. Notwithstanding that, their Lordships feel that, when there is a distinct statement by the High Court that U Laik's daughter, who was U Bauk's wife, had predeceased him, they cannot go behind that statement. The High Court was in possession of facts which are not before their Lordships; they certainly had before them whatever admissions Counsel may have made in the course of the case, and their Lordships feel that if a judgment was given out in which there was an absolute mis-statement of fact on a perfectly plain question, it would have been the duty of the person aggrieved to have gone to the High Court and said: "Your judgment is vitiated by an obvious error on a pure question of fact"; and to have attempted at any rate before the High Court to put it right.

There is another matter also: It is quite clear that, taking a strict view of the law, if the defendants showed that this statement was completely wrong, they went a long way towards winning the case and, therefore, in the ordinary and proper conduct of the case it would have been one of the things that one would have supposed the defendants' Counsel would have tried, before all other things, to bring out, that U Bauk had real possession as an heir. When one comes to the depositions of the witnesses in the case and the other documentary evidence, there is really nothing on which an actual determination can be founded. There are certain calculations, based upon a calculation as to age, on which one may come to certain conclusions; but there is nothing positive in the material before their Lordships on which they can come to a conclusion as to the proper date.

In those circumstances, their Lordships feel that they are really bound to take the fact as stated by the High Court that U Laik's daughter had predeceased him. If that is so, then U Bauk was not an heir, and it is in the complexion of that fact that he was not an heir that the rest of the evidence must be looked at. U Bauk was then, so to speak, a volunteer. It is equally possible that U Bauk redeemed the mortgage with his own money or with money which was given him by Ma Thet Pon, and here, of course, there is the actual testimony that was given about the advance of the money by Ma Thet Pon. U Bank is dead, and so unfortunately their Lordships cannot have his evidence; but not only does Ma Thet Pon depose quite clearly that she gave the money but there is also the testimony of one other witness. It is quite true that the learned Judge of first instance disregarded that testimony, and, if he had based his judgment upon the matter upon the demeanour of the witness and said that he thought from her demeanour that she was lying, or that the corroboratory witness was lying, it would be another instance of what has so often been said, that a Judge who sees the witness is in a better position than a Court of Appeal, which does not but that is scarcely what the learned Judge of first instance said. He did not seem to go so much upon the demeanour of the witness as upon what may be called the inherent probabilities of the story; the inherent probabilities of the story are taken up by the High Court and their Lordships can only say that they think the High Court has commented on those inherent probabilities in a way that commends itself to their Lordships' judgment.

Upon the whole matter, therefore, their Lordships do not think that a case has been made out to disturb the judgment of the High Court. That, after all, is a question for a Court of Appeal always, and it is especially a question for a Court of Appeal such as their Lordships' Board, which is a long way from the place and without any knowledge of the local circumstances.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

S. D. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Sanderson, Lee & Co.*

Solicitors for the Respondent:—Messrs. *Bramall & Bramal.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. [illegible]-B OF 1925.
July 27, 1925.
Present:—Mr. Findlay, Officiating J. C.
Musammat SUNDARBAI—APPLICANT
versus
GOPAL SINGH—PLAINTIFF—
NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. I, r. 10—Suit by widow for declaration of invalidity of adoption, dismissal of—Suit for possession by adopted son—Reversioner of adoptive father, whether can be impleaded as party.

The widows of a deceased Hindu instituted a suit against the plaintiff for a declaration that his adoption by their deceased husband was invalid. This suit was dismissed and the plaintiff then instituted a suit against the widows for recovery of possession of the property of his adoptive father. During the pendency of the suit, a reversioner of the deceased made an application to be impleaded as a party to the suit:

Held, that the suit being merely one for possession consequential upon the dismissal of the declaratory suit brought by the widows, it was not proper to implead the reversioner as a party to the suit, inasmuch as such a course would totally change the frame and scope of the suit and would render it necessary again to re-open the question of the validity or invalidity of the plaintiff's adoption which had already been settled as between him and the widows. [p. 919, col. 2.]

Application for revision of an order of the Subordinate Judge, Yeotmal, dated the 25th November 1924, in Civil Suit No. 14 of 1922.

FACTS.—The present non-applicant plaintiff has brought the present suit for the possession of the whole property in suit of his adopted father, Madhosingh, from *Musammat* Gangabai and Kamla, widows of the deceased Madhosingh as he has been declared to be validly adopted by defendant No. 1 to her deceased husband in C. S. No. 133 of 1920 instituted by the defendants Nos. 1 and 2 in this Court to obtain a declaration that his adoption is invalid. The suit was dismissed on the finding that the defendant now plaintiff in this suit was validly adopted by the defendant No. 1 in pursuance of a direction left by her deceased husband Madhosingh. The finding and decree of the lower Court has been upheld in the first and second appeal. The question of valid adoption is thus conclusive between the parties to the present suit. The present applicant is admitted to be a daughter of the deceased Madhosingh by defendant No. 1, Gangabai. She has now applied for being impleaded in this suit as a defendant alleging that she has got a reversionary interest in the suit property and that she was not aware of the present suit till now. It is also alleged that she has attained majority very recently. She is said to be a necessary and proper party to avail the multiplicity of suits and as she is substantially interested in the subject-matter in suit. For the plaintiff non-applicant the application is stoutly opposed on the ground that the applicant has no reversionary interest in the suit property being a resident of Central Provinces and even if she may have any she has no present interest therein during the lifetime of the widows, the defendants. That the question of adoption being finally decided the addition of the applicant in this suit is not necessary for determination of the question of possession involved in present suit. That her addition would increase complication as the question of adoption will have to be gone into. The question thus that presents for solution is whether the applicant *Musammat* Sundarbai is a necessary and proper party to the suit.

Mr. *M B. Kinkhede*, R. B., and Mr. *R. N. Padhye*, for the Applicant.

Mr. *A. V. Khare*, for the Non-Applicant.

ORDER.—The plaintiff, *Musammat* Sundarbai, has filed the present application in revision against an order under O. I, r. 10, C. P. C., passed by the Subordinate Judge, Second Class, Yeotmal, in Civil Suit No. 141 of 1922, refusing to make her a party in the suit. The plaintiff-non-applicant, Gopal Singh, in the said suit claimed possession of the property of his adoptive father Madho Singh, and the defendants are the widows of the latter. These defendants had in a previous suit claimed a declaration that Gopal Singh's adoption was invalid, but that suit was dismissed. As between the widows and Gopal Singh, therefore, the question of the validity of Gopal Singh's adoption is already settled, and the suit we are concerned with may be described as a consequential one brought by the adopted son for possession of the property.

The Subordinate Judge refused to make the present applicant a party on the ground that in the present suit no question of title is involved but only that of possession. He further pointed out that the present applicant is only a reversionary heir and that a right to sue for the alleged reversion will only arise when it opens out on the death of the widows.

In this Court on behalf of the applicant the decisions in *Rao Lal Singh* v. *Rani Bhagoti* (1) and *Rajaratnam Aiyar* v. *Valasyasundaram Aiyar* (2) are relied upon. Neither of these decisions is, as a matter of fact, helpful. In the C. P. L. R case quoted the question of adoption was in issue in the original trial of the suit, and the co-defendant alleged in effect that his right as a mortgagee would be prejudiced, if not entirely destroyed, were he not made a party. In the Madras case quoted the question of the validity of adoption was also at stake. It is perfectly clear that the present applicant, if she had so chosen, might have joined as a plaintiff in the previous suit by the widows for a declaration that the adoption of Gopal Singh was invalid But it seems to me that it is utterly impossible to hold, even giving the very broadest interpretation to the phrase in r. 10 (2) of O. I, C. P. C. (in order to enable the Court effectually and completely to adjudicate upon and settle all the question involved in the suit) that the applicant is a necessary party. The present applicant has only, in effect, a contingent interest which may arise in the future. It may never arise at all should she pre-decease the widows. While allowing to the fullest extent for the desirability of the enforcing of the principle of avoiding a multiplicity of suits, it seems to me utterly impossible to extend r. 10 (2) of O. I to a degree which would allow of the present applicant being made a defendant in the suit. If the applicant chose to go to the Court as a plaintiff in a separate suit, the utmost she could obtain either against the widows or against Gopal Singh would be a declaration that in the future she might be entitled to come in as a reversionary heir. It seems to me utterly impossible to hold in the circumstances of the present case, the question of the validity of Gopal Singh's adoption having already been determined as against the widows, that the applicant will be in any way prejudiced by being excluded from the present suit. The truth is that her inclusion in the suit would totally change the frame and scope thereof and would render it necessary again to re-open the question of the validity or invalidity of the adoption as between the applicant and Gopal Singh. The present suit is merely one for posses sion between Gopal Singh and the two widows, and it seems to me that by no stretch of imagination can the applicant be held to be a necessary party thereto.

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(1) 2 C. P L. R. 236.

(2) 72 Ind. Cas. 156; 44 M. L. J. 322; 17 L. W. 329 A. I. R. 1923 Mad. 521.

The finding of the lower Court is, therefore, undoubtedly correct and the present application is dismissed. The applicant must bear the non-applicant's costs. I fix Rs. 25 as Pleader's fees.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

Appeals from Appellate Order No. 317 of 1923 and from Appellate Decree No. 232 of 1925.
June 12, 1925.
Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.
RAHIMUDDI MEAJI—Plaintiff—Appellant
versus
Srimati AMINA BIBI *alias* KALI BIBI and others—Defendants—Respondents.

*Bengal Tenancy Act (VIII of 1885), ss. 49, 182—Under-*raiyati *of homestead and* nal *land—Lease, expiry of—Ejectment suit, maintainability of.*

Defendant was holding an under-*raiyati* of homestead and also of *nal* land and a tank under a registered lease the term of which had expired. The plaintiff brought a suit for recovery of possession after service of notice under s. 49 of the Bengal Tenancy Act:

Held, that s. 182 of the Bengal Tenancy Act was not applicable to the case and that the suit was maintainable. [p. 921, col. 1.]

Appeal against an order of the Subordinate Judge, Second Court, Tipperah, dated the 17th May 1923, modifying that of the Munsif, Second Court at Chandpur, dated the 26th February 1923, and appeal against a decree of the Subordinate Judge, Tipperah, dated the 17th September 1924, affirming that of the Munsif, Second Court at Chandpur, dated the 21st January 1924.

Babu *Nagendra Chandra Chowdhury*, for the Appellant in No. 317.

Babus *Biraj Mohan Majumdar* and *Probodh Chandra Kar*, for the Respondents.

Babu *Probodh Chandra Kar*, for the Appellant in No. 232.

Babu *Nagendra Chandra Chowdhury*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This appeal is by the plaintiff and arises out of a suit brought by him for ejectment of an under-*raiyat* after service of a notice under s. 49 of the Bengal Tenancy Act and after the expiry of a lease executed by the under-*raiyat*. The under-*raiyati* consisted of a plot of homestead land and also of some *nal* land and a tank as has been found by the Subordinate Judge. The defence of the defendant was that he was a settled *raiyati* of the village of lands which he held under a different landlord. Therefore, he contended that under the provisions of s. 182 of the Bengal Tenancy Act he could not be ejected from the lands in suit so far as they form part of his homestead. The Court of first instance gave a decree to the plaintiff, but on appeal the learned Subordinate Judge has remanded this case to the Court of first instance for the determination of the question as to what are the precise limits of the homestead in the view that the defendant is protected from ejectment so far as the homestead lands are concerned, although he is not so protected as regards the *nal* lands and the tank which form part of the under-*raiyati*.

Now, in this second appeal it has been contended by the Vakil for the appellant that the learned Subordinate Judge was in error that the under-*raiyati* could be divided into homestead portion and agricultural portion; and then apply the provisions of s. 182 of the Bengal Tenancy Act. The learned Vakil further contended that the case, relied on by the lower Appellate Court as an authority in support of his decision, does not apply to the present case. The case referred to is the case of *Krishna Kanta Ghosh* v. *Jadu Kasya* (1). I think the contention is well-founded. It has been found as I have already stated that the defendant's under-*raiyati* which he took from the plaintiff rightly consisted of homestead and also of *nal* land and a tank. Therefore, the question arises: Are the provisions of s. 182 applicable to the facts of this case. Now s. 182 of the Bengal Tenancy Act says this: "When a *raiyat* holds his homestead otherwise than as part of his holding as a *raiyat*, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and subject to local custom or usage". But the provisions of this Act are applicable to lands held by a *raiyati*. Now, in the case cited it appears that the homestead was held to which the provisions of the Transfer of Property Act apply and was not a part of an under-*raiyati* to which the provisions of the Bengal Tenancy Act were already applicable.

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(1) 28 Ind. Cas. 839; 21 C. L. J. 475; 19 C. W. N. 914.

The learned Vakil for the respondents has not drawn our attention to any case where the provisions of s. 182 have been applied to the case of a homestead to which the provisions of the Bengal Tenancy Act did already apply. If the provisions of s. 182 did already apply to the homestead then the provisions of s. 182 of the Bengal Tenancy Act need not be invoked for the purpose of the application of the provisions of s. 182 of the Bengal Tenancy Act. We think, therefore, the present case is distinguishable from the case cited before us and we think, therefore, the plaintiff was entitled to eject the defendant under the provisions of the Bengal Tenancy Act because the defendant was holding an under-*raiyati* under a registered lease the term of which had expired and the suit was brought for recovery of possession of the lands covered by the under-*raiyati* lease after the expiration of the term of the lease.

The result, therefore, is that this appeal is allowed with costs for all the Courts and the order of remand set aside and the decree of the first Court restored.

I assess the hearing fee at two gold *mohurs*.

Second Appeal No. 232 is by the defendant against the final decree made by the lower Appellate Court after the Trial Court had decided the case according to the remand against which Appeal No. 317 was perferred which I have already dealt with. It appears that there was an appeal by the plaintiff against the decree made by the Trial Court. The learned Subordinate Judge disregarding the previous remand order, decreed the whole suit of the plaintiff and on appeal by the defendant the learned Subordinate Judge not only refused to give relief to the defendant-appellants but set aside the order in effect made by his predecessor and gave a decree to the plaintiff for possession of the entire land. The defendants have appealed against that decree.

The appeal by the defendants is technically allowable because the learned Subordinate Judge had no jurisdiction to set aside the order made by his predecessor-in-office and gave a decree to the plaintiff against the order of the remand. However, as I have held in the appeal against the order of remand that the plaintiff was entitled to a decree for the entire land the decree, though erroneous, has given right relief to the plaintiff.

The result, therefore, is that we affirm the decree made by the Subordinate Judge; but we allow no costs of that appeal to the respondent. Each party will bear his own costs.

Cuming, J.—I agree.

Z. K. *M. A. No. 317 allowed: S. A. No. 232 dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEALS NOS. 50 AND 51 OF 1926.

February 19, 1926.

Present:—Mr. Justice Hasan.

KESHO PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GAYA BUX SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Joint land—Exclusive occupation by one—Partition—Joint possession.

Where one of the co-sharers exclusively occupies land which he holds in common with the rest of the co-sharers, the remedy of the other co-sharers is by means of partition. A suit for joint possession is not maintainable.

Midnapur Zamindary Company Limited v. *Naresh Narayan Roy*, 80 Ind. Cas. 827; 51 C. 631; A. I. R. 1924 P. C. 144; 26 Bom. L. R. 651; 47 M. L. J. 23; 35 M. L. T. 169; (1924) M. W. N. 723; 29 C. W. N. 34; 20 L. W. 770; 51 I. A. 293; L. R. 5 A. (P. C.) 137; 23 A. L. J. 76; 3 Pat. L. R. 193; 6 P. L. T. 750 (P. C.), followed.

Appeal against a decree and judgment of the Additional Sessions Judge, Hardoi, dated the 4th November 1925, reversing that of the Munsif, Sandila at Hardoi, dated the 21st October 1924.

Mr. *Harnarain Das*, for the Appellants.

JUDGMENT.—These appeals are by the plaintiffs in a suit for possession of a house No. 135 (compound No. 246) in village Chamka, Pargana Gondwa, District Hardoi. The relief prayed for was actual possession over the house in suit. The Trial Court gave a decree for joint formal possession and refused to give the relief of actual possession. Both sides appealed from the decree of the Trial Court.

The learned Additional Subordinate Judge of Hardoi accepted the defendants' appeal and dismissed the appeal of the plaintiffs with the result that the plaintiffs' suit was dismissed altogether. Hence these two appeals.

The chief defendant to the suit is Koili Singh. The plaintiffs and Koili Singh and some other defendants are co sharers of the village and the house in question lies in the *abadi* portion of the village. It was a *riyaya's* house and was formerly occupied by the widow of one Ram Charan, who vacated it some time ago. The defence was that on the house falling vacant Koili Singh occupied it in the right of a co-sharer of the village and also with the consent of the plaintiffs. The lower Appellate Court has found that the occupation by Koili Singh of the house in question was made with the consent of the plaintiffs and on his right to occupy it, the lower Court is of opinion that being a co-sharer he was justified in taking possession of the house and the plaintiffs' remedy lay in a suit for partition.

I agree with the Court below. As remarked by their Lordships of the Privy Council in *Midnapur Zemindary Company Limited* v. *Naresh Narayan Roy* (1) "when co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co sharer of lands held in common is to obtain partition of the lands." This pronouncement of their Lordships of the Privy Council is referred to by the learned Additional Subordinate Judge in his judgment. There is no substance in these appeals. They are dismissed.

Appeals dismissed.

N. H.

(1) 80 Ind. Cas. 827; 51 C. 631; A. I. R. 1924 P. C. 144, 26 Bom. L. R. 651; 47 M. L. J. 23; 35 M. L. T. 169; (1924) M. W. N. 723; 29 C. W. N. 34; 20 L. W. 770; 51 I. A. 293; L. R. 5 A. (P. C.) 137; 23 A. J. 76; 3 Pat. L. R. 193; 6 P. L. T. 750 (P. C.).

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL NO. 918 OF 1925.

March 8, 1926.

Present:—Mr Justice Kanhaiya Lal
and Mr. Justice Ashworth.

RADHA KANT SHUKUL—DECREE-HOLDER
—APPELLANT
versus
BUTAI MISIR AND OTHERS—
OPPOSITE PARTIES—RESPONDENTS.

Limitation Act (IX of 1908), s. 7—Decree obtained by joint Hindu family—Manager, whether can give discharge—Execution of decree—Minor member—Limitation.

The manager of a joint Hindu family can give a valid discharge in respect of a decree on his own behalf and on that of a minor brother and the latter cannot, therefore, take advantage of the provisions of s. 7 of the Limitation Act for the purpose of executing the decree.

Execution second appeal against a decree of the Additional Subordinate Judge, Ballia, dated the 20th December 1924.

Mr. *K. Varma*, for the Appellant.

Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—This is an appeal of a decree-holder. The facts are as follows:—One Jagesh Miser executed a simple mortgage in favour of one Har Har Nath. This Har Har Nath was not only the father of the present appellant, Radha Kant, but he was manager of a joint Hindu family which consisted of himself and of an uncle and a cousin of his own. He had also another son, Radha Govind, besides the present appellant, Radha Kant. Radha Govind is the elder of the two sons. It is common ground in this appeal that the execution of the decree obtained on the mortgage on 9th April, 1921 is time barred unless Radha Kant appellant can take advantage of the fact that he was a minor up to March, 1923. Both the lower Courts dismissed the application as time barred. The lower Appellate Court has held that the appellant cannot take advantage of s. 7 of the Limitation Act, because his elder brother Radha Govind who was admitted by him to be manager of the family to which he and that brother belonged could have given a discharge.

In this appeal it is contended that Radha Govind could not alone have given a discharge in respect of the whole mortgage debt, because the other relatives of the father, Har Har Nath, in whose favour the mortgage was originally executed had separated and consequently these members would separately have had to sign any deed of discharge. There appears to us to be no force in this argument. At any rate, Radha Govind could have given a discharge on behalf of Radha Kant, the minor, and this is all that is required by s. 7 of the Limitation Act. It was held by a Bench of this Court in *Rati Ram* v. *Niadar* (1) that the manager of a joint Hindu family, being member of a joint Hindu family, could give a valid discharge on his own behalf and

(1) 49 Ind. Cas. 990; 17 A. L. J 649; 41 A. 435.

on that of a minor brother. Accordingly, we dismiss this appeal with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1127 OF 1920; APPEAL No. 49 OF 1920.

December 5, 1924.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

RATANJI DORABJI—PLAINTIFF—APPELLANT

versus

KISANDAS TRIBHOVANDAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease—Covenant providing for assignment subject to consent of landlord—Consent withheld unreasonably, effect of.

Plaintiff obtained a lease of a piece of land from the defendants which contained a covenant that the demised premises and the buildings erected thereon should not be assigned without the consent in writing of the defendants, but that such consent would not be unreasonably withheld in the case of a respectable and responsible person. Plaintiff erected certain buildings on the land demised and entered into an agreement with a tenant to take the buildings on rent. Defendants, however, withheld their consent and plaintiff thereupon filed a suit for a declaration that the refusal of the defendants to consent to the assignment was unreasonable and that the plaintiff was entitled to assign the lease without their consent. It was found that the proposed tenant was a respectable and responsible person and that the defendants had withheld their consent owing to the fact that there had been a dispute between them and the proposed tenant with regard to another letting:

Held, that the refusal of the defendants to consent to the assignment was unreasonable and that the plaintiff was entitled to the declaration sought for by him.

Appeal from the order of Mr. Justice Marten, dated August 28, 1920.

FACTS.—Plaintiff took on lease a piece of land from the defendants Nos. 1 and 2, one of the conditions being, not to sub-let the leased property to anyone without the consent in writing of the landlords obtained previously, such consent, however, not to be unreasonably withheld in the case of a respectable and responsible person. Subsequently the plaintiff entered into an agreement with certain persons and asked for the consent of the landlords who refused it on the ground that the proposed sub-tenants were not desirable tenants, that they were troublesome and allowed the rent to fall into arrears for long periods. To meet the objections of the defendants the sub-tenants offered to deposit with them six months' rent in advance and to allow this sum to remain with them as a deposit during the pendency of the lease and also to pay the rent regularly every month. The landlords rejected this offer as well. The plaintiff thereupon brought a suit for a declaration that the refusal of the defendants was improper and the lease was liable to be assigned without their consent. The defendants urged that the proposed assignees had allowed the rent of some other buildings, rented by them from the defendants, to fall into arrears. The Trial Court decreed the suit holding that the proposed assignees were respectable and responsible persons that a reasonable person would have no apprehension from them as to the regular payment of rent, and would have taken into considerations their offer of the advance payment of rent by way of security, and that the refusal of the defendants was due to their differences with the proposed sub-tenants on some other letting. The defendants appealed.

Mr. *Engineer* (with him Mr. *Bahadurji*), for the Appellant.

Mr. *Munshi* (with him Mr. *Kanga*), Advocate-General, for the Respondents.

JUDGMENT.—We think that the learned Judge in the Court below was right in holding that the defendants' consent to the proposed assignment of the lease had been unreasonably withheld, the ground being that there had been a dispute between the landlord and the tenant with regard to another letting. The learned Judge has found as a fact that there was a genuine dispute between the parties, that there was not a determination on the part of the tenant to decline to pay rent, but an objection to pay until the particulars of the tenancy had been definitely ascertained, which was not done till 19.9. The appeal, therefore, must be dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 305-B OF 1924.

March 24, 1926.

Present:—Mr. Kinkhede, A. J. C.

DAYARAM AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

DEORAO AND ANOTHER—PLAINTIFFS—DEFENDANT No. 3—RESPONDENTS

Easements Act (V of 1882), s. 60 (4)—License—Execution of permanent works—Revocability—Inten-

tion of parties—Estoppel—Principle, whether applicable to licensor's heirs.

Where a license has been acted upon and cost has been incurred in executing works of a permanent character, the license is not revocable unless the power of revocation is expressly reserved or the terms of the grant limit the license as to its duration. [p. 925, col. 2]

The presence of a covenant in the agreement executed by the licensee that the agreement shall be binding on his estate and the heirs is an indication of the intention of the parties that a heritable grant was to be made. [*ibid.*]

The principle of estoppel where applicable as against the licensor is equally applicable as against his heirs. [p. 926, col. 1.]

Appeal against a decree of the Additional District Judge, Amraoti, dated the 27th September 1924, in Civil Appeal No. 162 of 1924.

Messrs. *Atmaram Bhagwant, S. A. Ghadgay* and *D. T. Mangalmurti*, for the Appellants

Mr. *R. R. Jaywant*, for the Respondents.

JUDGMENT.—One Vithoba, the father of plaintiff owned a site of a *ghanwad* in ruins in *Mouza* Maholi, *Taluq* Daryapur. In the year 1904 he granted that site together with the walls in ruins to one Gowardhan Ramlal Marwadi, the father of defendant No. 1, with permission to put the same in habitable condition and to afterwards use it as a dwelling house. The grantee executed a *karar chitti* dated the 24th May 1904, Ex. P. 1, in favour of the grantor Vithoba. It contained the following covenants and stipulations:—

"The site...belongs to you. You have given the same to me for dwelling purposes and I have got the same repaired. And the day on which I shall go away from this site, I shall remove my superstructure only and shall deliver into your possession the walls in ruins including your site. The day on which I shall go away from there I shall have left no right to the site and the walls. I have executed this *karar chitti* of my free will and consent. It is binding on my heirs and estate."

The original grantor Vithoba and the original grantee Gowardhan died respectively four and six years before suit. The grantor's son has sued the grantee's son on the 4th August 1923 for recovering possession of the site after removal of the superstructure on the ground that though the license had come to an end in 1919 by death and the defendant No. 1 was asked by notice to quit, he declined to do so. Defendants Nos. 2 and 3 who occupy the premises for and on behalf of the 1st defendant have also been impleaded as parties.

The defendant No. 1 contended that as the *karar chitti* binds the estate and the heirs of the parties thereto plaintiff had no right to sue; that as the deceased Gowardhan had to spend Rs. 1,000 in constructing a permanent structure upon the site in suit, the plaintiff could not recover the site so long as the superstructure lasts and is standing thereon; that although Gowardhan died about six years prior to the suit neither the plaintiff's father nor the plaintiff ever called upon the defendant No. 1 to vacate the site; that they kept quiet all along and even when four years ago the defendant No. 1 made certain additions at the cost of Rs. 100 and also when about three years ago, raised a new wall at the cost of Rs. 50 and retiled the roof at a cost of Rs. 175. None of them having objected to this, it is contended that the plaintiff was estopped from maintaining this claim; that in any case, the plaintiff must be deemed to have granted to the defendant No. 1 an implied license to occupy the site, and to have his superstructure standing thereon and that plaintiff cannot create a new cause of action by serving a notice just three months before suit. In the event of the Court, however, holding that the plaintiff has a right to call upon the defendant to vacate the site, Rs. 500 may be awarded to the latter as cost of reconstruction of the house after the removal of the superstructure.

The plaintiff in reply urged that as the original grantor and the grantee were dead the license came to an end and that the defendants became mere trespassers and further that the building not being worth more than Rs. 100 he was willing to pay Rs. 100 as compensation to the defendant No. 1 on eviction.

The Court of the first instance held that the license in question was a personal one, and came to an end on the death of the licensor and licensee, and that it was neither transferable nor heritable. It refused to draw the conclusion that after the determination of the said license any fresh license was granted by implication by the plaintiff to the defendant No. 1. Holding that there was no estoppel as against the plaintiff it decreed the claim but made Rs. 25 payable to the defendant No. 1 by way of compensation reserving him also the liberty to remove the superstructure which was held to be Rs. 150 in value.

Against this decree the defendant appealed to the Additional District Judge, Amraoti, who following the last sentence in the ruling of *Karelal* v. *Badri Prasad* (1) treated the defendant No. 1 as a trespasser and upheld the decision of the lower Court, but extended the time granted for the removal of the superstructure to four months.

The defendants have now come up in second appeal. It is contended on their behalf that the license granted to them as per Ex. P-1 was erroneously treated as personal and liable to termination on the death of the licensor and licensee, and that although the Indian Easement Act not being in force in Berar only the principles underlying that Act were rightly held applicable, the lower Courts failed to apply the principle of estoppel which underlies s. 60 (*b*) thereof in particular; and that on a proper interpretation of the *karar chitti* Ex. P-1 the grant evidenced by it enured for the benefit of the heirs of the grantee and he was not liable to be called upon to vacate the site, and in view of the plaintiff's conduct in delaying the suit, six years after the licensee's and four years after the licensor's death, it is contended that a permission to continue the license should have been implied, and that he could not be compelled to remove the superstructure at the sweet will of the grantor's heir and further that only right of re-entry if any which it might give plaintiff was when the grantee or his heir would voluntarily leave or abandon the premises as a place of their abode.

The case has been argued with great ability on both sides. Just as before the extension of the Transfer of Property Act to the Bombay Presidency the principles underlying the provisions of that Act were treated as applicable to transactions arising in those territories, similarly the Courts below were right in holding that the principles underlying the Easement Act would be applicable to Berar where that Act is not in force. But the question is whether the lower Courts have given full effect to the principle of estoppel which underlies s. 60 (*b*) of the Easements Act in the present case. The principle is well stated in Peacock's Law of Easement, pages 675 and 676 (3rd Edition):—

"A mere license is irrevocable when the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in so doing....In cases falling within this rule, if the licensor desires to be able to revoke he must expressly reserve the right when he grants the license, or limit it as to duration."

This shows that if the license has been acted upon and considerable cost has been incurred in executing works of a permanent character the license is not revocable, unless the power of revocation is expressly reserved or the terms of the grant limit the license as to its duration.

I have read the license (Ex. P-1) very carefully and nothing that is contained in the operative part thereof leads me to infer any intention on the part of the grantor to expressly reserve the power of revoking it at his own pleasure, or to limit it as to its duration, or even to give to the grantor a right of re-entry contingent on the death of the grantee. On the contrary the terms of the license as I read them clearly give the licensee an absolute right to retain possession as long as he pleased and technically leaves it to his option to choose whether he should leave the premises or not; and gives to the licensor no right, to command the licensee to vacate the premises earlier, or, to effect a right of re-entry even before any voluntary abandonment by the licensee or his heirs of the premises in question. Even the construction of a *kachcha* hut by the licensee was treated as a work of permanent character which made the license irrevocable in some of the following cases: *Nasir-ul-zaman Khan* v. *Azimullah* (2), *Bhaddar* v. *Khair-ud-din Husain* (3), *Madhusudan Das* v. *Bissuji* (4) (decided by Mittra, A. J. C., on 23rd September 1918), *Vithaldas Marwari* v. *Goma* (5) and *Amjad Khan* v. *Shafiuddin* (6). The presence of the covenant in the *karar chitti* that it shall be binding on the estate and the heirs of the grantee leads me to think that a heritable grant was intended to be made. This coupled with the further circumstance that the grantee acting on the license executed a work of a permanent character on the site, clearly makes it irrevocable.

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(1) 68 Ind. Cas. 107; 18 N. L. R. 76; A. I. R. 1922 Nag. 162.

(2) 28 A. 741; 3 A. L. J. 765; A. W. N. (1906) 216.

(3) 29 A. 133 at p. 137; 3 A. L. J. 760; A. W. N. (1906) 305.

(4) 48 Ind. Cas. 723.

(5) 79 Ind. Cas. 173; 20 N. L. R. 60; A. I. R. 1924 Nag. 254.

(6) 78 Ind Cas. 215; A. I. R. 1925 All. 203.

There is also much force in the contention raised by the appellants that the purpose of the license which was the reconstruction of the dilapidated walls into a residential house on the site was accomplished and that the license was, therefore, irrevocable. It is also arguable that it was not of the essence of the grant that any particular individual alone should occupy it till his death and his heirs should not, so as to make it personal and limited to the life of the grantee. I fail to see why on principle an heir of the licensor should be in a more advantageous position than the licensor himself. If the principle of estopple is applicable to the licensor, as I think it applies, it should apply with equal force to his heir also. I am not, therefore, prepared to uphold the decision of the Courts below that the license was personal and determined by the death of the grantor and the grantee.

Apart from any other question the long silence and delay in filing the present suit for nearly six years after the death of the grantee and four years after the death of the grantor is in itself a strong circumstance for non-suiting the plaintiff in this case. From his silence it could legitimately be inferred that he did not stir in the matter because he treated the license as heritable and still in force and binding as between the descendants of the parties to the original grant and, therefore, not revocable. Under such circumstances it can fairly be presumed that the plaintiff had decided to waive or abandon his right if any to re-enter upon the site, or at any rate he must be deemed to have impliedly granted a fresh license as it were to the defendant No. 1 to occupy the site. In face of such conduct he cannot give himself a new cause of action by serving a notice just three months before suit. The defendant No. 1 is not a trespasser and is not liable to be ejected from the premises.

The appeal is allowed and the suit is dismissed with costs throughout to be paid by the plaintiff. Pleader' fee in this Court will be Rs. 25.

G. R. D. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL APPEAL No. 308 OF 1923.
June 5, 1925.
Present:—Mr. Justice Broadway.
ALLAH JAWAYA AND ANOTHER—
PETITIONERS—APPELLANTS
versus
LAJPAT RAI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Assignment pendente lite*—Application for substitution by assignee—Delay in making application—Discretion of Court.*

Rule 10 of O. XXII of the C. P. C. leaves a discretion to the Court to recognize or refuse to recognize an assignment made *pendente lite.*

Where the *factum* of an assignment is disputed and an application by the alleged assignee to be brought on the record is made several months after the date of the alleged assignment, the Court may properly refuse to recognize the assignment.

Appeal from the order of the Senior Sub-Judge, Shahpur, dated 12th December 1922.

Mr. *Behari Lal* and Dr. *Nand Lal*, for the Petitioners.

Mr. *Nanak Chand*, for the Respondents.

ORDER.—On the 8th of January 1921 certain lands were sold by Lajpat Rai, son of Buta Ram to Ganga Ram and others for a sum of Rs. 2[illegible],833 5-6 One Sahib Ditta Mal, claiming to be entitled to pre-empt on the ground of relationship with the vendor, instituted a suit for possession by pre-emption and on the 12th of December 1922 a decree was passed in his favour directing that he be given possession of the land, etc., in suit on condition of his paying a sum of Rs. 15.198 10-6 for the vendees on or before the 11th of February 1923. On the 1st of February 1923 an appeal was filed in the High Court against that decree by Sahib Ditta Mal asking for a reduction of the amount payable. This was admitted as a first appeal on the 5th of February 1923.

On the 30th of May 1924 an application under O. XXII, r. 3 of the C. P. C., was filed by Mr. Mukand Lal Puri on behalf of Ram Asra and two others in which it was alleged that Sahib Ditta Mal, appellant, had died some three months previously and that the applicants were his sons and, as such, his legal heirs and representatives. It was prayed that the applicants be brought on the record as appellants. This application was not in proper form and was returned to the applicants by the office on the 30th of May 1924. On the 7th of March 1925 the application was re filed by Mr. Mukand Lal Puri, who on the same date, also filed an application purporting to be under

O. XXII, rr. 10 and 11 of the C. P. C., on behalf of Allah Jawaya and Rukan. In this application it was alleged that after the appeal had been admitted to a hearing Sahib Ditta Mal had assigned his rights in the appeal to the applicants and that as the sons of Sahib Ditta Mal were not prosecuting the appeal properly they (the applicants) should be allowed to continue the appeal as provided for in r. 10 of O. XXII of the C. P. C. The application on behalf of the sons of the deceased was granted by me on the 27th of March 1925 subject to all just exceptions. In regard to the application on behalf of the alleged assignees I directed that notice should issue to the respondents and appellants, who were then the sons of Sahib Ditta Mal. On behalf of the respondents Mr. Nanak Chand has objected to the assignment on the ground that there was no valid assignment, and further that a pre-emption decree was not capable of assignment. He has also filed an application to the effect that inasmuch as the sons of Sahib Ditta Mal had not been brought on to this record within the time prescribed by law the appeal had abated. On behalf of the appellants, that is to say the sons of Sahib Ditta Mal, Dr. Nand Lal, while claiming that his clients were properly on the record, strongly objected to the recognition of the alleged assignment. He has contended that in the first place the document said to be a deed of assignment was merely an agreement to assign, and that, in certain proceedings instituted by Allah Jawaya and his companions, this fact had been admitted by them. Secondly he contended that even if the deed of assignment be construed to be a completed sale this Court should not recognize it for purposes of r. 10, O. XXII, C. P. C, inasmuch as the present application is a belated one. Reliance is placed by him on the case of *Harihar Prosad* v. *Gendi Lal* (1). Finally he urged that the decree being a pre-emption decree was not capable of being assigned, basing his contention on the case of *Mehr Khan* v. *Ghulam Rasul* (2). On the other hand, Mr. Behari Lal, who has appeared for Mr. Mukand Lal Puri, has contended that the assignment is valid and was a completed one and that the application was not really a belated one inasmuch as the assignees were under the impression that the sons of Sahib Ditta Mal were prosecuting the appeal properly.

There are two questions of importance which have to be dealt with, namely, (1) whether there was any assignment; and (2) whether the appeal has abated owing to the fact that the application on behalf of the sons of the appellant was made after the period prescribed by law.

So far as the first question is concerned, in my judgment the application of the alleged assignees should be dismissed. Firstly the *factum* of the assignment is disputed and the fact that the present application was made months after the assignment was alleged to have been made is one that cannot be ignored. Finally as I read r. 10 of O. XXII of the C. P. C. the Court has discretion, and, in the present case, I do not feel disposed to recognize the assignment. As to what actually passed between the applicants' Counsel and his clients I am not concerned; but it is worthy of note that Mr. Mukand Lal Puri filed applications on behalf of the sons of Sahib Ditta Mal as well as on behalf of the alleged assignees. In these circumstances I dismiss the application on behalf of the assignee with costs.

The second question is one which goes to the root of the appeal and which I think should be decided by a Division Bench. I, therefore, direct that the appeal itself be placed before a Division Bench at a very early date and at the hearing a decision will be arrived at as to whether the appeal has or has not abated. In the meantime the printing of the record should be stayed.

Z. K.   *Application dismissed.*

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(1) 43 Ind. Cas. 811.

(2) 64 Ind. Cas. 191; 2 L. 282; 3 L. L. J. 553; A. I. R. 1922 Lah. 300.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 127 OF 1925.

March 20, 1926.

Present:—Mr. Justice Raza.

LACHMI NARAIN—DEFENDANT—
APPELLANT

versus

Musammat NAZEER FATIMA—PLAINTIFF
—RESPONDENT.

Fraud—Fraudulent transaction—Burden of proof—Decree—Sale of property of person not party to decree, effect of.

The burden of proving the fraudulent nature of a transaction lies ordinarily on the person who seeks to impeach it, and the question is always one of fact. [p. 928, col. 2.]

Persons who are not parties to a decree are not bound by it and, therefore, a sale in execution of a decree does not operate to pass the property of any person who is not bound by the decree. [p. 929, col. 1.]

The Court has no jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record. As against such persons decrees and sales would be a nullity and might be disregarded without any proceedings being taken to set them aside. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Hardoi, dated the 27th November 1924, reversing that of the Munsif, Hardoi, dated the 11th December 1922.

Mr. *Ishri Prasad*, for the Appellant.

Mr. *Mohammad Ayub*, for Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for possession of No. 1528, measuring 17 *biswas*, situate in Pihani, District Hardoi and for Rs. 72 mesne profits.

The facts of this case so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows:—

The plaintiff is the wife of the defendant No. 3. The defendant No. 3 executed a deed of gift in favour of the plaintiff, in lieu of dower, in respect of certain properties including the property in suit on the 23rd December 1901. Sadho Ram (defendant No. 2) obtained a money-decree against the defendant No. 3 and sold the plot in suit in execution of his decree on the 21st July 1909. The plaintiff was no party to the suit or the execution proceedings. The plot in suit was purchased by the defendant No. 1 at the auction-sale, which was confirmed on the 28th August 1909. The warrant for delivery of possession (*dakhal dehani*) was issued, on the application of the defendant No. 1 the auction-purchaser on the 21st February 1910.

The plaintiff brought the present suit on the 20th February 1922 alleging that the plot in suit was owned and possessed by her and that she was wrongfully dispossessed therefrom on the 21st February 1910.

The claim was resisted by the defendants Nos. 1 and 2, on various grounds.

The suit was dismissed by the first Court; but the plaintiff's appeal was allowed by the learned Additional Subordinate Judge, Hardoi, on the 27th November 1924. She got a decree for the plot in suit and also for Rs. 36 as mesne profits. The contesting defendant Nos. 1 and 2 have now come to this Court in second appeal. In my opinion there is no force in this appeal.

The learned Additional Subordinate Judge has found that the deed of gift dated the 23rd December 1901 is genuine and valid, that the transfer was not fraudulent or fictitious that the plaintiff got possession of the gifted property including the property in suit by virtue of the said deed, that she remained in possession of the plot in suit till the date of "*dakhal dehani*" mentioned above and that the defendant No. 1, the auction-purchaser, never got possession of the plot before the 21st February 1910. These findings are findings of fact based upon admissible evidence and cannot be impugned in second appeal. The burden of proving the fraudulent nature of a transaction lies ordinarily on the persons who seeks to impeach it. The question whether a particular transaction is *bona fide* or fraudulent is always a question of fact. So far as I see, the learned Additional Subordinate Judge has considered the whole evidence on record very carefully. I have no hesitation in accepting his findings about the plaintiff's title and possession.

The appellant's learned Counsel has argued with reference to Arts. 142 and 144 and also Arts. 11 and 12 of the Limitation Act, that the suit is barred by time. I am not prepared to accept his contention. When it has been found that the plaintiff got possession of the plot in suit by virtue of a valid deed and remained in possession thereof till the date of *dakhal dehani* mentioned above it must be held that the suit is not barred by Arts. 142 and 144 of the Limitation Act. She was in rightful possession of the property within limitation and though there was delay in bringing the suit, the suit was filed within limitation. No inference as to the falsity of the plaintiff's suit can be drawn from the mere fact that it was brought just within the period of limitation. Article 11 of the Limitation Act does not apply to the present case. The plaintiff filed no objection under O. XXI, r. 58, Sch. I, C. P. C., and no order was passed against her in the execution proceedings after due inquiry under O. XXI, r. 61, Sch. I, C. P. C. Under these circumstances it cannot be held that the suit falls within Art. 11 of the Limitation Act.

Article 12 also does not apply. The decree which Sadho Ram had obtained against the defendant No. 3 was a decree for contribution on the basis of a decree for arrears of revenue. It was a decree for money passed in a suit to which the plaintiff was no party. It is also not established that the original decree was for arrears of revenue in respect of the plot in suit. Under these circumstances it cannot be held that the sale in question was really for arrears of revenue. I have already observed that the plaintiff was no party to the suit in which the decree was passed. Persons who are not parties to a decree are not bound by it and ordinarily, therefore, a sale in execution of a decree does not operate to pass the property of any person who is not bound by the decree. A Court has no jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record. As against such persons decrees and sales would be a nullity and might be disregarded without any proceedings being taken to set them aside; see *Khiarajmal* v. *Daim* (1) and *Jadu Nath Singh* v. *Afzal Khanam* (2). It was not, therefore, necessary for the plaintiff to sue for setting aside the sale.

In my opinion the learned Subordinate Judge was perfectly right in decreeing the plaintiff's claim. I can find no ground for interference and dismiss the appeal with costs. The decree of the lower Appellate Court is confirmed in all respects.

Z. K. *Appeal dismissed.*

(1) 32 C. 296; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

(2) 57 Ind. Cas. 526; 8 O. L. J. 191; 7 O. L. J. 362; 2 U. P. L. R. (O.) 118.

CALCUTTA HIGH COURT.

Civil Rule No. 770-S of 1924
in
S. A. No. 741 of 1922.
November 24, 1924.
Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Chakravarti.
KRISHNA MOHAN GHOSH—
Appellant—Petitioner
versus
SURAPATI BANERJI and others—
Respondents—Opposite Party.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9—Limitation Act (IX of 1908), s. 5, Sch. I, Art. 177—Appeal—Death of respondent—Abatement of appeal—Application to set aside abatement—Ignorance of law, whether sufficient excuse for delay.

During the pendency of an appeal one of the respondents died and no application was made within time to bring his legal representatives on the record. In an application to set aside the abatement the appellant urged that he was an ignorant milkman and was not aware that he was required to make an application for substitution of the legal representatives of the deceased respondent:

Held, that there was sufficient cause to set aside the abatement.

FACTS.—In this case one of the respondents had died during the pendency of the appeal; the appellant knew of it, but he was an ignorant milkman, and did not know that it was necessary for him to bring the fact to the notice of the Court and that it was his duty to apply for the substitution of the legal representatives of the deceased within a prescribed period. After the period of limitation he put in application for the setting aside of the abatement and the substitution of the legal representatives, and pleaded ignorance of law under the above-mentioned conditions.

Babu *Hiralal Chakravarti*, for the Petitioner.

Babu *Hemendra Chandra Sen*, for the Opposite Party.

JUDGMENT.—We think that under the circumstances of the case the delay was *bona fide* and sufficient cause has been shown within the provisions of s. 5 of the Limitation Act.

We accordingly make the Rule absolute. Costs one gold *mohur* will be costs in the cause.

Z. K. *Rule made absolute.*

PATNA HIGH COURT.

Civil Appeals Nos. 1314 and 1315 of 1922.
November 11, 1925.
Present:—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Kulwant Sahay.
Thakurji Sri JUGAL SARKAR and others
—Plaintiffs—Appellants
versus
RAJ MANGAL PRASAD and others—
Defendants—Respondents.

Limitation Act (IX of 1908), s. 26—Water rights—Riparian owners—Higher owner, whether can appropriate whole water of stream—Prescription—Easements Act (V of 1882), s. 17, applicability of—Pleadings and proof, variance between—Appeal, second—Finding of fact.

Every right peaceably enjoyed as an easement, and as of right without interruption for the prescribed period becomes absolute and indefeasible after the expiry of such period. [p. 931, col. 2.]

For ordinary purposes such as drinking and watering cattle, a higher riparian owner is entitled to appropriate, if necessary, the whole of the water of the stream; but for extraordinary purposes, such as the irrigation of his fields, he is entitled only to take so much as will not reasonably diminish the volume of water in the stream. [p. 930, col. 2.

It is open, however, to a higher riparian owner to establish that he has been in possession from time immemorial of the right to appropriate the whole of the water of the stream for extraordinary purposes. [p. 931, col. 1.]

Section 17 of the Easements Act is intended to apply to rights in the nature of profits *a prendre* which do not include a right to water. [p. 931, col. 2.]

A party cannot be allowed to plead inconsistent facts or to give proof at variance with his pleadings. [*ibid.*]

The High Court ought not to interfere in second appeal with a finding of fact so long as there is some evidence to support it, but a finding arrived at without evidence is bad and is not binding upon the High Court. [p. 932, col. 2.]

Appeals from the decrees of the Sub-Judge, Muzaffarpur, dated the 22nd June 1922.

Messrs. *P. C. Manuk*, *J. P. Singh* and *Bhagwan Prasad*, for the Appellants.

Messrs. *S. N. Mullick*, *L. K. Jha* and *S. Saran*, for the Respondents.

JUDGMENT.

Mullick, J.—The plaintiffs in this litigation allege that a water-course called the Mangrooha river, which flows past the villages of Madanpur, Azamgarh, Bacharpur and Manik Chauk from north to south is a natural stream and that the plaintiffs who are the residents of Bacharpur have from time immemorial obstructed it by a *bundh* or dam measuring 107 feet in length, 31 feet in breadth and 11 feet in height and that the defendants who are residents of Manik Chauk and Azamgarh have caused injury to them by cutting it. The plaintiffs accordingly ask: (1) for a declaration that the defendants are not entitled to cut the dam; (2) for a declaration that the plaintiffs are entitled to maintain and repair the dam; and (3) that the defendants should be restrained by injunction from interfering with the right of the plaintiffs to maintain and repair and from doing any acts harmful to them.

The Munsif found that the water-course in question was not a natural stream. He also found that the plaintiffs had established that from time immemorial the dam in dispute of the dimensions claimed had been maintained by them for the irrigation of their fields. He accordingly decreed the suit.

In appeal the Subordinate Judge differed on all points. He held that the water-course was a flowing river and that the defendants, the residents of Manik Chauk, had a right to use the water to the same extent as the plaintiffs and that the plaintiffs had no right to maintain a dam of the dimensions claimed for the purposes of irrigation so as to diminish the supply to which the defendants are entitled. He found that in fact the dam in question completely deprived the defendants from any water at all.

Against this judgment the plaintiffs prefer the present second appeals.

Now the first question for decision is whether the water-course is or is not a natural stream. The Munsif has found that the bed of the water-course has been ploughed up and cultivated in several places and that there are already two dams existing to the north, one at Madanpur and the other at Majhaulia. Evidence was given by the plaintiffs to show that the water-course was fed by rain-water and apparently the view taken by the Munsif was that whatever may have been the original condition of the water-course the channel at present consists of a series of pools which are filled with water only during the rains and to which the law of natural streams does not apply.

Now the Subordinate Judge has made a very inadequate examination of the evidence upon this point. He does not consider the grounds given by the Munsif for holding that no connected channel exists. Apparently the learned Subordinate Judge thinks that as the water-course is called a *nadi* it must be a natural stream. In my opinion there has been an error of procedure in the trial of this issue, and the plaintiffs are entitled to a fuller examination of the evidence before the finding of the Munsif can be set aside.

The next point is whether assuming that this is a natural stream the plaintiffs have established a right to obstruct it to the injury of the defendants. Now the law on the subject in this Province is well-settled. For ordinary purposes such as drinking and watering cattle the plaintiffs are entitled to appropriate if necessary the whole of the water; but for extraordinary purposes such as the irrigation of their fields they are entitled only to take so much as will not reasonably disminish the volume of water in the river. The plaintiffs, however, contend that they are entitled either by twenty years' user as of right or by prescription to appropriate the whole of the water for irrigation purposes. The defendants contend that such an absolute right cannot be acquired either as an easement or in any other way. The learned Subordinate Judge accepts this view and relies on *White* v. *White* (1). In my opinion the learned Subordinate Judge has taken an erroneous view of the decision in this case. There the higher proprietor claimed the right to appropriate as much water as he required for his mill on the ground that the Crown had given him a grant of the whole water in the river, and the learned Judge held that such a grant was repugnant to the ordinary law of rivers and could not be conceived and that the proprietor had established the user of only 1,200 cubic feet of water per minute and that his claim to a prescriptive right to more than 6,000 cubic feet per minute or to as much water as he liked had failed. Lord Robertson in his judgment expressly points out that the rule of prescription is *tantum praescriptum quantum possessum* It was nowhere held in that case that if a higher proprietor establishes that he has been in possession from time immemorial of the right to appropriate the whole of the water the law will not sanction his title to do so. So it has been held in *Wright* v. *Howard* (2), *Mason* v. *Hill* (3), *Debi Pershad Singh* v. *Joynath Singh* (4) and *Belbhadar Pershad Singh* v. *Sheikh Barkat Ali* (5). On the other hand it is contended on behalf of the defendants that the Indian Easements Act, though not applicable in this Province, may be regarded for the purpose of ascertaining the general or common law principle applicable. Section 17 of the Indian Easements Act declares that a right which would tend to a total destruction of the subject of the right, or of the property on which, if the acquisition were made, liability would be imposed, cannot be acquired by prescription, and it is argued that the upper proprietor cannot be allowed to convert the river into a pond and thereby destroy the flowing stream. Here the right to appropriate the water is a negative easement appurtenant to the land of the upper proprietor and the water, though diverted, is not destroyed. Section 17 of the Easements Act is intended to apply not to such rights but to rights in the nature of profits *a prendre* which do not include a right to water. I do not think, therefore, that the principle of that section is applicable to this case.

The law applicable here is either s. 26 of the Indian Limitation Act of 1908 or the general law of prescription. Under that law every right peaceably enjoyed as an easement, and as of right without interruption for the prescriptive period becomes absolute and indefeasible after the expiry of such period. The plaintiffs are, therefore, entitled to succeed if they can prove enjoyment as alleged for the necessary period.

Apart from this question of law which, in my opinion, has been wrongly decided by the learned Subordinate Judge there is a further difficulty in the way of the respondents. Before the Munsif the parties went to trial on the issue whether the plaintiffs were entitled to maintain a dam of the dimensions described in the plaint. The defendants made a categorical denial to the effect that no dam of any kind had ever existed at this place. The Munsif disbelieved the evidence that no *bundh* had existed and he found that the evidence as to dimensions was unrebutted. On appeal the respondents shifted their ground and induced the learned Subordinate Judge to adopt a middle course, namely, that the plaintiffs had proved a right to maintain a "*bundh*," but that they had not proved that the *bundh* should be 107 feet long, 31 feet wide and 11 feet high. The learned Subordinate Judge states that the defendants allege that in 1321 the length as well as the height was altered by the plaintiffs so as to completely obstruct the water flowing down to their village. We have been unable to find any authority for this statement. There is nothing in the written statement or the depositions to support this finding. Apart from the objection that a party cannot be allowed to plead inconsistent facts, or to give proof at variance with his pleading, it is clear that there is nothing in the evidence produced by the defendants upon which this inconsistent finding can be based. The learned Subordinate Judge was, no doubt, competent to come to such a finding from the plaintiffs' own evidence, but on this point the evidence is one sided and unrebutted as the Munsif puts it. Again the learned Subordinate Judge's statement that there is no evidence on behalf of the plaintiffs to prove that the *bundh*, as it exists at present, existed from before 1326, is quite contrary to the evidence recorded. It is true that one witness, P. W. No. 2, states that the *bundh* was 160 feet long, 31 feet wide and 11 feet high. It is explained by the appellants here that "160" was a mistake for "107" the two words in *hindi* to express these lengths being very similar. Be that as it may, there was plenty of o her evidence to the effect that the disputed *bundh* is the one which has existed from time immemorial. The learned Subordinate Judge has committed a mistake of record in saying that no such evidence existed.

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(1) (1906) A. C. 72; 75 L. J. P. C 14; 94 L. T. 65.

(2) (1823) 57 E R. 76; 1 Sim. & St. 190; 1 L. J. (o. s.) Ch. 94; 24 R. R. 169.

(3) (1882) 110 E. R. 114; 3 B. & Ad. 304; 1 L. J. K. B. 107; 39 R. R. 354.

(4) 24 C. 865; 24 I. A. 60; 7 M. L. J. 120; 1 C. W. N. 401; 7 Sar. P. C. J. 200; 12 Ind. Dec. (N. S.) 1245 (P. C.).

(5) 11 C. W. N. 85; 4 C. L. J. 370.

The other evidence upon which the Subordinate Judge has relied consists of certain documents filed by the defendants to show that in a dispute between the villagers of Madanpur and Manik Chauk before an Assistant Settlement Officer it was agreed that a diversion made by the Madanpur villagers from a point north of the Madanpur *bundh* should not be kept completely closed by means of a dam erected by the Madanpur villagers, and that for a certain number of days the water in this diversion should be allowed to flow so as to go down south to Manik Chauk. The learned Subordinate Judge infers from this that the *bundh* at Bacharpur could not have been 160 feet long, 31 feet wide and 11 feet high. It was found in that case that there was a "*bundh*" of some kind at Bacharpur and the learned Judge infers from the conduct of the Manik Chauk villagers that the *bundh* could not have been high or long enough to obstruct the whole of the water. Before coming to this finding we had to find that the diversion brought the water back into the channel above the Bacharpur *bundh* and that at the time of the Magistrate's order the Manik Chauk people got their water over or through this *bundh*. There is no such finding by the learned Subordinate Judge and the inference does not follow that because the diversion through Madanpur was allowed to be kept open for a certain number of days for the benefit of Manik Chauk, therefore, the *bundh* at Bacharpur could not have been of the dimensions alleged in the plaint. The plaintiffs, on the other hand, assert that the water did not come back to the river but found its way to Manik Chauk if at all over the fields of Madanpur. The learned Subordinate Judge has, therefore, committed an error of law in drawing the inference.

Further the plaintiffs are entitled again to object that the defendants ought not to be allowed to give proof inconsistent with their pleading.

It is no doubt true that this Court ought not to interfere in second appeal with a finding of fact so long as there is some evidence to support it, but here it would seem that the learned Subordinate Judge has arrived at his findings without evidence and that the trial is bad. It is also not clear to what extent he has been affected by his erroneous view as to the rights of a lower proprietor against a higher proprietor.

The result is that, in our opinion, the appeals must succeed and the decree of the learned Subordinate Judge must be set aside. He will re-hear the appeals according to law but the parties will not be entitled to adduce any further evidence. As no objection was taken to the competency of the defendants to adduce evidence to show that a dam of different dimensions has been maintained by the plaintiffs the Subordinate Judge will be entitled to consider all the evidence adduced but he will, of course, also take into consideration the inconsistency between pleading and proof as a factor in determining the weight to be attached to such evidence. There being no materials for giving the plaintiffs relief in respect of any *bundh* of smaller dimensions their suit must either be decreed in full or dismissed.

Costs will abide the result.

Kulwant Sahay, J.—I agree.

Z. K. *Case remanded.*

OUDH CHIEF COURT.

FIRST CIVIL APPEALS NOS. 41 AND 52 OF 1924.

March 4, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

Thakurain GAYA KUNWAR—PLAINTIFF—APPELLANT
versus
GAURI NATH KAKAJEE—DEFENDANT—RESPONDENT.

Hindu Law—Co-widows—Partition, effect of—Alienation by one widow, whether binding upon co-widow, Where the widows of a separated Hindu governed by the Mitakshara Law succeed as co-heirs to the estate of their deceased husband, a partition of the estate between them can in no circumstances have the effect of destroying the right of survivorship, and whatever may be the authority, under a friendly arrangement, of each widow to enjoy the usufruct of a separate portion of the estate, there is no right of alienation by one widow alone, which will bind the other widow after her death. It is the right of each of the co-widows to enjoy her deceased husband's property by partition *inter se*, and she can assign her share to any one she chooses and if she has already obtained her share by partition, she can alienate that share; but in either case the assignment or alienation cannot take effect or have validity beyond her lifetime. It is good as long as she lives, and on her death, her interest in the property ceases and the share goes to the surviving co-widow. [p. 936, col. 2; p. 938, col. 1; p. 939, col. 1.]

First appeal against a judgment and decree of the Additional Sub-Judge, Hardoi, dated the 29th April 1924.

Messrs. *Niamat Ullah* and *Makund Behari Lal*, for the Appellant.

Messrs. *A. P. Sen*, *Haider Husein*, *Bisheshwar Nath Srivastava* and *Sheo Shankar Nath*, for the Respondent.

JUDGMENT.—Thakur Laiq Singh was a substantial *zemindar*, who resided in Mandauli in the Sandila Tahsil of the Hardoi District. He owned seven entire villages and shares in others. On the 1st July, 1880, he executed in favour of Babu Har Nath and Babu Gauri Nath of Lucknow a registered deed of mortgage for a consideration of Rs. 23,000 under the terms of which he agreed to place the mortgagees in possession of certain property in order that they might satisfy the interest on the consideration out of the usufruct. On the 8th August, 1883, he executed a registered deed of further charge on the same property in favour of the same persons for a consideration of Rs. 5,000. He died on the 13th August, 1885, having failed to deliver possession over the said property to the mortgagees. He had had sons born to him but they had predeceased him. He left surviving a senior widow Umrao Kunwar and a junior widow Gaya Kunwar. The latter was at the time of her husband's death about 19 years of age. He also left surviving certain daughters from his elder wife. On the 3rd January, 1886, a deed which purported to be a deed of mortgage was prepared, and signed by Umrao Kunwar and Gaya Kunwar. This deed is Ex. A-6. It purported to be for consideration of Rs. 9,400, Rs. 3,200 of which was stated to be in lieu of a portion of the interest due upon the two deeds executed by the deceased Laiq Singh. The remainder was stated to be in respect of the amounts due on simple bonds executed by Laiq Singh and certain small cash items, a portion of which was stated to have been for the benefit of Laiq Singh. Although this bond was signed by both widows, it was never given effect to as a transfer of the property for it was not registered. It is common ground that Gaya Kunwar after having signed it refused to register it. She stated in the evidence which she gave in the suit, against the decree in which these appeals are preferred, that her signature was obtained under a misapprehension. Be that as it may, it is clear that the document A-6 in no way operated as a transfer of the property left by Laiq Singh. At the time of Laiq Singh's death his two widows were living together and it is in evidence that they continued to live together for about a year. They separated some time in 1886. Relations had then clearly become very strained between them, and from the time of their separation their relations were never again friendly.

After their separation on the 29th of March, 1887, Umrao Kunwar executed a deed of mortgage in favour of Har Nath and Gauri Nath for a consideration of Rs. 18,367. This is a registered deed Ex. A-7. The consideration was very largely for the satisfaction of the interest due on the deed of mortgage and the deed of further charge executed by Laiq Singh and the amount which was stated to be due on A-6, though there were other items entered.

The strained relations between the two widows culminated very shortly after this deed had been executed in the institution of a suit against Gaya Kunwar by a boy, who alleged himself to have been adopted by Umrao Kunwar on the 19th of January 1887 under authority possessed under an alleged custom of the family and also under an alleged authorisation of Laiq Singh. This boy Debi Bakhsh was under the guardianship of Umrao Kunwar, and it is perfectly clear from the proceedings, that Umrao Kunwar was putting the boy forward, and was responsible for the institution of the suit. The object of the suit was clearly to deprive Gaya Kunwar of all rights to the estate and to confine her to a bare maintenance. This suit was instituted on the 25th April, 1887. It was dismissed on the 14th November, 1887. The judgment of dismissal is Ex. 41. The judgment of dismissal found that Umrao Kunwar had no authority to adopt a son and that, as a matter of fact, there had never been an adoption. An appeal was filed to the Court of the Judicial Commissioner which was dismissed by a decree dated 22nd March, 1889. A copy of this decree is Ex. A-371. In the meanwhile Har Nath and Gauri Nath had instituted on the 11th October, 1887, a suit on the basis of the mortgage-deed of 1st July, 1880, and the deed of further charge of 8th August, 1883, against Umrao Kunwar and Gaya Kunwar jointly, and in this suit an amicable arrangement was arrived at, which was given effect to under a decree of the Court dated 19th December, 1887. The particulars of this amicable arrangement will be found in A-9, Ex. 4 and A-10. It was as follows:—

The plaintiffs agreed to divide the responsibility for meeting their claims between Umrao Kunwar and Gaya Kunwar. Umrao Kunwar agreed to be responsible for discharging the sum of Rs. 15,983-6-0 in the following manner. She had at that time obtained sole possession of a half share in the village of Sikrauri and a half share in the village Janwar with hamlets. She agreed to transfer the possession of this property to Har Nath and Gauri Nath in order that they might enjoy the usufruct and re-pay themselves out of this usufruct both the principal sum of Rs. 15,983 6-0 and interest which was to be calculated according to the conditions laid down in the deed of mortgage executed by Laiq Singh on the 1st of July 1880. This obligation was upon Umrao Kunwar alone, and Gaya Kunwar had no part in this liability, or the method of satisfying the amount Gaya Kunwar on her own behalf agreed to pay Rs. 17,777 to Har Nath and Gauri Nath in cash, on the condition that when she paid this money she was to be held under no further liability in respect of the deeds of 1st July, 1880, and 8th August, 1883.

It appears that at this time, under some sort of private arrangement Umrao Kunwar and Gaya Kunwar had each taken separate possession of cerain portions of the property left by Laiq Singh. There had, however, then been no partition through the Revenue Courts, or any recognition of this arrangement in writing.

On the 23rd December, 1887, Umrao Kunwar executed a deed (A-16) in favour of Har Nath and Gauri Nath for a consideration of Rs. 3,000. It is to be noted that Rs. 1,411-15-0 out of the consideration were to be paid to Gaya Kunwar, who had satisfied the whole of a decree in favour of a man called Lallu Chaubey in respect of a debt of Laiq Singh. On the 20th of January, 1888, Gaya Kunwar executed a deed of mortgage in favour of Surat Singh. This is Ex. A-46. The consideration of this deed was Rs. 22,000 and under it she mortgaged a half share in the village of Mandauli with hamlets and the whole of the village of Janwar with hamlets, stating that the shares were in her exclusive proprietary possession and occupation without any co-parcenership by virtue of inheritance from her husband. Later in 1888 Umrao Kunwar and Gaya Kunwar proceeded to partition Laiq Singh's property through the Revenue Courts. The proceedings will be found in Exs. A-372, A-373, A-367 and A-374. The order confirming the partition was passed on the 25th June, 1888 and the partition took effect from the 1st July, 1888. The Deputy Commissioner carried out a partition by assigning separate villages to each lady except in one instance. He refers in his order to the separate indebtedness of the two ladies stating that Umrao Kunwar was very much indebted. He also found that Gaya Kunwar had mortgaged her share in Janwar and Sikrauri to Surat Singh and Udai Nath, and that Umrao Kunwar had mortgaged her share to Har Nath and Gauri Nath, and he commented that the parties had settled amongst themselves that after the properties had been divided by lots in a case, where the property had been encumbered by one party and had fallen into the share of the other party, it was the duty of the party who had encumbered the property to satisfy the encumbrances and hand it over free from liability to the party in whose share it had fallen.

In the year 1889 Har Nath and Gauri Nath applied in execution to obtain possession of the half share of Sikrauri, which Umrao Kunwar had agreed to hand over to them. These proceedings commenced on 16th September, 1889 and went on over subsequent dates. They will be found in A-11. The agent of Har Nath and Gauri Nath stated that Gaya Kunwar had paid up the full amount due from her. Gaya Kunwar's agent said that under the partition Sikrauri had fallen to the share of Gaya Kunwar. Possession of Sikrauri could not be given. The decree-holders' agent pointed out that Gaya

Kunwar had mortgaged half of Janwar which had fallen to the share of Umrao Kunwar at partition. Gaya Kunwar's agent replied that his employer recognised this fact and was going to alter the deed that she had executed in favour of Surat Singh mortgaging half Sikrauri and half Janwar into a deed mortgaging half Sikrauri and half Maroli, and that in these circumstances it would meet the case if Har Nath and Gauri Nath took possession of the whole of Janwar in order to satisfy their claim against Umrao Kunwar. The parties agreed to this and Janwar passed into the hands of Har Nath and Gauri Nath, in order that they might satisfy themselves from the usufruct the amount which Umrao Kunwar had made herself liable to pay under the compromise decree of 19th December 1887.

On the 20th January, 1888, Gaya Kunwar executed a second registered deed for Rs. 26,620 (Ex. A-42) in favour of Surat Singh to satisfy the deed which she had previously executed in his favour. She did this to carry out the arrangements mentioned above. Under this deed she mortgaged with possession the whole of Sikrauri and half of Mandauli. In this deed she stated that she was the full proprietor of the villages without the co-parcenership of any one, and that her name stood entered in the Government papers after partition and that she was in all respects in possession and enjoyment of these villages On 8th February, 1890, Umrao Kunwar executed a simple mortgage-deed for Rs. 4,700 in favour of Har Nath and Gauri Nath mainly in respect of expenses that she had incurred in her litigation with Gaya Kunwar.

On the 28th April, 1891, Umrao Kunwar executed a registered deed of mortgage (A-19) for Rs. 38,000 in satisfaction of the amount due on A-7, the amount due on A-18 (the deed of 8th February, 1890) the portion of the interest due under the compromise of 19th December, 1887—for she had not put Har Nath and Gauri Nath in immediate possession—and other items. Under this deed she mortgaged with possession Janwar, Mandauli, Madna Khera and Tikra Khurd. On the 23rd August, 1891, she executed a deed of further charge for Rs. 1,200 on account of money for her own use. This is a registered deed A-34. Under this deed possession of the villages was not to be given at once and interest accumulated. Possession not having been given, a suit was brought in 1904. The judgment is A-25 dated 25th November, 1904, and possession over these villages was obtained in 1905 as will be seen from Ex. 31 (order in mutation). The order is dated 2nd November, 1905.

Umrao Kunwar died in December 1908.

The present suit was filed by Gaya Kunwar on the 16th November, 1920, against Gauri Nath, who represented the deceased Har Nath also, on the following allegations. Gaya Kunwar asserted that she and Umrao Kunwar had, as the co-widows of Laiq Singh, succeeded jointly to his estate upon his death, that on the death of Umrao Kunwar in December, 1908, nearly 12 years before the date of the suit, she had by survivorship acquired a widow's estate under the Mitakshara Law in the whole property, that the village of Janwar had passed under the compromise of 18th December, 1887, from Umrao Kunwar to the defendant's predecessors-in-interest. that the amount due from Umrao Kunwar had long since been satisfied out of the usufruct, and that she, therefore, demanded restoration of possession over their village claiming as the holder of the whole widow's estate by survivorship on the ground that under Umrao Kunwar's action the amount due had been satisfied. So far she would appear from the pleadings to have professed to represent Umrao Kunwar.

But in the 9th and 10th paragraphs of her plaint she takes a position which is very difficult to understand. She refers to the mortgage A-19 of the 28th April, 1891, which was executed by Umrao Kunwar, and these are the words which she uses in respect of that mortgage :—

"That the defendant being afraid of losing Janwar from his possession soon got a fictitious collusive possessory mortgage-deed executed by *Musammat* Umrao Kunwar on the 28th of April 1891 in lieu of Rs. 33,000 with respect to the villages Janwar, Madna Khera, Tikra Khurd and Mandauli detailed in the list hereto attached and acquired possession over the villages in suit.

"That neither Umrao Kunwar was under the necessity of borrowing money, nor was any debt contracted for any valid necessity. The plaintiff is not bound by the aforesaid mortgage-deed in any way and she is entitled to get possession over the villages in suit and their profit after the death of Thakurain Umrao Kunwar." In these paragraphs she did not take the position which she took subsequently to the effect that Umrao Kunwar had no power to transfer any of the property without her consent. She did not take the position that she repudiated the transfer, as she was not bound by it and that the defendants had obtained no title under that transfer. She took the position that she was the representative of Umrao Kunwar, but that she refused to be bound by Umrao Kunwer's disposition because the deed was fictitious and collusive and executed without necessity. Here the first difficulty arose out of careless pleadings. This difficulty is considerably enhanced by the next plea which she takes up. After having stated that she refused to be bound by Umrao Kunwar's action she continues that if, by any change, a portion of the consideration of A-9 had been for legal necessity—it apparently being assumed here that the deed was neither fictitious nor collusive the plaintiff was ready to redeem the mortgage. Then followed the relief claimed. We have had great difficulty in understanding what was claimed but we are now satisfied by the learned Counsel for Gaya Kunwar that the plaintiff meant to ask for a finding that she was in no way bound by any of the acts of Umrao Kunwar and was, therefore, entitled to possession over the four villages in question on the ground that Umrao Kunwar had no right to transfer them without her consent, and she wishes the Court to consider the defendant a trespasser. It is to be noted that in this relief she did not ask for mesne profits. In the next three reliefs sought she takes the alternative position, that if the transfers have been good transfers, and she is bound by them she has a right to redeem the mortgages, that accounts should be taken, that such balance should be paid by her as is found to be due by her, and that such balance should be paid to her as the account showed due to her.

It is further necessary to note that in her subsequent replication in para. 41 she did take the position that transfers by Umrao Kunwar were not made with her knowledge, information, or consent.

The learned Subordinate Judge appears to have had considerable difficulty in appreciating the points in dispute and in disposing of them. He is not, we think, to be blamed in his difficulty, for the nature of the pleadings and the manner in which the case was presented to him left much to be desired. We have had the advantage of having the appeal argued by competent Counsel, who thoroughly understood the position and have helped us to a very great degree. We do not think that he had the same advantages. He has arrived at a decision which has satisfied neither party. He has held, that Gaya Kunwar is bound by Umrao Kunwar's transfers in so far as those transfers were for legal necessity, and according to this view he has awarded Gaya Kunwar a decree for the redemption of the village on payment of a sum of Rs. 91,435-9-7. Against this decision Gaya Kunwar has appealed in Appeal No. 41 of 1924 and desires in this appeal not only that she should receive the property back free of charge, but that she should receive an unspecified sum which she considers will be a large sum upon a re-taking of accounts between the parties. She is ready to pay the Court-fee upon anything extra awarded to her. Gauri Nath, on the other hand, has filed Appeal No. 52 of 1924 in which he claims 2 lakhs and 15 thousand in addition to the amount already awarded to him.

We shall proceed first to state the law, as we consider it to be, which will bind the parties in this suit. The law in question is the law regulating transfers by one of several widows of a separate Hindu governed by the Mitakshara Law, when such widows have succeeded as co-heirs to the estate of their deceased husband.

The law on the subject was first considered authoritative in 1867, when the Judicial Committee decided the appeal of *Bhugwandeen Doobey* v. *Myna Baee* (1). This appeal arose out of a suit brought by Myna Baee the widow of one Dina Nath, a Hindu inhabitant of Benares, who had died separate, and whose estate was governed by the Mitakshara Law against a person to whom the senior widow, who had since died, had devised her portion of the estate. In this case Dina Nath had left a senior widow Doola Baee, and a junior widow Myne Baee. Disputes having arisen between these two ladies, a Judge had made an order under Act XIX of 1841, by which he had assigned each a moiety in the estate. Their Lordships had to consider in this case, whether, according to the Mitakshara Law, a Hindu widow was competent to dispose, by Will or deed of gift, of either moveable or immoveable property inherited from her husband to the prejudice of the next heir.

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(1) 11 M. I. A. 487; 9 W. R. P. C. 23; 2 Suth. P. C. J. 124; 2 Sar. P. C. J. 327; 20 E. R. 184.

They decided that she was not competent so to dispose. They further had to decide whether one of two Hindu widows, taking as full heirs to their husband, is in a more favourable position than that of a person claiming as the next heir of the husband in succession to a single heir deceased. They further had to decide whether the division made by the Judge, to which reference has already been made, enlarged the power of Doola Baee to dispose of the property or affected the right of Myna Baee to question the disposition. They decided that the estate of two widows who take their husband's property by such inheritance is one estate, and that the right of survivorship is so strong, that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. Such widows are, therefore, in the strictest sense co-parceners, and between undivided co-parceners there can be no alienation by one without the consent of the other. And they further decided, that such partition as was effected by the order of the Judge under Act XIX of 1841, would have no effect in giving Doola Baee any power of disposition over her share which she would not otherwise have had. Without deciding whether the Judge had made this order in the suit on his own initiative or on the application of either widow, and deciding that he had no jurisdiction to determine questions of title and could only deal with the right to possession, they found that it was difficult to see how any partition could enlarge either widow's estate so as to give her a disposition, which she would not otherwise have had against the next heirs of her husband.

The question as to what partition was possible between the two such widows was not definitely settled by this authority. It is decided by a later authority.

That authority will be found in *Gajapathi Nilamani* v. *Gajapathi Radhamani* (2) which was decided by their Lordships in 1877. The decision will be found in *Gajapathi Nilamani* v. *Gajapathi Radhamani* (2). This was a suit from Madras It should be stated first, that the provisions of the Mitakshara Law as governing the parties in that suit are the same as the Mitakshara Law governing the parties in the present suit. The headnote says that "according to the Mitakshara Law...two or more lawful wives take a joint estate for life in their husband's property, with rights of survivorship and equal beneficial enjoyment. Although widows so taking have no right to enforce an absolute partition of the joint estate between them, they have power to arrange for separate enjoyment of their shares, their respective rights by survivorship and otherwise remaining unaffected". The case had arisen this way: Nilamani and Radhamani were the widows of a certain Gopinadha. Nilamani was the senior widow, Radhamani was the junior widow. Nilamani had denied that Radhamani had any rights in her late husband's estate. The Madras High Court had found that Radhamani had such rights and Nilamani came in appeal to their Lordships of the Judicial Committee. Their Lordships had to decide whether Radhamani had any rights; if so, what were those rights; if, the rights were capable of partition and whether it was within their power to put Radhamani in separate enjoyment of those rights. They concurred with the decision of the High Court of Madras to the effect that two or more lawfully married wives take a joint estate for life in their husband's property with rights of survivorship and equally beneficial enjoyment, and after referring to and concurring with the authority, which we have just quoted in *Bhugwandeen Doobey* v. *Myna Baee* (1) they laid down that widows taking a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the joint estate between them. But they went on to say, that a case could be made out entitling one of several widows to the relief of separate possession of a portion of the inheritance, and they agreed with the finding of the High Court to the effect that such relief can and ought to be granted, when from the nature or situation of the property, and the conduct of the co-widows or co-widow it appeared to be the only proper and effectual mode of securing the enjoyment of her distinct right to an equal share of the benefits of the estate. They concurred with a previous authority, that there was no objection to a transaction which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected, although the widows nevertheless remained co-parceners, with a right of survivorship with them, and there could be no alienation by one without the consent of the other. It appears to us to follow from the rule of law laid down herein, that a partition between widows can in no circumstances have the effect of defeating the right of survivorship, and that whatever be the authority under a friendly arrangement of each widow to enjoy the usufruct of a separate portion of the estate, there can be no right of alienation by a co-widow alone, which will bind the other co-widow after her death.

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(2) 4 I. A. 212; 1 M. 290; 1 Ind. Jur. 589; 1 C. L. R. 97; 3 Sar. P. C. J. 753; 3 Suth. P. C. J. 355; 1 Ind. Dec. (N. S.) 193 (P. C.).

The final decision of their Lordships to which we would refer in this connection is in a matter in which Nilamani and Radhamani were concerned, which came up many years later. We refer to the appeal [*Jagapati Radhamani Garu* v. *Maharani Sri Pusapati Alakajeswari* (3).] It appears that Nilamani had made two mortgages in 1874. She died on the 1st August, 1882. Radhamani refused to be bound by the disposition of Nilamani. Their Lordships say at page 189*:

"The High Court upon appeal reversed the judgment and decree of the District Judge, and gave a decree against the defendant for the amount found due upon the mortgages. As to Radhamani's consent not having been obtained, they said it would have been impossible for Nilamani to have obtained Radhamani's assent to any arrangement which she might have proposed at a time when they were in litigation, and that the moneys borrowed were for Radhamani's benefit, and that she was bound by the mortgages.

"It by no means follows that if it had been necessary to borrow money to save the estate of the two widows from sale for arrears of revenue, Radhamani would have refused to consent to mortgage the joint interest of the widows for a sum sufficient to discharge those arrears, notwithstanding the widows were at enmity, and actually engaged in litigation with each other respecting the estate.

"At any rate an application was not made to Radhamani for her consent, and without such an application it is impossible to hold, even if that would be sufficient, that Nilamani was under such a necessity of borrowing money without Radhamani's consent for the preservation of the estate that a mortgage by Nilamani alone would be binding upon Radhamani's interest in the event of her survival.

"But there was a very good reason why Nilamani did not apply to Radhamani for her consent. The mortgages were in 1874, whereas it appears that down to the year 1877 Nilamani was contending that Radhamani as junior widow took no interest in the estate, but was merely entitled to maintenance: *Gajapati Nilamani* v. *Gajapati Radhamani* (2). It was not determined until 1877 that Radhamani had a joint interest in the estate. If Nilamani had applied to Radhamani to join in the mortgages she would have impliedly admitted that Radhamani had a joint interest.

"It may be assumed for the present judgment, without deciding the point, that there was a sufficient necessity for borrowing money to pay the Government revenue, or even for the payment of Nilamani's debt; but that necessity did not render a mortgage by one widow binding upon the joint estate which had descended from their deceased husband so as to affect the interest of the surviving widow: *Bhugwandeen Doobey* v. *Myna Baee* (1). But, irrespectively of these considerations, it appears clear to their Lordships that the mortgages were not so framed as to bind the estate in the hands of Radhamani, as the surviving widow after the death of Nilamani. Many of the stipulations in the mortgages were personal to Nilamani, and they cannot be held to have been binding or intended to be binding upon Radhamani or her interest in the event of her surviving. Their Lordships are, therefore, of opinion that the mortgages were not binding upon Radhamani, and that the decree of the High Court ought to be reversed, with costs in that Court, and the decree of the District Judge affirmed."

This last decision again lays down the necessity of consent by the co-widow to validate a transfer that will affect the estate after the death of the transferor. It further lays down the very important principle that, even when the consideration for the transfer has been a legal necessity of the estate, the transfer is nevertheless invalid in absence of such consent. It would appear to us from the study of the decision, that the consent which their Lordships had in mind was an explicit consent and not an implied consent. There have been no further authoritative pronouncements on the point. The law has been well-summarized in a head-note in *Hari Narayan Jog* v. *Vitai* (4). "It is the right of each of the co-widows to enjoy her deceased husband's property by partition *inter se*, both under the Mitakshara and the Mayukha. She can, therefore, assign her share to anyone she chooses; and if she has already obtained her share by partition, she can alienate that share. But in either case the assignment or alienation cannot take effect or have a validity beyond her lifetime. It is good as long as she lives; and, on her death, her interest in the property ceases and the share goes to the surviving co-widow or co-widows as the case may be."

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(3) 19 I. A. 184; 16 M. 1; 17 Ind. Jur. 36; 6 Sar. P. C. J. 1; 5 Ind. Dec. (N. S.) 709 (P. C.).

*Page of 19 I. A.—[*Ed.*]

This is the law which we have to apply to the facts of the case. Upon the face of it, the transfer of the village Janwar which was made by Umrao Kunwar under the compromise of the 19th December 1887 and the subsequent transfers of the village Janwar and the three other villages which were made by Ex. A-19 on the 28th April 1891 can have no effect after her death, and Gaya Kunwar has a right to repudiate them, to treat the defendant as a trespasser, and obtain possession over the four villages in question on the ground that the transfers by Umrao Kunwar were only good for Umrao Kunwar's lifetime, unless it can be established that Gaya Kunwar consented to those transfers. It is not suggested by the learned Counsel for the respondent, who has argued the case with great ability and fairness, that there was anything of the nature of explicit consent. Gaya Kunwar was examined on commission as a witness in the original suit, and it was nowhere suggested by the defendant in his cross-examination of Gaya Kunwar that she had ever consented explicitly to either of those transactions. It is true that she was a party to the compromise, in which the offer of Umrao Kunwar to make a transfer is contained, but she nowhere consented to that offer. She herself was making an independent offer. In respect of the subsequent transaction of 1891 there can be no suggestion that she ever consented explicitly. It is sufficient to note that the relations between Umrao Kunwar and Gaya Kunwar after the end of 1886 were such as to render it unlikely to a degree that one would ever consent to any arrangement made by the other. The learned Counsel for the respondent has argued, however, that the circumstances of the case are such as would justify this Court in holding that there was an implied consent by Gaya Kunwar to these transfers which is established by the evidence of her conduct. He further argued that her methods of dealing with the property which had been left in her individual management were such as rendered it impossible for her to plead that Umrao Kunwar was not entitled to make the tranfers which she had made.

Before we proceed to discuss the arguments of the learned Counsel for the respondent on the latter points and the evidence on which they are based, it is necessary to touch upon the method, in which the plaintiff's case was presented to the Trial Court in respect of the transfer of Janwar by Umrao Kunwar in accordance with the offer made by her in the compromise of 19th December 1887. Nowhere in the pleading did the plaintiff ever ratify that transfer in explicit terms. She never stated, that she consented to Umrao Kunwar making the transfer in question. In this particular instance it was necessary to obtain an exact statement in respect to a consent, for the transfer of Janwar under this arrangement was not necessarily a transfer which would have had effect after the lifetime of Umrao Kunwar. It is in fact the case for the plaintiff that, if the profits of Janwar had been correctly calculated, the obligation created against Umrao Kunwar would have ceased to exist before the latter's death. The plaintiff, however, was permitted in the course of the trial in the Trial Court to take up an extraordinary position to the following effect. Having satisfied herself that if she ratified Umrao Kunwar's action in the matter there would be a substantial profit accruing to her after the accounts were taken in respect of the transaction in question, she proceeded to set up the position that that transaction should stand (although she never suggested that she consented to it) in order that she might be permitted to recover the balance of profit which, she said, should have accrued if the accounts had been prepared properly. It is clear enough to us that if the accounts had been taken properly, there is at any rate no balance due to the defendant-respondent in respect of Umrao Kunwar's accepted offer contained in the compromise of the 19th December, 1887, and it is quite possible that the defendant-respondent has gained more under that transaction than the amount which he agreed to accept in the compromise. We do not understand, how the learned Subordinate Judge arrived at the figures contained in List A which is appended to his decree. We have discovered many errors in those figures, and the amount of realizations from Janwar in those figures do not correspond with the amount of realizations from Janwar given in the Commissioner's report which the learned Subordinate Judge accepted. The realizations from Janwar in the Commissioner's report are considerably greater than those given in the Appendix. But it appeared to us that it was impossible for the plaintiff-appellant, not only in view of her own pleading but in view of the ordinary rules of pleading, in absence of clear and final proof of consent to Umrao Kunwar's action in the matter, to ratify a transaction by Umrao Kunwar which she considered to be to her own advantage. No difficulty arises now, for the learned Counsel for the plaintiff-appellant, who has, in his arguments before us, shown admirable reasonableness and every desire to rectify any omissions and errors that have occurred in the Court below, has agreed to withdraw all claims for extra profits in the event of a decision that Gaya Kunwar did not consent to or ratified the transfer made by Umrao Kunwar in the course of the proceedings of 19th December, 1887. He does not assert now that Gaya Kunwar ever ratified this transfer or consented thereto. We have already noted that there is nothing in the compromise to show such ratification or consent by Gaya Kunwar. It is to be noted from A-9 that although the two compromises are contained on one paper they are made perfectly separately. Th first compromise is stated to be between Har Nath and Gauri Nath plaintiffs and Gaya Kunwar, and the second compromise is stated to be between the same plaintiffs and Umrao Kunwar.

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(4) 31 B. 560; 9 Bom. L. R. 1049.

We shall now examine the evidence upon which the learned Counsel for the respondent relies in support of his argument that Gaya Kunwar consented to these transfers. We have already touched upon some of the evidence. In the first place it is common ground that, even before the partition through the Revenue Court, which came into effect from the 1st July, 1888, the two ladies had from the end of 1886 onwards, as a matter of mutual arrangement, taken separate portions of the estate into their individual management and we have already noted that in A-46, which was executed on the 20th January, 1888, Gaya Kunwar made a transfer in favour of Surat Singh in which she stated that Mandauli and Janwar were in her exclusive proprietary possession and occupation without any co-parcenership. In the partition through the Revenue Court both Umrao Kunwar and Gaya Kunwar were putting themselves forward as independent of one another. That much is clear. Each was claiming the right to transfer her own share without objection by the other and the same position was taken up on the proceedings in execution of the compromise decree which are detailed in A-81. Here Hazari Lal, Gaya Kunwar's agent, referred to past transfers by Gaya Kunwar and future transfers which he proposed to make. In the transfer which was made by A-42 on the 21st October, 1889, by Gaya Kunwar to Surat Singh we have again a clear statement by the lady of complete rights over the villages of Manduali and Sikrauri. We have further the fact that she received Rs. 1,411-15-0 from Umrao Kunwar, which had formed part of the consideration of the deed executed by Umrao Kunwar in A-16 on the 23rd December, 1887, and was thus taking to herself something which Umrao Kunwar had obtained by transfer. Certain passages in her evidence have been dwelt on by the learned Counsel. At o. p. 667 she admitted having signed the abortive deed on the 3rd June, 1886, (Ex. A-6) but that circumstance goes for nothing. All that she admits here is that she was ready to agree to a transfer by Umrao Kunwar and herself at a time when they were friendly, but that later on she withdrew her consent and the transfer never took place. She admitted later on that she had paid money in settlement of her husband's debts. She admitted frankly at o. p. 667 that she made transfers without taking the permission of Umrao Kunwar and that Umrao Kunwar made transfers without taking her permission. But this evidence taken together does not, in our opinion, establish such a consent by Gaya Kunwar to the transfers by Umrao Kunwar which she now attacks as to make them binding upon the estate, which has now come to her by survivorship. We find that there was no suggestion on the part of the respondent in his pleadings that Gaya Kunwar had consented to these transfers

No issue was framed upon the point and the framing of the second issue would almost go to show that the parties agreed that there had been no consent. That issue is as follows:—

"Were the said mortgages made for a legal necessity and for payment of antecedent debts? Are they for that reason binding on the plaintiff, even though they were not made with her consent?

The most that this evidence can establish is that Umrao Kunwar and Gaya Kunwar each acted independently of one another in making transfers. Each asserted a right, which was not possessed, to deal absolutely with the property in her separate possession. It is to be noted that each had a right to make transfers of the property in her separate possession provided that the transfer did not have effect after her own lifetime. The circumstance that neither objected to a transfer made by the other cannot, in our opinion, be construed to mean more than that neither objected to the other making a transfer, provided that transfer did not affect her own interests in the event of her succeeding to the estate by survivorship. It would not be correct, we think, to draw an inference from these facts that the failure to object by either lady could imply that she consented to a transfer by the other which would have the effect after the lifetime of the transferor. When we are asked to decide that a transaction is ratified by implied consent, it is necessary for us to exclude the possibility of there having been a consent which did not carry the matter up to ratifying an alienation which would defeat the consenter's right to succeed by survivorship. Here it is necessary to have something more than generalities. Knowledge of the effect of what the person alleged to be consenting was doing and an intelligent intention to consent to such an effect must be further shown; and we find an absolute absence of evidence which would justify us in drawing a conclusion that Gaya Kunwar consented to the transfers in question.

Much time was spent by the lower Court in deciding which items that formed consideration of the transfer were justified or were not justified by the legal necessity of the estate. We do not propose to touch upon these points for, as we read the law, the question of legal necessity does not enter into the matter. There having been no consent by Gaya Kunwar, the transfers made by Umrao Kunwar have no effect after the death of the latter lady. For the above reasons we accept the Appeal No. 41 of 1924 and pass a decree for possession of the villages, Janwar, Mandauli, Madna Khera and Tikra Khurd in favour of Gaya Kunwar. This is all the relief which the plaintiff will obtain. She did not ask in her plaint for mesne profits and we see no reason at this stage to allow any extension to enable her to add this relief to the relief which she originally sought. No question of accounting can arise. If the transfers by Umrao Kunwar had been held valid against Gaya Kunwar, she would have had to pay a very large sum of money in order to obtain possession of the villages. She is not entitled to any extension of relief outside what she actually claimed and she actually claimed either the possession of these villages without accounting or, if she failed to obtain possession, then the taking of an account. It did not appear to have occurred to her that she had a claim for mesne profits, and we see no reason why she should be allowed to insert a claim for mesne profits at this stage. Gauri Nath will pay his own costs and those of Gaya Kunwar in both Courts. We consider that Gaya Kunwar has succeeded absolutely in respect of the relief 14 (*a*), the remaining being alternative reliefs. As a consequence we dismiss Appeal No. 52 of 1924. Gauri Nath will pay his own costs and those of Gaya Kunwar in that appeal.

Appeal No. 41 accepted.
Z. K. *Appeal No. 52 dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 133 OF 1924.
February 17, 1926.
Present :—Mr. Findlay, Officiating J. C.
WAMANRAO AND OTHERS—PLAINTIFFS —APPELLANTS
versus
SHRAWAN AND ANOTHER—DEFENDANTS —RESPONDENTS.

C. P. Tenancy Act (I of 1920), ss. 12, 13—Occupancy holding—Surrender to co-sharer—Joint possession by lambardar, *suit for—Contribution, whether can be claimed by co-sharer—Trusts Act (II of 1882), s. 90—"Properly incurred", meaning of.*

A transfer of an occupancy holding is not *ab initio* void but only voidable, as it can be avoided by certain specified persons mentioned in s. 13 of the C. P. Tenancy Act. [p. 943, col. 2.]

A *lambardar* can, therefore, obtain joint possession of land acquired under a surrender by a co-sharer from an occupancy tenant only on making contribution towards the cost of acquisition incurred by the latter: [p. 942, col. 2.]

Moolchand v. *Chittoo*, 5 Ind. Cas. 431; 6 N. L. R. 12 and *Ramdayal* v. *Gulabia Bai*, 4 N. L. R. 120, followed.

The words "properly incurred" in s. 90 of the Trusts Act mean "reasonably and suitably incurred". [p. 944, col. 1.]

Appeal against a decree of the District Judge, Nagpur, dated the 18th December 1923, in Civil Appeal No. 133 of 1923.

Mr. *M. B. Kinkhede*, R. B., for the Appellants.

Mr. *J. C. Ghosh*, for the Respondents.

JUDGMENT.—The original plaintiff Santosh Rao was the *lambardar* of *patti* No. 2 of *Mouza* Khandala. Occupancy field No. 345 in that *patti* was held by one Kashideo and others who executed a deed of surrender in respect of it on 11th April 1921 in favour of the defendants Shrawan and Ghusajee and placed them in possession. The consideration for the surrender was said to be Rs. 1,500. No. 2 *patti* is a 6-anna one and is held as follows :—

	Rs.	a.	p.
Plaintiff	0	1	0
Defendants Nos. 1 and 2	0	2	0
Ragho and Nago	0	1	0
Maroti	0	1	0
Paikoo and others	0	1	0

The defence was that plaintiff had consented to the surrender and a further pleading was offered that, in any event, plaintiff could only be entitled to possession if he contributed proportionately to the cost of acquisition. The Munsif, Katol, on the issues which arose on these and connected pleadings of the parties, came to the following findings :—

(*a*) that the original tenants had surrendered the field to the defendants on 11th April 1921 for Rs. 1,000;

(*b*) that plaintiff and the other co-sharers had not consented to the surrender;

(*c*) that, as the surrender was not to the entire proprietary body, it was in reality a sale in contravention of the Tenancy Law and plaintiff could not be called on for contribution.

A decree for joint possession was accordingly passed in favour of plaintiff as *lambardar* to the extent of the remaining 4-anna share out of the 6-anna *patti* in question. In arriving at the decision he did the Munsif—so far as the question of contribution was concerned—relied on the decision of Prideaux, A. J. C. in Second Civil Appeal No. 210 of 1920 (Ex. P-1.)

The defendants appealed to the Court of the District Judge, Nagpur, and the most vital question involved in that appeal was that of contribution. Plaintiff did not appeal from the decision of the Munsif which disallowed his claim for exculusive possession ; hence he was rightly deemed to have accepted the position that defendants were not trespassers and that he was only entitled to claim joint-possession to the extent of the 4-anna share. Incidentally, the District Judge confirmed the finding of fact arrived at by the Munsif that the consideration of the surrender was Rs. 1,000 only to which he added Rs. 14-0-6 on account of registration and connected charges. The learned District Judge, after considering the decision of Prideaux, A. J. C., quoted above, referred to the case of *Ramdayal* v. *Gulabia Bai* (1) and pointed out that, where some of the members of a proprietary body accept and others reject such a transfer, it cannot be avoided and the latter can only claim joint possession by contributing their share of the cost of acquisition. He held that although registration of the so-called deed of surrender was invalid it would be contrary to equity to allow plaintiff joint possession without contribution. The lower Appellate Court accordingly gave a decree for joint possession in favour of plaintiff to the extent of his one anna share subject to payment by him of one sixth of the cost of acquisition [*cf. Moolchand* v. *Chittoo* (2) .]

The representatives of the plaintiff now deceased have come up on second appeal against this decision. As regards the question of contribution the decision of Bose, A. J. C. in the case of *Moolchand* v. *Chittoo* (2) last quoted was attacked as inapplicable to the facts of this case on the ground that s. 90 of the Trusts Act of 1882 is only to be enforced where the expenses have been "properly incurred." Here it is urged the expenses of acquisition were improperly incurred with the express object of defeating the provisions of the Tenancy Law. It is urged also that the consideration in question was unlawful within the meaning of s. 23 of the Contract Act as the object was to defeat the provisions of the Tenancy Law. Reliance has in this connection been placed on the decision of Prideaux, A. J. C. in Second Civil Appeal No. 210 of 1920 and on *Moti Chand* v. *Ikram-ullah-Khan* (3) and *Mir Dad Khan* v. *Ramzan Khan* (4). The actual point of Tenancy Law involved in these two Allahabad cases was, however, different and they are not peculiarly apposite to the decision in this one. I have been, however, referred to the Bench decision of Baker, J. C., and Prideaux, A. J. C., in *Zingoba* v. *Kautikabai* (5) a year or more after the District Judge had delivered the judgment now under consideration. In that case the learned Judges held that a transfer such as we are concerned with here was an illegal one intended to evade the provisions of the Tenancy Law and, being so forbidden by law, that contribution should not be allowed.

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(1) 4 N. L. R. 120.

(2) 5 Ind. Cas. 431; 6 N. L. R. 12.

With all respect I find myself unable to concur in this decision. It seems to me that a transfer like the present, cannot be regarded as one *ab initio* void under s. 23 of the Indian Contract Act in view of the special law applicable to the transaction. Under s. 13 of the Tenancy Act of 1920, the nearest heir or the landlord could have applied to the Revenue Officer for possession. From any point of view the transfer was not one *ab initio* void but only a voidable one. If the element of voidness as compared with voidableness entered into the transaction it arose only between the defendants and the original tenant: the element of voidableness entered into it as between the transferee and the heirs or the landlord only to the extent laid down in the Tenancy Act. If the transfer were to be considered void *ab initio*, the apposite provisions of the Tenancy Act relating to its avoidance, would have been of an entirely different nature from what they are. In both the Allahabad cases quoted above the position was entirely different: the plaintiffs therein were endeavouring to enforce mortgages and connected agreements the very object and *raison d'etre* of which was to defeat certain provisions of the Agra Tenancy Act relating to the non-transferability of *sir* and *khudkasht* lands. Here the tenant under ss. 12 and 13 of the Tenancy Act is not entirely debarred from transferring his right: he can only do so in certain specified ways under s. 12 (1): if he does transfer the right in any other way, the heirs and the landlord have a special remedy provided in the Revenue Courts for recovering possession. From this point of view I am of opinion that it is incorrect to regard the consideration of a transfer such as we are concerned with here as necessarily an illegal one within the meaning of s. 23, Indian Contract Act, and therefore, void *ab initio*. The special law applicable under the Tenancy Act lays down that the transaction can only be avoided by certain specified persons and, this being so, I do not think it is open to the appellants to urge that the transaction was one void *ab initio* a position which their argument necessarily implies.

A great deal of stress has been laid on behalf of the appellants on the fact that the registration of the *razinama* (D.-1) was in effect a fraud and deceit practised on the Registration Officer in view of the provision of s. 12, sub-s. (4), Tenancy Act. The latter provision was obviously an extra safeguard introduced to prevent or discourage as far as possible improper transfers: it is an incidental provision, so to speak, while the real nature of the transaction as well as the extent to which it can be avoided are laid down in s. 13 of the Tenancy Act. From this point of view I am with all due diffidence unable to accept the decisions of Prideaux, A. J. C. in Second Appeal No. 210 of 1920 and of Baker, J. C. and Prideaux, A. J. C., in *Zingoba* v. *Kautikabai* (5). These decisions proceed largely on what may be termed the utilitarian argument, *viz.*, that registration of such documents is forbidden by law and the connected transaction should be, therefore, regarded as illegal *ab initio*. As I have shown, however, the latter proposition cannot accurately be postulated of the transaction in view of its exact legal nature as laid down in the specific provisions of the Tenancy Act applicable. The incidental argument offered in this case that the document (D-1) being inadmissible in evidence as improperly registered there has been no proof in any case of the consideration having passed need not detain me as there is sufficient independent evidence on record regarding the payment of consideration and in any event the document would be admissible in evidence for a collateral purpose such as we are concerned with where the question involved is whether plaintiff should be allowed to share in the possession obtained by the defendants under the *razinama* without contribution to the costs of acquisition incurred by the latter.

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(3) 39 Ind. Cas. 454; 39 A. 173; 15 A. L. J. 150; 5 L. W. 388; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 26 C. L. J. 24; (1917) M. W. N. 453; 44 I. A. 54 (P. C.).

(4) 44 Ind. Cas. 988; 40 A. 449; 16 A. L. J. 329.

(5) 93 Ind. Cas. 106.

There is another aspect of this matter which deserves consideration. In *Zingoba* v. *Kautikabai* (5) Baker, J. C., and Prideaux, A. J. C., remarked as follows :—

> "We think that devices to avade the Tenancy Law should as far as possible be checked and that when a tenant is induced to part with his land to a fractional co-sharer and not to the *lambardar*, the land thus becoming *khudkasht* of the whole proprietary body, the purchasing co-sharer should not be allowed to claim compensation from his other co-sharers because he obtained possession by a device intended to defeat the Tenancy Law; and that unless the proper mode of procedure, *viz.*, a surrender to the *lambardar*, is followed, other co-sharers can claim a share according to their share in the village without the payment of compensation."

The desirability of effecting such an object as this is obvious but the question is whether under the law as it stands at present such an object can be attained. I have already given my reason for holding that as the Tenancy Law stands at present this is not so.

Now how do the equities stand in a case like the present. The *lambardar* did not attack the transfer with the special weapon the Tenancy Act put ready to his hands. He has chosen to sue in the Civil Court and while nominally impeaching the transfer as illegal he, in reality, founds his case upon and claims proportionate possession from the defendants without paying his share of the cost of acquisition. In other words, he is attempting to obtain free in this suit what in any ordinary circumstances he would have to pay for. The principle "he who seeks equity must do equity" is surely, therefore, applicable here. [*cf. Moolchand* v. *Chittoo* (2).] I am not at all impressed by the contention that the cost of acquisition could not be said to be costs "properly incurred" within the meaning of s. 90 of the Indian Trusts Act, 1882. The costs were *bona fide* and reasonable ones: what was wrong was that the transaction was carried out by a single co-sharer and not by the landlord as such: the words "properly incurred" obviously mean "reasonably and suitably incurred". I am, therefore, of opinion that the decision in *Moolchand* v. *Chittoo* (2) is fully applicable in the present case.

It only remains to deal with the argument that the plaintiffs should be allowed to recover joint possession of the 4-anna share instead of the one-anna share he Santosh Rao held himself. The recent Land Revenue Act now includes a definition of *lambardar* but in doing so it only crystallised what was already the accepted position of such a functionary. I cannot see any reason for holding that the principle laid down in this connection in *Ramdayal* v. *Gulabia Bai* (1) is inapplicable here and I cannot see any reason for holding that the plaintiffs are entitled to recover possession up to the extent of the 4 anna share when there is nothing to show their father has brought this suit with the concurrence and consent of the remaining co-sharers included in the said share.

The appeal accordingly fails and is dismissed. Appellants must pay the respondent's costs in the lower Courts as already ordered.

G. R. D. *Appeal dismissed.*
Z. K.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 217 OF 1924.
March 5, 1926.
Present :—Mr. Justice Kanhaiya Lal
and Mr. Justice Boys.

PARTAP NARAIN SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
RAM KUMAR SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Separation—Separate acquisitions—Burden of proof.

Where a party comes into Court claiming a share in a certain property, it lies upon him to establish the foundation of his case, *viz.*, that the property was Hindu joint family property, to which he as a surviving member is entitled.

The presumption of jointness of a Hindu family does not arise where it appears that before the suit there has been a division of the family property or a separation in the family all the members of which are living separately, though the date of the separation is unknown. [p. 945, col. 2; p. 946, col. 1.]

Where a family is admitted to be separate on the date of the suit, it is on a party who alleges that certain acquisitions were made at a time when the family was joint to prove that they were so made. [p 945, col. 2; p. 956, col. 1.]

A separation in mess and worship may be due to various causes and yet the family may continue joint in estate. In other cases separation may take place and yet partition of the family property may be postponed. [p. 947, col. 1.]

Second appeal from a decree of the District Judge, Benares, dated the 5th November 1923.

Dr. *M. L. Agarwala* and Mr. *Baleshwari Prasad*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The dispute in this case relates to some shares in certain *pattis* of the village Kartarpur, and the complaint of the plaintiffs is that in the course of a partition proceeding, instituted by Lachhman Das for the partition of his share of the said village followed by certain intermediate applications made by Ram Kumar Singh and Mahip Singh for the partition of, what they described, as their share therein, an order was passed by the partition officer in his capacity as Assistant Collector on the report of the *patwari* of the village, directing the correction of certain entries in the *khewat* in a manner prejudicial to the rights of the plaintiffs. The facts of the case are somewhat complicated, and we had some difficulty in getting the right facts in consequence of the manner in which the case was presented to us. We give the facts as stated to us, or as far as they could be ascertained from the papers laid before us for consideration.

The plaintiffs and the defendant Jadunandan Singh are the descendants of one Salhant Singh. The defendant Ram Kumar Singh is the son of Mahip Singh and the nephew of Mata Din, both of whom form a branch of the family from another branch of which Salhant Singh was descended. The allegation of the plaintiffs was that they and their predecessor Salhant Singh were separate from Mahip Singh and Mata Din and also from Ram Kumar Singh, the present contesting defendant. Ram Kumar Singh, however, asserted that he and his father Mahip Singh and also his uncle Mata Din lived jointly with Salhant Singh and his descendants up to 1325F. The dispute between the parties centred round certain acquisitions which had been made in the name of Salhant Singh in 1865, 1866, 1869 and 1894. There was also a dispute about certain property acquired in the names of the plaintiffs in 1901. By an order of the Assistant Collector passed on the 26th September 22 in the mutation proceeding, instituted on the report of the *patwari* above referred to, both branches were recorded as owners of the property purchased in the name of Salhant Singh.

The Trial Court found in a judgment which itself is not free from inconsistencies that the family was separate in mess and some cultivation, but in other respects it was joint. It proceeded to observe that while it could hardly be described as a joint family, it was equally difficult to say that it was a separate family, and the conclusion at which it ultimately arrived was that it was a mixture of both, and that the separation would be deemed to have taken place in 1325 F. It further found that the plaintiffs had no cause of action against Mahabir and that s. 233 (*k*) of the U. P. Land Revenue Act (III of 1901) barred the claim.

The lower Appellate Court examined the evidence produced by the parties and came to the conclusion that, though the evidence was not so clear as it might be, the learned Subordinate Judge was right in holding that the family was not proved to have separated before 1325 F. In arriving at that finding it placed the burden of proof on the plaintiffs to establish that they had made the acquisitions while the family was separate; and since its finding was that a separation before 1325 F had not been proved, it necessarily upheld the finding of the Trial Court that the acquisitions must be presumed to have been made from the joint funds.

It is obvious that the burden of proof was erroneously laid on the plaintiffs, for the allegation of both the parties was that the family was separate on the date of the suit. The question which the Courts below had to determine really related to the status of the family at the time when the acquisitions were made; and it is manifest that if the family was admitted to be separate on the date of the suit, it was on the party that alleged that the acquisitions were made at a time when the family was joint, to prove that they were so made. In *Bannoo* v. *Kashee Ram* (1) their Lordships of the Privy Council observed: "Where a party comes into Court claiming a share in a certain property, it lies upon him to establish the foundation of his case, namely that the property was joint property, to which he as a surviving member was entitled. The presumption of jointness does not arise where it appears that before the suit there has been a division of the family property or a separation in the family, all the members of which were living separately, though the date of the separation might be unknown."

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(1) 3 C. 315; 3 Sar. P. C. J. 781; 3 Suth. P. C. J. 490; Rafique & Jackson's P. C. No. 49; 2 Ind. Jur. 151; 1 Ind. Dec. (N. S.) 788 (P. C.).

In *Bala Bux* v. *Rukhmabai* (2) it was held that if a person claimed to be entitled to a certain property on the death of one of the members of the family, another member of which had admittedly separated himself much earlier, and no agreement by the other members to remain united or to re-unite, had been proved, the ordinary presumption that a Hindu family was presumed to be joint could no longer be availed of to establish a right to that property, and it was the duty of the person claiming that right to establish the state of jointness necessary to make his claim successful.

The presumption of jointness having been destroyed by the admission that the family was separate on the date of the suit, it is for the party, which alleges separation or jointness on a particular date, to entitle him to a particular right, to establish the state of things which would give him that right.

On behalf of the defendants-respondents reliance is placed on the decision in *Ram Ghulam Singh* v. *Ram Behari Singh* (3) and that of *Bhagwani Kunwar* v. *Mohan Singh* (4). But in those cases an attempt was made to establish that the family was joint when the right to sue accrued, and the evidence went to show that there had been separation, though the actual date of separation was not ascertainable. In the present case the allegation of the defendants was that a separation had taken place in 1325 F and that of the plaintiffs was that it had taken place much earlier. The acquisitions made between 1865 and 1894 were made in the name of Salhant Singh and that in 1901 in the names of the plaintiffs, and inasmuch as the presumption of jointness was destroyed by the admission that there had been a separation prior to the suit, it was for the defendants to establish that the family was joint when these purchases were made, or that the purchases had been made from the joint family funds.

As the lower Appellate Court appears to have been largely influenced in arriving at its finding by the question of burden of proof, which was incorrectly thrown on the plaintiffs who had an ostensible title in the disputed property by virtue of the purchases which had been made in their names or in the name of their ancestor, it is difficult to act on that finding; and the only course open to us is either to send the case back to the lower Court for proper findings on the evidence adduced, or to go into the evidence ourselves and to record a finding after hearing the parties. This litigation has been going on since 1923, and affects materially a partition proceeding now pending in the Revenue Court, and we have considered it consequently desirable that we should examine the evidence ourselves and come to a finding on the main question upon which the determination of the title of either of the two contending parties must clearly rest. We have had the assistance of the learned Counsel for the parties in going through the evidence and we agree with the lower Appellate Court that some weight must be attached to the opinion of the Trial Court which had an opportunity of seeing the witnesses, and was in a better position to judge by their demeanour which side was speaking the truth. The Trial Court relies very largely on the evidence of one Babu Sankata Prasad, who was a school-master, employed in the village in the year 1901-02. This gentleman has since been practising as a Pleader and is not connected with either party, and it can hardly be disputed that he had an intimate acquaintance with the real state of affairs, because, he used to be supplied food by the family, and he was working in a school maintained in the house of the parties, of which Ramgulam Singh, one of the plaintiffs-appellants, was the manager. The witness lives at present in a village a mile off from the village in dispute, but at the time when he was employed in the school he lived in the school premises and his statement is that though the parties messed separately and also cultivated some land separately, they had a joint management and a joint staff for the collection of rents and also a joint cultivation of 8 or 10 ploughs. He further states that the collection of rents was made jointly, that Ramgulam was a leading member of the family, and that from the collections made the expenses connected with the marriage and funeral ceremonies etc. of the whole family were defrayed and the stable expenses were also paid from the joint fund. In other words, though each party messed separately and paid for its messing expenses from that portion of the land which was allotted to it for cultivation, all other expenses in connection with the management of the family property, the cultivation of the joint land, and the marriage and funeral ceremonies were jointly incurred from the common fund. It not infrequently happens that where a family outgrows the conveniences at its disposal or some of the members have to go for their living or work elsewhere, the messing becomes temporarily separate, but for all other purposes the income of the entire family, or of the family property, remains in the joint stock to meet all common expenses. As observed by their Lordships of the Privy Council in *Suraj Narain* v. *Iqbal Narain* (5) a separation in mess and worship may be due to various causes and yet the family may continue joint in estate. In other cases a separation may take place and yet a partition of the family property may be postponed. That was not, however, the condition of this family at the time. There was a joint cultivation but a portion of the land was set apart for separate cultivation to meet the separate messing expenses of some of its members or in other words to obviate inconveniences due to the growth or bifurcation of the family into several branches. The rest of the cultivation continued to be joint. The entire property was managed by a joint staff paid from a common fund. The collections made by the manager, Ramghulam Singh, were kept in a joint stock, and the marriage and funeral ceremonies of the entire family were met from that fund.

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(2) 30 C. 725; 7 C. W. N. 642; 5 Bom. L. R. 469; 30 I. A. 130; 8 Sar. P. C. J. 470 (P. C).

(3) 18 A. 90; A. W. N. (1895) 234; 8 Ind. Dec. (N. S.) 765.

(4) 88 Ind. Cas. 385; 23 A. L. J. 589; A. I. R. 1925 P. C. 132; 49 M. L. J. 55; (1925) M. W. N. 421; 41 C. L. J. 591; 22 L. W. 211; 29 C. W. N. 1037 (P. C).

If there were any doubt about the status of the family in 1901-1902, it is removed by the *dastur dehi* of the village Madasia, wherein it was stated that no division of properties was made between the co-sharers because the members of the family lived jointly. Both the Trial Court and the lower Appellate Court have referred to the above document as establishing beyond doubt that the family was joint in 1901 and at no stage of the case it was ever disputed that the *mahal* and the *dastur dehi* relied on did not belong to the family, or that the contending parties were not co-sharers therein. In fact the *khewat* of *mahal* Ramghulam Rai, also known as Ramghulam Singh, of the village Madasia is also on the record; and we have no hesitation in finding that up to 1901, at all events, the family was joint, though, for the sake of convenience, some of the members were messing separately, and met their expenses from some land, which had been allotted to each of them for their cultivation. This *dastur dehi* was verified in 1906. Reading it with the evidence of Babu Sankata Prasad we can safely carry the period of jointness up to 1902, that is beyond the dates when the acquisitions in question were made.

On behalf of the plaintiffs-appellants our attention has been invited to the statement of Ramghulam Singh in a proceeding instituted by him under s. 145 of the Cr. P. C. against Fateh Bahadur Singh and others in 1921, wherein Ram Kumar Singh is said to have stated that he had separated from the plaintiffs at the time of the settlement, which took place in 1882, and the case of the present plaintiffs is said to have then been that the property then in dispute, namely, the village Uttargaon, had been acquired from the joint family fund. The deposition aforesaid was put to Ram Kumar Singh when he was examined in the present case; and the Trial Court which recorded his statement observes that the witness resiled from it. Whether he did so or not, both the parties in the present case are seeking to resile from the position which they had taken up in the criminal proceeding above referred to. Ram Kumar Singh now says that the family has continued to be joint up to 1918, while the plaintiffs choose to affirm that it had separated very long ago. Each party appears to have been anxious at the time to set up allegations which suited its case, regardless of the truth, and the Courts below have, in the face of the conflict, rightly confined their attention to the more important of such independent evidence—oral and documentary—which was forthcoming in the case, and we have done the same in arriving at the conclusion that the family was joint when the acquisitions in question were made.

That being the position, the plaintiffs and the defendant Ram Kumar Singh, who is the heir of his father Mahip Singh and his uncle Mata Din, must be treated to be the joint owners of the properties in dispute and the acquisitions must be deemed to have been made from the joint fund possessed by the family at the time. It is not disputed that the family had a nucleus of some ancestral property and some sale-deeds bear evidences of earlier loan transactions which were either credited towards or for which some money was left out of the sale consideration.

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(5) 18 Ind. Cas. 30; 35 A. 80 at p. 88; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 315; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40 (P. C.).

It is argued on behalf of the plaintiffs that there was a decision in 1882 between the present plaintiffs on the one hand and Ram Kumar Singh on the other, which operated as *res judicata*, inasmuch as no title was set up by Ram Kumar Singh to any share in the property, which the plaintiffs were then claiming. It appears that in 1864 a deed of mortgage was executed by some Pandey Brahmans in favour of Salhant Singh and a suit was brought in 1882 for the recovery of the money due on that mortgage by foreclosure. Ram Kumar Singh was added in that suit as a *pro forma* defendant by reason of his having asserted his title to a portion of the property by a purchase said to have been made in 1865. It was found in that case that that purchase was invalid and unenforceable. Ram Kumar Singh did not set up a joint right to the mortgage-bond then in suit, but it is possible that that mortgage may have been a separate transaction entered into by Salhant Singh on his own account. The decision in that case cannot in any case affect other property or the points in controversy in the present case.

It is also urged that the Courts below had erred in holding that there was no cause of action against Mahabir. We do not know whether the name of Mahabir is recorded in the revenue papers. By the order passed in the mutation proceeding which forms the subject of complaint in the present suit, we do not find that the name of Mahabir was directed to be recorded in respect of any portion of the *patti* Ram Kumar Singh. He is said to have made an intermediate application for the partition of his share, but we are not aware that any entry was made when the order complained of was passed which is really prejudicial to the rights of the plaintiffs. The appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 20 OF 1925.
March 17, 1926.
Present:—Mr. Findlay, Officiating J. C.
GUNAJI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
RAMCHANDRA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by father—After-born son, when may impeach.

If there be an alienation invalidly made by a Hindu father where a son was either born or *in gremio matris*, the rights of any after-born son attach thereto and the latter is entitled to challenge the validity of the transaction. [p. 949, col. 1.]

Hurodoot Narain Singh v. *Beer Narain Singh*, 11 W. R. 480 and *Sabapathi* v. *Somasundaram*, 16 M. 76; 2 M. L. J. 244; 5 Ind. Dec. (N. S.) 760, followed.

Appeal against a decree of the Additional District Judge, Nagpur, dated the 22nd November 1924, in Civil Appeal No. 74 of 1924.

Mr. *A. V. Wazalwar*, for the Appellants.
Mr. *K. K. Gandhe*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants Gunaji and Kashinath, sons of Ramchandra, sued their father and defendant No. 2, Chirkut in the Court of the Second Subordinate Judge, Second Class, Nagpur, for the setting aside of the decree obtained by Chirkut in Civil Suit No. 124 of 1922 for sale of three-fourths of the family house in satisfaction of a mortgage, dated 13th December 1911, executed by Ramchandra, his mother Savitri and brother Damu. The allegation was that the guardian *ad litem*, Ramchandra, acted fraudulently against the interests of the minor sons, that the mortgage was not for legal necessity and that the shares of the minor were not involved.

The Judge of the First Court gave no finding on the question of legal necessity and practically decided the suit on the ground that the minors were not born on the date on which the mortgage-deed was executed. The Subordinate Judge apparently missed the point that it would have been sufficient if either of the minors had on the said date been *in gremio matris*.

The plaintiffs appealed to the Court of the Additional District Judge who held that there had been a failure to prove that Gunaji was born on 9th May 1912, or that he was *in gremio matris* on the date of the execution of the mortgage-deed.

The finding of fact of the Additional

District Judge is, however, a vague and unsatisfactory one. It is difficult to make out from his judgment whether he believed or not that the Municipal entry (P. 2) showing a son as born to one Ramchandra Nago on 9th May 1912, referred or not to a son of the present defendant-respondent No. 1. The parties were entitled to a definite finding on this point. Apart from this, however, the Additional District Judge went on to say as follows:—

"Even assuming that respondent Ramchandra was referred to in the entry, it should have been shown that the particular son, to whom the entry related, was alive and that he was Gunaji."

I am unable to see why this position should have been postulated by the Additional District Judge. If there was an alienation invalidly made by the father, when a son was either born or *in gremio matris*, the rights of any after-born son would attach thereto and the plaintiffs in this capacity, even if neither of them was the son supposed to have been born or *in gremio matris* on the date of the execution of the mortgage-deed, would be entitled to challenge the validity of the transaction: *cf. Hurodoot Narain Singh* v *Beer Narain Singh* (1) and *Sobharam Teli* v. *Makdu* (2), as well as *Sabapathi* v. *Somasundaram* (3). Baker, O. J. C., in *Man Singh* v. *Karan Singh* (4), has fully considered the legal incidents applicable in a case like the present. He therein pointed out that a son cannot object to alienations validly made by his father before he was born or begotten, but if the alienation was made by a father without necessity and without the consent of a son then living, it would be invalid not only against him but also against any son born before he had ratified the transaction.

I am of opinion, therefore, that this case has been unsatisfactorily dealt with and that the suit must go back to the Court of first instance for re-trial. The Subordinate Judge has, first of all, to decide whether any son was born to Ramchandra or was *in gremio matris* on the date of the execution of the mortgage-deed in question. Incidently, he will have to find whether, if there was any such son, he was either of the plaintiffs, or, if, not, whether a previous son had been born to Ramchandra and had died. There are various other questions in the suit relating to legal necessity, fraud and the like which require decision, and it is impossible in the present state of the case to decide the suit on the merits.

Both the judgments and decrees of the lower Courts are accordingly reversed and the suit is remanded for re-trial to the Court of first instance with directions to re admit it under its original number in the register of civil suits and to proceed to determine it on the merits with advertance to the above remarks. The costs incurred in this Court and in the lower Courts will follow the event. There will be no certificate for refund of Court-fees.

G. R. D. *Suit remanded.*

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(1) 11 W. R. 480.
(2) 12 C. P. L. R. 63 at p. 65.
(3) 16 M. 76; 2 M. L. J. 244; 5 Ind. Dec. (N. S.) 760.
(4) 78 Ind. Cas. 260; A. I. R. 1924 Nag. 200.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 487 OF 1926.
April 7, 1926
Present:—Mr Justice Sulaiman.
MOHAMED SHER KHAN AND OTHERS—
DEFENDANTS—APPELLANTS
versus
CHAMMAN KHAN AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 41—Civil Procedure Code (Act V of 1908), s. 102—Suit for contribution by co-judgment-debtor—Second appeal.

A suit by a co-judgment-debtor to recover by way of contribution a share of the decretal amount paid by him is a suit of the nature of a Small Cause and not one falling under cl. 41, Sch. II, of the Provincial Small Cause Courts Act and, therefore, no second appeal is competent in such case where the value of the suit is less than Rs. 500.

Roshan Lal v. *Ram Lal*, 4 A. L. J. 543; A. W. N. (1907) 230 and *Ant Ram* v. *Mithan Lal*, 45 Ind. Cas. 560; 40 A. 135; 16 A. L. J. 44, distinguished.

Second appeal against a decree of the Additional Subordinate Judge, Badaun, dated the 11th December 1925.

Mr. *Harnandan Prasad*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit brought to recover by way of contribution a share of the decretal amount paid by the plaintiff. The decree was a joint decree for damages against the defendants. The amount claimed was less than Rs. 500. In my opinion no second appeal lies to the High Court. The suit was obviously one of a Small Cause Court nature, and a second appeal is barred. The learned Vakil for the appellants relies on cl. 41 of Schedule II of the Provincial Small Cause Courts Act. That clause obviously applies to suits for contributions brought by a *sharer in joint property* in respect of the payment made by him of money due from a co-sharer. This is not the case here. The parties are not sharers in any joint property at all. They are co-judgment-debtors jointly liable to pay the amount of the decree. I may refer to *Roshan Lal* v. *Ram Lal* (1) and *Ant Ram* v. *Mithan Lal* (2).

It is lastly urged that this appeal should be treated as a revision. Assuming for the sake of argument that the lower Appellate Court has made a mistake on a point of law (which is by no means clear), the case does not fall under s. 115, C. P. C. The Court had the jurisdiction to hear the appeal and to dispose of it; whether it has done so rightly or wrongly is immaterial. It has committed no irregularity in the exercise of its jurisdiction. The appeal is accordingly dismissed under O. XLI, r. 11, C. P. C.

R. L. *Appeal dismissed.*

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(1) 4 A. L. J. 543; A. W. N. (1907) 230.

(2) 45 Ind. Cas. 560; 40 A. 135; 16 A. L. J. 44.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 983 OF 1923.

January 8, 1926.

Present:—Justice Sir Charles Gordon Spencer, KT.

SURYADEVAR MAHALAKSHAMMA
—PLAINTIFF—APPELLANT
versus
VENNAM NAGAYYA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, alienation by—Necessity—Purchase of other properties—Benefit of estate.

If the parties who have to support an alienation made by a Hindu widow can show that the estate has been improved by selling immoveable property and buying other lands of equal or greater value and more convenient for cultivation and management, the Court will not set aside such a transaction. [p. 957, col. 1.]

In re Krishnasawmi Doss, 13 Ind. Cas. 648; (1912) M. W. N. 167; 11 M. L. T. 182, and *Ramsumran Prasad* v. *Shyam Kumari*, 69 Ind. Cas 71; 49 I. A. 342 at p. 346; 31 M. L. T. 200; 3 P. L. T. 749; A. I. R. 1922 P. C. 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. 175; 27 C. W. N. 269; 37 C. L J. 356; 44 M. L. J. 751; 25 Bom. L. R. 634 (P. C.), followed.

Second appeal against a decree of the District Court, Guntur, in A. S. No. 157 of 1922, preferred against a decree of the Court of the District Munsif, Tenali, in O. S. No. 794 of 1920.

Mr. *G. Lakshmanna*, for the Appellant.

Mr. *Ch. Raghava Rao*, for the Respondents.

JUDGMENT.—This is an idle suit and an idle appeal. The plaintiff, who was the daughter of the last male-holder, brought this suit to set aside an alienation made by her mother on the 24th February 1900 of immoveable property which belonged to her deceased father and to recover the same. At the trial it came out that the land in question was sold because it was situated far away from Kollur, which was the plaintiff's mother's residence, in order to buy better land in Kollur itself. Both the District Munsif and the District Judge found that the sale was valid and binding on the plaintiff, because the lands sold were situated in an out-of-the-way village and yielded very little and because the object of the sale was, with the aid of the proceeds of the sale and some other money contributed by the plaintiff's mother, to purchase in plaintiff's name better land which was more convenient for cultivation. The suit was, therefore, dismissed.

Now it is argued in second appeal that the defendants failed to prove necessity for the sale. Reliance is placed on a decision in *Ganesa Aiyur* v. *Amirthasami Odayar* (1) in which Kumaraswami Sastri, J, observed "Families often own lands at some distance from their village and I do not think the mere fact that the lands are a few miles away would justify a Hindu father in alienating the lands." In that case the lands that were sold were within 10 miles of the 1st defendant's village. The substantial reason for the Court setting aside the alienation in that case appears from the words at page 247*. "The family was not a trading family or one carrying on money lending business and the starting of prospective money-lending transactions is no ground for alienating family properties." The starting of money-lending transactions was one of the objects with which the family property had been sold.

Then in *Ganap* v. *Subbi* (2) there is this observation of Justice Batchelor; "a widow can alienate in order to preserve the estate, but we do not think that she is entitled to alienate merely in order to improve it." In *Subramania Chetty* v. *Chidambaram Mudali* (3) Sadasiva Iyer, *J.*, called attention to the opinion of Sundara Iyer, J., in *In re Krishnasawmi Doss* (4) that manifest benefit was sufficient and it was not necessary to prove necessity for an alienation made by a manager of a Hindu family for it to have a binding effect on the junior member's share. What Sundara Iyer, J., said was "it must certainly be shown that the family would not lose by parting with ancestral lands and purchasing new lands. This would necessitate the giving of evidence to show that the new lands are at least not inferior in quality and value to the old lands. It may be open to an alienee to establish reasonableness by showing that the though the new lands are not superior in value to the old lands, the family would otherwise gain by the changes." The learned Judge was inclined to substitute the question of whether the sale was a proper and reasonable act for the question whether it was necessary, in cases of alienation. This view finds support in the case decided by the Privy Council in *Ramsumran Prasad* v. *Shyam Kumari* (5). Their Lordships point out that the word "necessity" when used in this connection has a somewhat special almost technical meaning. They say that if an act of alienation of a widow is reasonable and prudent and for the interest of the estate in matters of compromise, it will fall within the powers of the holder of a Hindu woman's estate, either as being an alienation which is deemed to be induced by necessity or as being in a parallel position to an alienation induced by necessity. I am of opinion that the view taken in *Ganap* v. *Subbi* (2) as to the meaning of "necessity" and "benefit" is too narrow. If the parties who have to support an alienation mada by a widow can show that the estate has been improved by selling immoveable property and buying other lands of equal or greater value and more convenient for cultivation and management, Courts will not set aside such transactions. In *Subramanya Chetty* v. *Ramakrishnamma* (6) a case came before Devadoss, J., and myself in which a widow borrowed money and improved her husband's estate by completing an unfinished house. We held that the reversioner who had taken the benefit of the improvements made by the widow was not entitled to impeach the act of alienation by which the estate had been improved. The present case is a stronger one, because there has been no loss or encumbrance upon the estate caused by the alienation, seeing that the plaintiff's mother left the estate in possession of better lands in place of those sold away and more conveniently situated for cultivation.

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(1) 44 Ind. Cas. 605; 23 M. L. T. 245; (1918) M. W. N. 892.

(2) 32 B. 577; 10 Bom. L. R. 927.

(3) 69 Ind. Cas. 756; 41 M. L. J. 459; 14 L. W. 495; (1921) M. W. N. 740.

*Page of 23 M. L. T.—[*Ed.*]

There are no merits in this second appeal. It is dismissed with costs.

V. N. V. *Appeal dismissed.*
Z. K.

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN S. A. No. 1834 OF 1925.
February 26, 1926.
Present :—Mr. Justice Lindsay and
Mr. Justice Mukerji.
BACHHAN—PLAINTIFF
versus
THE MUNICIPAL BOARD OF MIRZAPUR
—DEFENDANT.

Court Fees Act (VII of 1870), s 7 iv (d)—Suits Valuation Act (VII of 1887), s. 8—Injunction, suit for —Valuation—Court-fee payable.

Under the provisions of s. 8 of the Suits Valuation Act the value of a suit for an injunction for the purposes of Court-fees and of jurisdiction must be the same and Court-fee must be paid according to the amount at which the relief sought is valued in the plaint. [p. 952, col. 2.]

OFFICE REPORT.—The suit giving rise to this appeal was brought for a declaration of title in respect of a certain plot of land and for an injunction restraining the defendant from interfering with plaintiff's construction over the land in dispute. He valued the suit at Rs. 1,100 the value of the plot in suit and at Rs. 10 the value of the injunction prayed for (*vide* paper No. 105 C on the record and para 7 of the plaint). The Court-fees paid on the plaint was Rs. 20 only which is too little. According to a ruling of this Hon'ble Court reported as *Jogeshara* v. *Durga Prashad Singh* (1) the injunction claimed is a consequential relief and consequently the suit falls within the purview of s. 7 cl. iv para. (*c*) of the Court Fees Act (VII of 1870) and is liable to be charged with an *ad valorem* Court-fee calculated at Rs. 1,100 which comes to Rs. 107-8-0 according to the schedule of Court-fees in force at the time when the suit was instituted. Rupees 20 having already been paid there is a deficiency of Rs. 87-8 payable by the plaintiff-appellant for the Court of first instance.

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(4) 13 Ind. Cas. 618; (1912) M. W. N. 167; 11 M. L. T. 182.

(5) 69 Ind. Cas. 71; 49 I. A. 342 at p. 346; 31 M. L. T. 200; 3 P. L. T. 749; A. I. R. 1922 P. C. 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751; 25 Bom. L. R. 634 (P. C.).

(6) 84 Ind. Cas. 868; 20 L. W. 627; (1924) M. W. N 794; A. I. R. 1925 Mad. 403.

(1) 24 Ind. Cas. 679; 36 A. 500; 12 A. L J 844.

His claim having been dismissed by the first Court the plaintiff-appellant moved the lower Appellate Court in appeal valuing his appeal at Rs. 1,100 and paying a Court-fee of Rs. 20 only. The memorandum of appeal to that Court for the reason set forth above and according to the schedule of Court-fee then in force should have borne a Court-fee of Rs. 85 out of which Rs. 20 have already been paid. There is, therefore, a deficiency of Rs. 65 payable by the plaintiff-appellant for the lower Appellate Court.

The lower Appellate Court dismissed the appeal with costs. The plaintiff-appellant then preferred this second appeal and again valued at Rs. 1,100 and paid Rs. 10 only as Court-fee. As shown above and with reference to the grounds of appeal taken in the memorandum of appeal to this Court as well as the relief sought by the appeal he should have paid here a Court-fee of Rs. 85 while he has paid Rs. 10 only. There is, therefore, a deficiency of Rs. 75 payable by the plaintiff-appellant for this Court.

The result is that the deficiency payable by the plaintiff-appellant for all the three Courts is Rs. 227-8.

OBJECTION.—I take exception to the stamp report and shall file objections in writing if necessary. If the matter is put up before the Court, I shall address the Court orally.

Dr. *K. N. Katju*, for the Appellant.

Mr. *Sankar Saran*, for the Respondent.

JUDGMENT.—We have heard the Counsel for the plaintiff-appellant in this case in connection with the Office Report dated the 17th of February 1926 regarding the deficiency in the Court-fee in all three Courts. According to the Office Report there is a deficiency of Rs. 227-8 payable by the plaintiff-appellant.

In our opinion the Office Report is correct. The suit was brought for the purpose of obtaining a declaration of title regarding a certain piece of land in Mirzapur and for the declaratory relief a Court-fee of Rs. 10 was paid. Further relief was sought in that the plaintiff asked the Court to issue a perpetual injunction restraining the Municipal Board of Mirzapur from interfering in any way with the construction of a *chabutra* which the plaintiff desired to erect on the land in question.

In para. 7 of the plaint we find the following "For purposes of jurisdiction the value of the thing claimed is Rs. 1,100 and for payment of Court-fee it is Rs. 10 in respect of declaration and Rs. 10 for the issue of an injunction."

As regards the relief by way of declaration there can be no dispute. As regards the Court-fee payable for relief by way of an injunction that is regulated by s. 7 iv (*d*) of the Court Fees Act, which lays down that in a suit to obtain an injunction the Court-fee shall be paid according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

We have to read this along with s. 8 of the Suits Valuation Act, Act VII of 1887, according to which in suits of the class we are now considering the value as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same. In this case for purposes of jurisdiction, the plaintiff valued what he calls, the "thing claimed" at Rs. 1,100 and consequently the suit was instituted in the Court of the Subordinate Judge. It seems to us, therefore, that having regard to the provisions of the two sections just mentioned the plaintiff was bound to pay a Court-fee for relief by way of injunction on the valuation of Rs. 1,100 and that is what the office has reported.

We, therefore, direct that this appeal be not heard until the plaintiff-appellant has made good the deficiency reported by the office. Of course, the appellant is at liberty, if he desires to avoid the payment of the deficiency reported in respect of this Court, to amend his plaint and memorandum of appeal. We give the plaintiff an opportunity to do so. We allow a month for making good the deficiency.

Z. K. *Order accordingly.*

OUDH CHIEF COURT.

DIVORCE CASE NO. 1 OF 1926.

March 2, 1926.

Present:—Mr. Justice Ashworth.

ROBERT HENRY LEADON—APPLICANT

versus

ETHEL MAY LEADON AND ANOTHER—OPPOSITE PARTY.

Divorce Act (IV of 1869), ss. 3 (1), 10—Oudh Chief Court, whether has original jurisdiction to entertain *petition for divorce—Residence within jurisdiction, nature of —Interpretation of Statutes.*

Where an Act says that a person may present a petition to a particular Court, it must be inferred that it means that the Court shall have power to entertain and decide the petition. [p. 953, col. 2.]

Generally a qualifying word in a Statute must be made to qualify the word nearest to it. [p. 954, col. 1.]

Under s. 10 of the Divorce Act the Oudh Chief Court has original jurisdiction in matters of divorce under the Act. [p. 953, col. 2.]

The word 'together' in s. 3 (1) of the Divorce Act governs only the word 'resided' and not the word 'reside'. Where a petitioner and respondent both reside within the jurisdiction of a Court, even though they did not reside together within the jurisdiction of such Court, the Court has jurisdiction to entertain a petition for divorce. [p. 954, col. 1.]

Application for dissolution of marriage with damages instituted on the 1st February 1926 disposed of by Mr. Justice Ashworth, dated the 2nd March 1926.

Messrs. *F. Carlton* and *H. K. Ghosh*, for the Applicant.

Mr. *St. George Jackson*, for Mr. J. H. Thompson, Opposite Party.

Mr. *Motilal Saksena*, for Mrs. E. M. Leadon, Opposite Party.

JUDGMENT.—In this case Robert Henry Leadon petitions for the dissolution of his marriage with Ethel May Leadon on the ground of her misconduct. The misconduct alleged is that she lived in open adultery in Wazirganj, Lucknow, for the period of almost two months, June and July 1925, with John Hope Thompson, co-respondent, and on divers occasions with other unknown persons committed adultery. The defence consisted in a denial of misconduct, and in the averment of such misconduct on the part of the petitioner himself as would make it improper for him to obtain a decree, even if he could prove his allegations against the respondent and co-respondent. John Hope Thompson was made co-respondent in this case.

The following issues were framed by the Court:—

1. Has this Court original jurisdiction in respect of divorce?
2. If so, has it local jurisdiction in a case where the husband and wife, as admitted in the plaint, last resided together in a place outside the Province of Oudh?
3. Did the respondent, Ethel May Leadon, in June and July 1925 live in open adultery with the co-respondent, John Hope Thompson?
4. Has the petitioner since March 1923 been guilty of misconduct with a Mrs. Cole and should he, on that account, be refused a divorce?
5. What damages, if any, should the petitioner be awarded against the alleged co-respondent, John Hope Thompson?
6. What should be the order as to costs?

As to Issue No. 1 the argument put forward by the co-respondent's Counsel was that the jurisdiction of High Courts in respect of divorce is conferred by s. 4 of the Indian Divorce Act, IV of 1869. That section only continues the jurisdiction already possessed by High Courts at the date when the Act came into force. It is common ground that at one time the Judicial Commissioner was the District Judge, within the meaning of the definition of this expression in s. 3 (2) of the Act, but that subsequently the District Judge of the particular district where the case was brought was substituted for the Judicial Commissioner as District Judge within the meaning of the expression "District Judge." Up to the time then when the Oudh Chief Court Act, IV of 1925, brought into existence the Chief Court of Oudh, the original and appellate jurisdiction in respect of divorce proceedings was vested in the Allahabad High Court, and not in the Judicial Commissioner's Court. If s. 4 were, therefore, the only section that conferred powers of original jurisdiction in divorce proceedings on High Courts, the Chief Court of Oudh would not possess such jurisdiction. It is, however, plain that s. 10 and not s. 4 is the section which confers jurisdiction on High Courts generally. This section begins "Any husband may present a petition to the District Court or to the High Court, etc.," Section 4 merely applies to High Courts which, before the Divorce Act came into force, had jurisdiction. If s. 4 were omitted, s. 10 would suffice to confer on all High Courts powers of original jurisdiction because where an Act says that a person may present a petition to a particular Court it must be inferred that it means that the Court shall have power to entertain and decide the petition.

As to Issue No. 2, the present place of residence of the petitioner must be held to be Rae Bareli, where he was posted two years ago as a Reserve Inspector, and where he is still posted, and where he maintains a bungalow with his furniture therein. It is equally true that the respondent has resided for a year at Lucknow. Both parties must, therefore, be deemed to reside within the local limits of the Chief Court of Oudh. It has been urged that the expression "within the local limits of.........whose jurisdiction under this Act the husband and wife reside or last resided together," which occurs in s. 3 (1) of the Divorce Act, should be so construed as to make the word "together" qualify not only the word "resided" but also the words "resided together." This question came before a Single Judge of the Bombay High Court, *Borgonha* v. *Borgonha* (1). It was held that the word "together" does not govern the word "reside" in the section. In this case *Durand* v. *Durand* (2) was followed, which was a decision of three Judges in Calcutta, and a previous two Judges decision of the Bombay High Court, *Xavier* v. *Xavier* (3), was not followed. The matter again came up before a Full Bench of the Punjab Chief Court, and there two Judges held that the word "together" does not govern the word "reside." Some doubts on the matter were expressed by Mr. Justice Rattigan. The preponderance of opinion appears, therefore, to be in favour of making the word "together" govern only the word "resided." The general rule is that a qualifying word shall be deemed to qualify the word nearest to it. For this reason I adopt the view for which there is the greater authority, and decide that the fact of the petitioner and respondent both residing within the jurisdiction of this Court, even though they did not reside together, is sufficient to give this Court jurisdiction.

As to Issue No. 3, the chief witness is a man named Makhi Lal, who is at present cook of the Sergeant's Mess at the Police Lines. He has to admit that the petitioner's brother actually hands him over his wages at present. His story is that about July 1925, when he was in the service of the co respondent, Thompson, he was sent by Thompson to the respondent to cook for her in Wazirganj where she lived alone. He never spent the night there, but says that he saw the co-respondent using the one bed in the bedroom in the day-time. This man's evidence is worth little. It is unlikely that he ever saw the respondent and co-respondent occupying the bed in the day-time. There are many other things in his evidence which make it open to grave suspicion. The other two witnesses are neighbours at Wazirganj of the respondent. They identify not the co respondent, but the co-respondent's brother as a person who used to visit and stay the night with the respondent. The evidence of Mohammad Raza, who is a drill master on Rs. 35 a month, is too vague to be relied upon, while that of Syed Mohammad Jaffar, a clerk in the Travelling Ticket Examiner's section of the Railway, is not convincing. The petitioner's case was that the respondent lived in open adultery for two months with the co-respondent. If this were the case, there should have been better evidence available. The respondent admits that while living at Wazirganj, the co-respondent, Thompson, used to visit her occasionally in the day-time, but that he merely visited her as an acquaintance. I am not convinced that this is not truth. The petitioner is very anxious to get a divorce as is proved by his having already brought an abortive petition at Allahabad. Anyway, the evidence produced in this case is insufficient to convince me that there has been the misconduct alleged against the respondent.

As to issue No. 4, it is unnecessary to decide this issue, but it may be said that there is no evidence of any value to prove the petitioner's misconduct with a Mrs. Cole.

Issue No. 5 does not arise now.

As to Issue No. 6, the petition is rejected with costs to the co-respondent. For the respondent Mr. Moti Lal Saksena appeared and stated during arguments that he had not been paid any fee but that a reasonable fee might be allowed him. I should have been disposed to allow him a fee if the rules permitted. The rules made under s. 27 of the Legal Practitioners Act, XVIII of 1879, by the late Judicial Commissioner assert forth in para. 272 of the Oudh Civil Digest. These rules were applicable not only to the subordinate Courts but also to the Judicial Commissioner's Court. Until new rules are framed these rules apply to the Oudh Chief Court. They do not confer on the Chief Court of Oudh a power to allow any fee where no certificate has been signed Accordingly no fee can be allowed to the respondent.

Z. K. *Petition rejected.*

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(1) 59 Ind. Cas. 931; 44 B. 924; 22 Bom. L. R 361.
(2) 14 W. R. 416.
(3) (1892) P. J. 153.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 54 AND 80 OF 1922.
July 31, 1925.
Present:—Mr. Justice Odgers and
Mr. Justice Madhavan Nair.

A. RAMANATHAN CHETTIAR AND OTHERS—DEFENDANTS—APPELLANTS
versus
KANAGASABAPATHY CHETTIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Religious Endowments Act (XX of 1863), s. 14—Temple Committee—Breach of trust—Trustee, appointment of—Undischarged insolvent removed from Government service, whether can be appointed.

An insolvent ought not to be appointed to a position of trust since a necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people. [p. 958, col. 1.]

Where persons in a fiduciary capacity make an improper choice of a person to fill an office of trust, they must be held to have been guilty of a breach of trust and it would be wholly wrong to say that after all the choice was not improper because it has turned out that no material damage has been done to the institution through the improper appointment. [*ibid.*]

Where the members of a *Devasthanam* Committee under the Religious Endowments Act appointed to the trusteeship of a temple with an annual income of about 2 *lakhs* of rupees a retired Government servant who was an undischarged insolvent and had been removed from Government service before the age limit without a pension for flagrant violation of the Government rules regarding the conduct of public servants:

Held, that in the matter of the choice of the trustee, the members were guilty of a breach of trust in that they had not done their duty or acted reasonably in the interests of the institution of which they were in charge and they were accordingly liable to be removed by Court under s. 14 of the Act. [p. 959, col. 2.]

Appeals against a decree of the District Court, Madura, in O. S. No. 1 of 1921.

Messrs. *T. Rangachariar*, *T. Nallasivam Pillai* and *C. S. Venkatachariar*, for the Appellants.

Messrs. *T. R. Venkataramasastri* and *K. V. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.

Odgers, J.—In the former of these appeals defendants Nos. 2 and 4 are the appellants but Mr. T. Rangachariar informed us that he is only instructed to appear for the 4th defendant and we have consequently heard no argument on behalf of the 2nd defendant. In A. S. No. 80, 5th defendant is the appellant and appears by Mr. C. S. Venkatachariar. The suits were brought by certain worshippers in the temple of Sri Sri Minakshi Sundareswaral and other connected temples comprised in what is commonly known as the "Madura, etc., Devasthanams." In the suit to which A. S. No. 54 relates, the principal prayer was for removing the defendants from their respective offices. A. S. No. 80 is an appeal from the same decree by one of the defendants (defendant No. 5) in that suit. It is of some importance to describe the defendant. First defendant is one Kuppuswami Mudaliar, the manager of the Sri Minakshi Sundareswaral temple. The other defendants are or were members of the Committee of the said temple. The second defendant A. Ramanathan Chettiar, as has been stated, does not appear to argue before us. Third defendant, C. Sambasiva Mudaliar, gave evidence in the case as D. W. No. 1 to which evidence more particular reference will be made by and by and at the end of a lengthy cross-examination tendered his resignation to the Judge so that he has now ceased to be a member of the Committee. Fourth defendant is one Tirugnana Sambanda Pandara Sannadhi whose conduct will be in question in considering the subject-matter of this appeal. Fifth defendant is one A. Rangaswami Aiyar, who, I understand, is a leading Vakil in Madura and has held the position of Public Prosecutor and Government Pleader. The 6th defendant is K. V. Subramania Aiyar who is, as a matter of fact, dead and has been exonerated by the learned District Judge who tried the suit. The District Judge has ordered the removal of defendants Nos. 2, 4 and 5. As stated, 2nd defendant does not appear before us to urge his appeal. We are, therefore, concerned only with the cases of defendants Nos. 4 and 5. The grounds on which the 4th defendant has been removed from his office are two: (1) that he took part in appointing one T. Minakshisundaram Pillai as trustee of the institution at the end of the year 1920 and (2) that he was responsible directly or indirectly for the non-performance or imperfect performance of the Chithrai festival in the plaint temple in April 1921. With regard to the 5th defendant the only charge against him is No. 1 above, namely, that he voted for T. Minakshisundaram Pillai as trustee of the temple. It will, therefore, be convenient to proceed to investigate the appeal in the first instance by taking the first charge which is common to both the 4th and 5th defendants. Fourth defendant was selected to the Temple Committee in 1919, and the 5th defendant in 1911 and the first point at which it is necessary to take up the matter is September 1920 when, in answer to the advertisement for a joint manager, a telegram Ex. CCCI was received by the Temple Committee from Minakshisundaram Pillai on the 20th of that month. The original idea seems to have been to associate a joint manager with Chockalingam Chettiar, who was the manager at that time. There was apparently some inclination on the part of the Committee to get rid of Chockalingam Chetti, because in letter Ex. CVI dated 25th September, Minakshisundaram Pillai, applied for the post of manager which had not yet been notified as vacant, but Chockalingam Chetti, resigned on the 27th September, and it was then incumbent upon the Committee to appoint a new manager. They had two meetings on the 3rd and 5th October, 1920 to consider this question, but apparently it was then resolved merely to call for further applications for the post, and we are told that as many as 37 applicants applied and on the 17th October, the Committee again met to consider the applications. The proceedings are contained in Ex. XI, in which we see the names of the applicants for this post. It is quite evident that this question of appointing a manager was made a communal question. D. W. No. 1 frankly says that he wanted to appoint a Non-Brahmin Manager. So did the 4th defendant and at the meeting of the 17th October he was not for appointing anybody but Minakshisundaram Pillai. Again the witness points out that in nearly all the resolutions passed by the Committee there has been this controversy and that he has joined defendants Nos. 2 and 4 against defendants Nos. 5 and 6 because they are Non-Brahmins. The attitude of defendants Nos. 5 and 6 throughout was that they did not want a Non-Brahmin Manager. It will be observed that three members of the Committee, defendants Nos. 2 to 4, were Non-Brahmins whereas defendants Nos. 5 and 6 were Brahmins. The Non-Brahmin majority defeated at least 5 candidates proposed by one or other of the Brahmin members. A good deal of discussion has arisen as to who exactly proposed the name of Minckshisundaram Pillai. Third defendant as D. W. No. 1 was the only witness for the defendants Nos. 2 to 4 and his evidence has been characterized by the Judge as truthful though in many cases what he said was to his own detriment. It appears to me, therefore, that we must accept the opinion of the Judge who saw and heard the witness give his evidence. He says that he thinks that the 4th defendant must have proposed Minakshisundaram Pillai and that the 5th defendant approved his nomination. The only members of the Committee to whom Minakshisundaram Pillai was known at the time were defendants Nos. 5 and 6. Sixth defendant may be immediately dismissed from consideration as he voted against the appointment. Third defendant (D. W. No. 1) says that though he first met him (Minakshisundaram) at the 5th defendant's house, the latter did not recommend him until the meeting of the 17th October. The 5th defendant knew Minakshisundaram Pillai previously as they were both ardent theosophists. It does not seem to me to matter as to whether Minakshisundaram Pillai was actually proposed by the 4th defendant or 5th defendant. We know that he was elected by a majority of 4 to 1 of the Committee (*i. e.,*) that the 5th defendant, though a Brahmin, apparently convinced that none of the Brahmin candidates had any chance, eventually voted for his fellow theosophist. It may be somewhat reasonably asked what the objection is to the nomination and election of this man Minakshisundaram Pillai. The objection to him may be summed up. He had been for 23 years a *Tahsildar* in Government service and he left that service before the age limit without a pension and he was further at the time of his election an undischarged insolvent. In these circumstances, we are asked to say whether those who voted for this man exercised their discretion as reasonable business-men charged with the duty of protecting an institution whose yearly revenues, we are told, amount to about to two lacs of rupees. Much argument has been expended on the reasons or possible reasons why Minakshisundaram Pillai left Government service. In an affidavit filed by himself in O. S. No. 63 of 1921 he says he was "removed" from Government service for "flagrant violation of the rules regulating the conduct of Government servants." D. W. No. 1 states that Minakshisundaram Pillai never placed any credentials before the Committee; that when the 4th defendant met Minkshisundaram Pillai, in the 5th defendant's house about the 23rd or 24th September, 1920, he then learnt that he was an undischarged insolvent and that he had been a Government servant. The witness says:—

"I thought from what was said that papers should be gone into so as to how his Government service determined."

There seems to be no doubt that Minakshisundaram Pillai had told the Committee or, at any rate let it be known, that he had been adjudicated insolvent and had been a Government servant. D. W. No. 1 says that Minakshisundaram Pillai showed him (the witness) some printed papers. From these papers the witness says he found that his services were dispensed with and he was not dismissed. The papers shown to him did not appear to be final and he took Minakshisundaram Pillai on trust as to the truth of the printed papers without his producing any official communication. Minakshisundaram Pillai, held office for about a month and a half. As early as 23rd October, 1920, a petition by worshippers was addressed to the Temple Committee pointing out the disabilities under which Minakshisundaram Pillai laboured and protesting against his appointment. The petition further asked for a full and responsible statement on the points raised and on the 9th December 1920, Ex. A, points out that the previous petition remained unanswered that the petitioners understand that the resignation of Minakshisundaram Pillai, was due to the fact that the Official Receiver attached the greater part of his salary and the petitioners, therefore, ask that in filling up the vacancy the proceedings of the Committee shall be in public.

With regard to the 5th defendant it is contended that though he voted for Minakshisundaram Pillai he insisted that certain conditions should be fulfilled which, it is said, would protect the institution. Those conditions were that he should only hold the office for 5 years, that he should furnish security for Rs. 10,000 and that he should file a scheme suit as soon as possible. Although the 4th defendant had not the courage to go into the box the 5th defendant did so as D. W. No. 2. He says that he agreed to support defendants Nos. 2 to 4 over Minakshisundaram Pillai's appointment if they would agree to his (5th defendant's) conditions as he did not want to encourage any internal animosity such as was rife at about that time. Apparently the idea of the 5th defendant as stated was that in the scheme there would be a provision against the manager's post being held by an insolvent so that if Minakshisundaram Pillai did not get his discharge within a short time he would *ipso facto* cease to be manager. Fifth defendant admits that he had known Minakshisundaram Pillai as a theosophist for 5 to 10 years and that he received from Dr. Annie Besant a letter of recommendation to him which, however, neither he nor, I imagine, anybody else could describe as strong. Fifth defendant says that from subsequent events he is prepared to ascribe improper motives to defendants Nos. 2 and 4 in appointing Minakshisundaram Pillai. His whole excuse is in a word that Minakshisundaram Pillai would have been appointed in any case by Non-Brahmin majority on the Committee and that knowing that, he (the witness) thought it was better that he should be appointed on the conditions laid down by him. The latter admits that with regard to his retirement from service he was shown one paper and he did not pay any real attention to it nor did he call for any more papers on this subject or on the matter of his insolvency. The witness adds:—

"I did not want to make further enquiries as in my then view he was not a suitable candidate even for the joint-manager's post. *A fortiori* I thought him unfit to be manager. I regarded him as not suitable until 17th October, 1920. I thought his appointment against the interests of the *Devasthanam* under normal conditions. When I changed it was because the evil was one that could not be avoided and which I wished to minimise as far as possible."

It is difficult to see how if Minakshisundaram Pillai was not a suitable person to be appointed the conditions have made any material difference. To begin with it is doubtful whether it is within the powers of a Committee under the Act of 1863 to appoint a trustee for a limited term. Secondly, it seems very doubtful if the security said to have been furnished by the sons of Minakshisundaram Pillai was of any real value. No Committee member seems to have considered it his duty to really investigate the matter. The only enquiry made by the 5th defendant as to the value of the properties was at the meeting of the 17th October by asking the members, which of course amounts to nothing at all. Again it is very difficult to see how the manager could have been forced to bring a scheme suit and it is surely improbable that he would have done so voluntarily considering that one of the terms was that no insolvent was to hold the post. In my opinion, the conditions sought to be imposed were entirely illusory and were put in because the Committee, as a body, were aware that the appointment of Minakshisundaram Pillai was entirely improper and in order that they might be able to meet objectors with some form of guarantee. It is of course perfectly clear in law that an insolvent ought not to be appointed to a position of trust of this sort. In *Zemindar of Kalahasti* v. *Ganapathi Iyer* (1) Abdur Rahim and Burn, J., observe as follows:—

"We think that the observation of Jessel, Master of Rolls in *In re Barker's Trusts* (2) affords a proper guidance to the Court in cases of this character: 'a necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people.'"

I cannot hold that either of these Committee members, defendants Nos. 4 and 5, did their duty or acted reasonably in the interests of the institution of which they were Committee members in giving their vote for this man Minakshisundaram Pillai. It is said that, as a matter of fact, no loss has occurred to the *Devasthanam* through this appointment. It seems to me that, that is entirely a perverted way of regarding the matter. If an improper choice is made by a person in a fiduciary capacity it seems to be wholly wrong to say that after all the choice was not improper because as it turns out that no material damage has been done to the institution through the improper appointment. Even so this is apparently not certain. Minakshisundaram Pillai resigned on the 9th December, 1920 asking it as a condition of his resignation that his security bond should be cancelled. This was accepted by the Committee and the security bond was returned to him on that very day. D. W. No. 1 says:—

"We had seen the accounts at that time which gave us no room to suspect defalcation or warrant us in keeping the security bond alive."

But later on he says:

"The *Devasthanam* had a complicated system of accounts. They are hard to understand without the help of trained professional auditors. Without such assistance it will be hard to find out any irregularity. The Committee had no such assistance when it looked into the accounts."

The witness also states that the resolution to cancel the security bond was in his opinion premature. He further adds that by the cancelling of Minakshisundaram Pillai's security bond he considers that the interests of the *Devasthanam* have suffered because of his having expended or drawn sums which he should not have expended or drawn for which the *Devasthanam* may be held liable. Fifth defendant as D. W. No. 2 states that the accounts of Minakshisundaram Pillai's management have not so far been audited. Therefore, it appears to me, that these two persons, defendants Nos. 4 and 5 by voting for the appointment of this undischarged insolvent *Tahsildar* who had, in his own words, been removed from Government service for a flagrant breach of the rules regulating the conduct of Government servants of which we have no details had acted improperly and that men who can lend themselves to an appointment of this sort are entirely unfitted to carry out the responsible duties with which they were entrusted. This is possibly more so in the case of a man of the world like the 5th defendant than in the case of the former. But in neither case can I find any excuse or palliation for their conduct. In the case of the 4th defendant, there is, as I stated at the outset, a further charge which I propose to treat very shortly. I have stated that Minakshisundaram Pillai resigned on the 9th December, 1920. The 1st defendant, Kuppuswami Mudali, was then appointed manager. He apparently was a weak individual who was easily swayed by the Committee. A matter which was investigated at some length, by the District Judge and which has in fact been the subject of more than one proceeding in this Court is the undue interference with the trustees by the Committee of this *Devasthanam*. I do not proceed with this matter as the learned District Judge has decided that it is not sufficient to warrant the removal of any Committee member on this ground. But the events immediately preceding the suit and which no doubt gave rise to disputes in the institution are that soon after the appointment of Kuppusami Mudaliar, namely, on the 30th December, 1920, the 2nd defendant complained that the pipers were not carrying out their duties in the temple properly (Ex. DDD). The Bhattars had apparently for some time been in the habit of engaging the services of the pipers on private occasions in their own houses and this had increased to such an extent as to detract them from their proper piping services in the temple. The Committee then passed a resolution on the complaint of the 2nd defendant that a written permission should be taken by the pipers before they are engaged in these private festivals. The trouble seems further to have increased by an alleged insult to the 2nd defendant of which he complained in Ex. LXVI on the 20th January 1921, and he accuses the Bhattars with want of respect to himself. This came up on the 23rd January, 1921, Ex. XIII, in which the two Brahmin members thought that the matter might be recorded and the others thought that the matter should be referred to the manager for disposal. This state of things seems to have gone on—we are left without any details—till the approach of the Chithrai festival in April when owing to the strike of the Bhattars and the attempt to bring in substitutes to carry on the festival resulted in something like an open riot within the temple, so much so that an application had to be made to the Town Magistrate under s. 144, Cr. P. C. A Nadar Magistrate arrived with European Police Sergeant wearing boots and various incidents offensive to the scruples of the worshippers appear to have taken place. The learned Judge finds that defendants Nos. 2 to 4 not only kept aloof in this crisis but threw obstacles in the way of things being properly done. In a word these three defendants never showed their face at all. Fourth defendant is said to have been found in the 5th defendant's house and the excuse they have is that they were all in danger of their lives. The learned Judge has examined the evidence very carefully as to this charge in which only the 4th defendant is concerned, and I am not prepared to say that he is wrong. But I think we possibly have not the whole history of this quarrel between the Bhattars and the manager and the Committee before us. The Bhattars, no doubt, imagined themselves to be in an impregnable position from the fact that they hold an hereditary office and are in fact the one permanent element in the temple staff. It was undoubtedly the duty of the Committee and the manager the latter having a primary duty, to see that the worship at the Chithrai festival was properly carried out and it is probably enough to say that if a manager and the Committee permit a state of things to arise such as had arisen in this temple shortly before and during the Chithrai festival, it is proof positive that they are unfit to hold the management of the Institution. I prefer, however, to rest my judgment principally on the first ground which is common to both the defendants, thought it must not be supposed that I am in any way differing from the finding of the learned District Judge on the second ground. Both the appellants appeal to us that we should refrain from delivering judgment and that they might both be allowed to resign. Speaking for myself, I must say that they have made such an application too late and it would have come from them with far better grace if, after they had seen how matters went before the District Judge when they heard the admissions made not only by the 3rd defendant but by one of themselves in the witness-box they had then applied to withdraw. It is difficult to appreciate the state of mind of men who after a long and patient enquiry are so determined to cling to this office in which they have been found, and rightly in my judgment found, to have failed in their duty. Both these appeals must be dismissed with costs.

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(1) 48 Ind. Cas. 897; (1918) M. W. N. 555.

(2) (1876) 1 Ch. D. 43; 45 L. J. Ch. 52; 24 W. R. 264.

Madhavan Nair, J.—I agree and have nothing to add.

V. N. V.   *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 556 OF 1922.
March 17, 1926.
Present:—Mr. Justice Harrison and
Mr. Justice Jai Lal.
Musammat BHURI AND OTHERS—
DEFENDANTS—APPELLANTS
versus
Musammat ASGHARI BEGAM *alias*
NAWAB JAN—PLAINTIFF—RESPONDENT.

Muhammadan Law—Dower—Claim based on contract—Customary dower, whether can be decreed Civil Procedure Code (Act V of 1908), O. XLI, r.

O. XLII—Appeal from decree in cross-appeal—Decree requisite for second appeal—Limitation Act (IX of 1908), s. 5—Second appeal—First Court judgment, delay in preparation of—Extension of time.

A party appealing from a decree passed against him in appeal need only file the decree made in his appeal and his failure to file the decree made in cross-appeal will not bar his appeal from being proceeded with.

Muhammad Din v. *Zeb-un-nisa*, 77 Ind. Cas. 541; 3 L. 215; A. I. R. 1922 Lah. 390 and *Bhan Singh* v. *Gokal Chand*, 53 Ind. Cas. 137; 1 L. 83, not followed.

Ghansham Singh v. *Bhola Singh*, 74 Ind. Cas. 411; 45 A. 506; 21 A. L. J. 465; A. I. R. 1923 All. 490, referred to.

Jogal Kishore v. *Chammo*, 85 P. R. 1905; 151 P. L. R. 1905; 105 P. W. R. 1905, followed.

Where a copy of the judgment of the first Court is applied for within limitation but is not filed in time with memorandum of appeal owing to inordinate delay in its preparation, the appellant will be given the benefit of s. 5, Limitation Act.

In a suit for dower if the plaintiff bases her claim on a contract between the parties at the time of her marriage but fails to establish the amount claimed, the only amount which the Court can allow is the amount which the defendant either admits or agrees to pay and no decree for customary dower can be passed.

Fazl Khan v. *Karam Begam*, 27 Ind. Cas. 113; 105 P. R. 1914; 241 P. L. R. 1915, followed.

Second appeal from a decree of the District Judge, Delhi, dated the 9th November 1921, affirming that of the Subordinate Judge, Second Class, Delhi, dated the 29th March 1921.

Lala *Mehr Chand Mahajan*, for the Appellants.

Mr. *M. Obedulla*, for the Respondent.

JUDGMENT.—In this appeal a preliminary objection is taken by the respondent relying on *Muhammad Din* v. *Zeb-un-nisa* (1) and *Bhan Singh* v. *Gokal Chand* (2). The facts are that the plaintiff brought a suit claiming Rs. 5,000 as her dower, and a sum of Rs. 3,000 was decreed by the Trial Court. Both parties appealed and the result of the two appeals was that the order of the Trial Court was maintained and both appeals were dismissed.

The co-widow of the plaintiff's husband and her co-defendants have presented this second appeal accompanied by a copy of the decree in which her own appeal to the District Judge was dismissed. No copy of the decree dismissing the cross-appeal was presented, although one had been obtained. No copy of the judgment of the Trial Court accompanied the memorandum of appeal. Both these omissions were pointed out to the appellants who put in both the required copies after the period of limitation had expired. According to the view taken in *Muhammad Din* v. *Zeb-un-nisa* (1) and *Bhan Singh* v. *Gokal Chand* (2) the decree against which an appeal has not been preferred and which does not accompany the memorandum stand a good and, therefore, the appeal proper cannot proceed, as at the best the only possible result would be that one and the same decree would at the same time be set aside by this Court and remain good in virtue of the operation of the law of *res judicata*. Counsel for the appellants has referred us not only to *Ghansham Singh* v. *Bhola Singh* (3) a recent Full Bench ruling of the Allahabad High Court but also to *Jogal Kishore* v. *Chammo* (4) which apparently was not referred to at the time the cases reported as *Bhan Singh* v. *Gokal Chand* (2) and *Muhammad Din* v. *Zen-un-nisa* (1) were argued. We consider ourselves bound by the decision of the Full Bench of this Court and we, therefore, overrule the objection that the appeal is defective because of the failure to attach a copy of the decree in the cross-appeal.

So far as the copy of the first Court's judgment is concerned, we see that an application for a copy was made on the 7th of February within limitation and it was only because of inordinate delay in the preparation of this copy that the appellants were unable to present it with the memorandum. Under the circumstances we extend time under s. 5 of the Limitation Act and allow the appeal to proceed.

On the merits the point urged by the appellants rests on the clear authority, namely, *Fazl Khan* v. *Karam Begam* (5). The plaintiff in this case claimed a dower as fixed between the parties at the time of her marriage. The finding throughout by both the Trial and the Appellate Courts has been that no sum was fixed and the amount allowed; Rs. 3,000 was allowed as being a suitable amount, having regard to the history and position of the family. It is laid down in the clearest possible terms in *Fazl Khan* v. *Karam Begam* (5) that where these are the findings the only amount of dower which the Court can allow is the amount which the defendant admits or agrees to pay. The plaintiff has wholly failed to establish the position taken up in the plaint and no question of custom having been raised the Court was not competent to decide the matter on these grounds.

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(1) 77 Ind. Cas 541; 3 L. 215; A. I. R. 1925 Lah 390.

(2) 53 Ind. Cas. 137; 1 L. 83.

(3) 74 Ind. Cas. 411; 45 A. 506; 21 A. L. J. 465; A I. R. 1923 All. 490.

(4) 85 P. R. 1905; 151 P. L R. 1905; 105 P. W. R 1905.

(5) 27 Ind. Cas. 113; 105 P. R. 1914; 241 P. L. R. 1915.

We, therefore, accept this appeal and allow only Rs. 32 the amount admitted by the defendants. We dismiss the remainder of the plaintiff's claim. The legal position was apparently not understood until the parties reached this Court and was certainly not put before the District Judge. This being so, we order the parties to bear their own costs throughout.

R. L. *Appeal accepted.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 176 OF 1925.

December 14, 1925.

Present:—Mr. Justice Dalal and Mr. Justice Boys.

Sahu NAND LAL SARAN—OBJECTOR—APPELLANT

versus

Sahu DHARAM KIRTI SARAN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, 48—Award not operative—Decree, whether executable—Executability of decree, decision as to, in previous application—Res judicata—*Decree of Original Court appealed from—Limitation, starting point of—Limitation Act (IX of 1908), Sch. I, Art. 182—Decree partly joint and partly several—Execution application—Execution of costs in execution.*

Where in an award a sum is noted as due by one party to another but without any direction that the party so liable should pay it to the other, the decree based upon such award cannot be said to be executable. [p. 962, col. 1.]

But where once in execution proceedings of such a decree it is decided that the decree is executable, the decision operates as *res judicata* in a subsequent application. [p. 962, col. 2.]

Where an appellate decree either affirms, modifies or reverses the decree of the Trial Court, the period of limitation will begin to run under s. 48, C. P. C., from the date of the decree of the Appellate Court. [*ibid.*]

Ram Churn Bysack v. *Luckhee Kant Bornick*, 16 W. R. F. B. 1; 7 B. L. R. 704, referred to.

But where an appeal is dismissed as not being competent, there is no decree by the Appellate Court and the limitation would run from the date of the decree of the Trial Court. [*ibid.*]

Muhammad Razi v. *Karbalai Bibi*, 5 Ind. Cas. 473; 32 A. 136; 7 A. L. J. 58, and *Rup Narain* v. *Sheo Prakash*, 61 Ind. Cas. 129; 19 A. L. J. 159; 43 A. 405, distinguished.

Abdul Majid v. *Jawahir Lal*, 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.) and *Sachindra Nath Roy* v. *Maharaj Bahadur Singh*, 74 Ind. Cas. 660; 48 I. A. 335; 4 U. P. L. R. (P. C.) 57; 30 M. L. T. 96; 24 Bom. L. R. 659; (1922) M. W. N. 338; 26 C. W. N. 858; A. I. R. 1922 P. C. 187; 49 C. 203 (P. C.) relied on.

Where a decree is jointly passed against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of the Explanation to Art. 182, Limitation Act, shall apply to decrees passed severally and the second portion to the decree or decrees passed jointly. [p. 965, col. 1.]

Subramanya Chettiar v. *Alagappa Chettiar*, 30 M. 268; 2 M. L. T. 189, distinguished.

Application for execution of costs incidental to the execution proceedings is not an application for the execution of the original decree or any part of it and, therefore, does not save limitation. [p. 965, col. 2.]

Appu Rao v. *Ramakrishna Chettiar*, 24 M. 672, relied on.

Execution first appeal from a decree of the First Subordinate, Judge, Moradabad, dated the 24th March 1925.

Sir *Tej Bahadur Sapru*, Messrs. *Surendra Nath Sen*, *K. N. Katju* and *Narain Prasad Asthana*, for the Appellant.

Messrs. *Iqbal Ahmad* and *Durga Prasad*, for the Respondent.

JUDGMENT.—This is an appeal from an order by the Subordinate Judge of Moradabad in execution proceedings. The decree which was sought to be executed was passed on the basis of an award on 18th May, 1909. The present application for execution was filed on the 17th November 1924. In the lower Court the judgment-debtor Sahu Nand Lal Saran objected to the execution of the decree on the following grounds:—

1. That twelve years had expired since the date of the decree sought to be executed, so the application was barred under the provisions of s. 48 (*a*) of the C. P. C.

2. That if for any reason there was no such bar, then the application was barred by the period of three years fixed under Art. 182 (2) of the Limitation Act because no step-in-aid of execution of this particular decree had been taken within three years of 17th November 1924.

3. That the decree was not capable of execution on the ground that there was no operative order in the decree for the recovery of the sum claimed by the decree-holder.

The lower Court held that there was no bar under s. 48 because the period of limitation would be calculated not from the date of the decree but from the date of the dismissal of an appeal from that decree on 18th, November 1912; that there had been a step taken by the decree-holder against another judgment-debtor for recovery of certain costs by an application in execution which saved limitation as against the present judgment-debtor-objector and that though there was no operative order in the decree of 18th May 1909 for the payment of the sum claimed by the decree-holder from the judgment-debtor, this defence was barred to the present judgment-debtor by the rules of *res judicata*.

The last point may be disposed of first. The award dealt with the business of the firm of Sahu Radha Kishen whose descendants were parties to the suit for partition. In the award, while making up the accounts of the *karkhana* (business concern) of Gokul Prasad, Brij Bhukan Saran and Sibta Prasad, the arbitrator has taken into account in favour of Dharam Kirti Saran and Sibta Prasad a sum of Rs. 12,046-2-3 payable to them by the Rampur business in which the present judgment-debtor Nand Lal Saran was a partner (see page 171 of the printed paper-book, F. A. No. 21 of 1911, District Moradabad filed on 18th January, 1911). Though this sum has been noted as due to Dharam Kirti Saran and Sibta Prasad, there is no direction in the award that the firm carrying on business in Rampur was liable to pay this sum to Dharam Kirti Saran and Sibta Prasad. No direction was given by the arbitrator as regards this sum of money because in an earlier portion of the award (page 152 of the same printed book) an order was recorded by the arbitrator as part of the decree in the following terms :—

> " Out of the properties which were admittedly held jointly by all the members of the family of Sahu Radha Kishen the *kothi hundi* (*i. e.* the *hundi* business) at Rampur and the immoveable property in the said state are not partible by the Civil Courts situate in British India".

It is clear, therefore, that the arbitrator was of opinion that he had no jurisdiction to pass any orders regarding this sum of Rs. 12,046-2-3. Sahu Dharam Kirti Saran, however, applied for recovery of his half share of this money by an execution application which was Execution Case No. 308 of 1924. Nand Lal Saran objected to this application but his objection was dismissed on 11th October 1915 on the ground that he and the other judgment-debtors were managers of the Rampur *kothi* and bound to pay the decree-holders' share of this sum of Rs. 12,000 and odd. That order is final and the judgment-debtor cannot be permitted to re-open the question in a subsequent execution proceeding. If not otherwise barred, the applicant Dharam Kirti Saran would be entitled to recover his half share of this sum of money.

We shall next consider the question of limitation under s. 48 of the C. P. C. The proposition of law was accepted by the appellant's learned Counsel that where an appellate decree either affirms, modifies or reverses the decree of the Trial Court, the period of limitation will begin from the date of the decree of the Appellate Court. As observed in *Ram Churn Bysack* v. *Luckhee Kant Bornick* (1). "If the decree of the lower Court is reversed by the Appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the Appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court, which takes its place for all intents and purposes. Both the decrees cannot exist simultaneously."

The question for our consideration will, therefore, be whether the order of this Court of 18th November, 1912, amounted to a decree so as to put an end to the decree of the Trial Court of 18th May, 1909. As we have already noticed, the decree of the Trial Court was passed on the basis of an award from which no appeal is allowed by law. A so-called appeal was filed by Sahu Sibta Prasad and prosecuted after his death by his son Sahu Param Kirti Saran minor under the guardianship of his mother. A Bench of this Court held that no appeal lay to this Court, because the award being a legally valid one and the decree being in accordance with the award, no appeal could be preferred from that decree. The Court, therefore, dismissed the so-called appeal without entering into the merits of the case. In our opinion such an order is not a decree affirming the decree of the Trial Court and, therefore, there was no appellate decree, in which the decree of the Trial Court could merge. The rulings cited on behalf of the respondent do not cover this particular point. No case was cited to us in which the period of limitation was counted from the date of the dismissal of a so-called appeal in a case where no appeal lay under the law. In *Muhammad Razi* v. *Karbalai*

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(1) 16 W. R. F. B. 1; 7 B. L. R. 704.

Bibi (2), the appeal, when it was filed, was a proper appeal, but subsequently on the death of the appellant no action was taken by his successor to be brought on the record and so the appeal abated and was dismissed. In that case an appeal did lie and the dispute between the parties was determined by the Appellate Court. The decree of the Trial Court, therefore, would be merged in such a decree of the Appellate Court. The next ruling cited, on behalf of the respondent was in the case of *Rup Narain* v. *Sheo Prakash* (3). On reading the judgment of the learned Judges the first impression would be that no appeal lay in that case and the appellant had come to that Court merely to get certain words in the judgment deleted for his personal satisfaction. When we examined the records of the appeal (Ex. F. A. No. 50 of 1907), we found that the appellant had a right of appeal and did appeal in the ordinary way against the decree of the Trial Court, but he had no real objection to the decree itself; the Court below had given him what he had asked for, a decree absolute for sale; his real objection was that certain words appearing in the judgment, but not appearing in the decree, suggesting that the appellant-decree-holder should give time to the judgment debtor might at some subsequent date be given effect to in a sense adverse to his interests; and under colour of appealing from that decree he was really appealing against a suggestion made only in the judgment. But, though it was held that an appeal did not lie against the words used in the judgment, an appeal did lie against the decree, was properly preferred and was disposed of in the ordinary way by a finding that the decree-holder had really got all for which he asked. A Bench of this Court decided that those words did not form part of the decree and were not operative and that the appellant was in no danger of any loss, if such words were maintained in the judgment. This Court further declared that if at a subsequent date the rights of the appellant were prejudiced, he would have an opportunity of appealing to this Court from that fresh order. In such a case, it will not be correct to say that the appeal was barred by any provision of law.

Decree means (s. 2 (2), C. P. C.) "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." In the case before us this Court held that it had no jurisdiction to give any formal expression of an adjudication determining the rights of the parties, because no appeal lay to this Court under the law.

In *Abdul Majid* v. *Jawahir Lal* (4) their Lordships of the Privy Council had to consider a case where an appeal to the Privy Council was dismissed for want of prosecution. They held that the period of limitation in such a case commenced from the date of the decree of the High Court and not from the date of the order in Council dismissing the appeal. They observed: "The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that, therefore, he was in the same position as if he had not appealed at all."

These words were repeated by their Lordships in a subsequent case *Sachindra Nath Roy* v. *Maharaj Bahadur Singh* (5). In our opinion the case before us is stronger because in the Privy Council case an appeal did lie and had been properly preferred, while in the present case the proceedings not only did not terminate in an order dealing judicially with the matter in suit; but, as no appeal lay at all, could not under any circumstances whatever have so terminated. We hold, therefore, that where it has been held that no appeal lay, the order disposing of the so-called appeal will not amount to a decree. The converse proposition, though it is not necessary for us to decide this, would also seem to be in conformity with the spirit of s. 2, with the decision of their Lordships of the Privy Council and with Indian Judicial Authority, *viz.*, where an appeal lay and that appeal was disposed of by an order, that order will amount to a decree except as in the case dealt with by their Lordships of the Privy Council (a case of dismissal for default) and in other special cases where it is expressly declared by s. 2 that the order shall not amount to a decree. We are, therefore, of opinion that in the present case the period of 12 years should be counted from the date of the original decree, *i e.*, 18th May, 1909, and not from the date of the dismissal of the so-called appeal here on 18th November 1912. The respondent's present application for execution is, therefore, beyond time.

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(2) 5 Ind. Cas. 473; 32 A. 136; 7 A. L. J. 58.

(3) 61 Ind. Cas. 129; 19 A. L. J. 159; 43 A. 405.

(4) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

(5) 74 Ind. Cas. 660; 48 I. A. 335; 4 U. P. L. R. (P. C.) 57; 30 M. L. T. 96; 24 Bom. L. R. 659; (1922) M. W. N. 338; 26 C. W. N. 858; A. I. R. 1922 P. C. 187; 49 C. 203 (P. C.).

The execution case, which according to the decree-holder-respondents saves limitation, is Case No. 233 of 1921, in which the application was filed on the 3rd March, 1922. The present application is filed within three years of the date of that application, which was filed by Dharam Kirti Saran for withdrawal of money deposited by Sahu Param Kirti Saran in Court. The amount sought to be recovered and which was deposited consisted of costs, which were awarded to Dharam Kirti Saran against this particular judgment-debtor Param Kirti Saran during execution proceedings in the Trial Court, and in the High Court. Dharam Kirti Saran had applied for execution of a portion of the decree of 1909, in which he was decreed a sum of Rs. 51,000 odd against the deceased father of Param Kirti Saran. Param Kirti Saran objected and his objection was dismissed. The Execution Court ordered on 8th March, 1916 (Execution Case No. 308 of 1914 and Miscellaneous Case No. 127 of 1916) that Param Kirti Saran judgment-debtor shall pay Rs. 418-8-0 to the decree-holder Dharam Kirti Saran on account of the costs incurred in the application of objection. Param Kirti Saran appealed from this order. His appeal was dismissed, and he was made liable to pay costs Rs. 262. These were the two items of costs of which recovery was desired by an application of 30th August, 1921, in the Execution Department. The question is whether this step in execution of a decree against one of several judgment-debtors saved limitation as against the present judgment-debtor, who was not a party to the previous execution proceeding. If it does not, the application of 3rd March, 1922, for withdrawal of this money from Court will not save limitation. Explanation I to Art. 182 of the First Schedule of the Limitation Act lays down (second para):—

"Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all." It was argued on behalf of the appellant that the first portion of this rule will apply to the present case. The alleged facts, on which this argument was based, are not correct in our opinion. The appellant's case was that there was no portion of the decree passed against all the defendants jointly in favour of Dharam Kirti Saran, that the decree was passed severally and Nand Lal Saran was not interested in the portion of the decree passed in favour of Dharam Kirti Saran against Sibta Prasad. We find in the award cl. (19) that certain properties were allotted to Dharam Kirti Saran as against all the defendants of this suit. The decree passed on this award decreed this property, which was joint up to the institution of the suit, in favour of Dharam Kirti Saran against all the defendants It is not the fact, therefore, that no portion of the decree was passed jointly against all the defendants. The case before us does not appear to be specifically provided for in the explanation where a portion of the decree is jointly passed against all the defendants and there are other portions of the decree passed severally against different defendants. The question will be whether such a decree will fall within the first portion of the explanation or the second or whether such a decree will be governed by the first part of the explanation as regards the several decrees and by the second portion of the explanation as regards the joint decrees. The opinion of the Madras High Court is that where any portion of the decree is joint the case will fall within the second part of the explanation. This was laid down by a Bench of the Madras High Court in *Subramanya Chettiar v. Alagappa Chettiar* (6). According to the learned Judges the second part of the paragraph should be read literally, *i. e.* the words "where the decree or order has been passed jointly against more persons than one." The reasoning does not appear to us to be convincing. If the first portion is read literally—"where the decree or order has been passed severally" it may be argued with equal reason that such a case must be governed by the first part of the explanation. The principle appears to us to be that when *A*, *B* and *C* are jointly liable and the decree-holder is attempting to recover the decretal amount from one of them he should not be barred from recovering it from the rest if he fails to recover it from that particular judgment debtor. He exercises due diligence in recovering the amount decreed to him and it will be no fault of his if he does not find the particular judgment-debtor of sufficient substance to pay up the entire decree. In such a case it will be equitable to direct that steps taken in aid of execution against one of the joint judgment-debtors should save limitation as against the others. It is also obvious that when a joint decree is passed the decree-holder cannot execute it at one and the same time against them all separately for the same amount. The case is different when certain portions of a decree are jointly passed and others severally passed against more persons than one. While the decree-holder is executing the joint portion of the decree against one of the joint judgment-debtors there is nothing to prevent him from executing the other portions of the decree against the several judgment-debtors who are liable thereunder. It would be expected of a diligent decree-holder that he should do so. We think, therefore, that where a decree is jointly passed against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of the explanation should apply to decrees passed severally and the second portion to the decree or decrees passed jointly. We find ourselves unable to agree with the opinion of the Madras High Court. We have not been referred to any rulings on the subject of any other High Court during the arguments. We hold that the application is barred by the three years' limitation.

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(6) 30 M. 268; 2 M. L. T. 189.

From another point of view also the application will be so barred. The three years' period is to be counted in terms of Art. 182, cl. (5):—

"Where an application for execution has been made the date of applying in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree, the step-in-aid of execution which would save limitation is the step taken in execution of that particular decree which is sought to be executed subsequently". In the present case the step taken was to withdraw costs of execution proceedings and those costs were not costs in the suit. Those costs were not of the suit because they were not incurred in execution proceedings but were incurred by a particular objector who objected to a certain execution proceeding. That decree for costs was a separate decree against a particular objector. The execution application for recovery of such costs was not an execution application of the original decree. The learned Subordinate Judge has explained away this difficulty by holding that the application in execution by Dharam Kirti Saran for recovery of Rs. 51,000 and odd and the objection of Sahu Param Kirti Saran to the payment of that amount were proceedings in suit between the preliminary decree and the final decree. According to the lower Court the order for payment dated the 8th March 1916 was really a final decree for the payment of Rs. 51,000 and odd and the costs incurred in obtaining that decree were costs in the suit. If this view be accepted the decree of 1908 will be taken to be a preliminary decree and there would be several final decrees on foot thereof. The present judgment-debtor was not a party to the final decree of 8th March 1916, so any steps taken in execution of that decree cannot save limitation against the present judgment-debtor. Our view that application for execution of costs incidental to the execution proceedings was not an application for the execution of the original decree or any part of it is supported by a Bench ruling of the Madras High Court in *Appu Rao* v. *Rama Krishna Chettiar* (7).

In the result we decree the appeal and dismiss the execution application of Dharam Kirti Saran with costs including in this Court fees on the higher scale.

R. L. *Appeal dismissed.*

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(7) 24 M. 672.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION
No. 1057 OF 1925.
February 3, 1926.
Present:—Justice Sir William Phillips, KT.,
and Mr. Justice Krishnan.
SRILASRI VYTHILINGA DESIKA
PANDARA SANNATHI—PETITIONER
versus
AURUMUGHA THAMBIRAN AND
OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 109 (c), *110, O. XLV, rr. 2, 3, 8—Order of remand setting aside abatement of suit, whether final—Leave under s. 109* (c), *grant of.*

Where in a suit under s. 92, C. P. C, for removal of a trustee and for framing of a scheme, the trustee died and the Court of first instance held that the suit had thereby abated but the High Court on appeal set aside the abatement in so far as the prayer for scheme was concerned, and remanded the case to the lower Court for disposal according to law:—

Held, that the order in appeal was not a final one within the meaning of s. 110, C. P. C., nor was the case a fit one for granting special leave under s. 109, C. P. C.

An order is only final if it finally disposes of the rights of the parties.

Radha Kishan v. *Collector of Jaunpur*, 23 A. 220; 28 I. A. 28; 5 C. W. N. 153; 11 M. L. J. 65; 3 Bom. L. R. 78; 7 Sar. P. C. J. 800 (P. C.), *Firm of Ram Chand-Manjumal* v. *Firm of Goverdhan Das-Vishindas Ratanchand*, 56 Ind. Cas. 302; 47 C. 918; 24 C. W. N. 721; 18 A. L. J. 591; 22 Bom. L. R. 606; 39 M. L. J. 27; 12 L. W. 150; 2 U. P. L. R. (P. C.) 94; (1920) M. W. N. 407; 28 M. L. T. 87; 47 I. A. 124; 14 S. L. R. 191 (P. C.), *Mukarram Ali Khan* v. *Spinner*, 86 Ind. Cas. 161; 47 A. 335; 23 A. L. J. 12; L. R. 6 A. 175 Civ.; A. I. R. 1925 All. 263 and *Sultan Singh* v. *Murli Dhar*, 80 Ind. Cas. 366; 5 L. 329; 6 L. L. J. 210; A. I. R. 1924 Lah. 571; 1 L. C. 100, relied on.

Petition presented under ss. 109 (*c*) and 110 and O. XLV, rr. 2, 3 and 8 of the C. P. C. praying that the High Court will be pleased to grant a certificate enabling the petitioner herein to appeal to His Majesty in Council against the judgment and decree of the High Court in Appeal No. 43 of 1921, preferred against a decree of the Court of the Subordinate Judge, Kumbakonam, in O. S. No. 71 of 1918.

Messrs. *T. Rangachariar*, *A. Srirangachari* and *R. Gopalachari*, for the Petitioner.

Messrs. *S. Srinivasa Iyengar*, *K. S. Jayarama Iyer*, and *V. N. Venkata Varadachari*, for the Respondents.

ORDER.—In this case the Subordinate Judge held that the suit abated on the ground of the death of the defendant, the suit being one for the removal of the defendant from his alleged trusteeship and for framing a scheme for the suit *mutt*. In appeal here it was held that so far as the removal of the alleged trustee was concerned, the suit must abate on the death of that trustee, but in so far as the suit was for the framing of a scheme, the suit did not abate and could be continued against the succeeding trustee. An application has now been made for leave to appeal to His Majesty in Council against the order of this Court and the question with which we are now concerned is whether this is a final order within the meaning of s. 109. The petitioner relies upon two cases: *Meghraj* v. *Bidyabati Koer* (1) and *Lachmi Narain Marwari* v. *Bal Makund Marwari* (2). The first of these two cases is distinguished from the prior case reported in *Krishna Chandra Ghosh* v. *Maharaja Ram Narain Singh* (3) on the ground that in the latter case the decree of the Court did not finally terminate the trial between the parties but left it open to the plaintiff to enforce his rights if any in a fresh suit. This remark would apply equally well to the facts of the present case and, therefore, even if the decision in *Meghraj* v. *Bidyabati Koer* (1) is correct in law, it is not applicable to the case before us. The case reported as *Lachmi Narain Marwari* v. *Bal Makund Marwari* (2) differentiates the Privy Council decision in *Radha Kishan* v. *Collector of Jaunpur* (4) not so much on what is actually decided in the latter, but on an inference drawn from the Privy Council judgment as to what would have been the decision if the facts had been different. It must, however, be observed that both the cases relied on by appellant appear to be opposed to the decisions of the Privy Council, the latest of which is *Firm of Ram Chand Manjumal* v. *Firm of Goverdhan Das-Vishin das Ratanchand* (5). There it was held that an order is only final if it finally disposes of the rights of the parties. These decisions have been discussed and followed by the High Courts of Allahabad and Lahore [*vide Mukarram Ali Khan* v. *Skinner* (6) and *Sultan Singh* v. *Murli Dhar* (7).] In the present case there has been no adjudication as to the right of the parties. So far as the petitioner is concerned there has been no trial and no adjudication. The question as between him and the plaintiffs is as to whether a scheme should or should not be framed and on that point there has been no adjudication at all and consequently the order of remand cannot be deemed to be a final order. The contention urged before us is that under the decree of the Subordinate Judge the petitioner obtained some sort of right, *i. e.*, that that particular suit should not proceed, and that that right has been taken away by the order of this Court. This is true but the right has not been taken away finally; it has been merely suspended pending further proceedings, and consequently the order taking it away temporarily cannot be said to dispose finally of that right, there being no final order by this Court. The leave to appeal must, therefore, be refused on the ground that the order of this Court is not a final order within the meaning of s. 109, C. P. C.

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(1) 28 Ind Cas. 567; 21 C. L. J. 279.

(2) 60 Ind. Cas. 479; 6 P. L. J. 116; 2 P. L. T. 155.

(3) 21 Ind. Cas. 430; 18 C. L. J. 124.

(4) 23 A. 220; 28 I. A. 28; 5 C W. N. 153; 11 M. L. J. 65; 3 Bom. L. R. 78; 7 Sar. P. C. J. 800 (P. C.).

(5) 56 Ind. Cas. 302; 47 C. 918; 24 C. W. N 721; 18 A. L. J. 591; 22 Bom. L. R. 606; 39 M. L. J. 27; 12 L. W. 150; 2 U. P. L. R. (P. C.) 94; (1920) M. W. N. 407; 28 M. L. T. 87; 47 I. A. 124; 14 S. L. R. 191 (P. C.).

(6) 86 Ind. Cas. 161; 47 A. 335; 23 A. L. J. 12; L. R. 6 A. 175 Civ.; A. I. R. 1925 All. 263.

It is further contended that special leave should be given as it is a fit case for appeal but we must refuse the application. If the allegations in the plaint are correct it is certainly desirable that the matter should be enquired into and that a scheme should be framed; consequently there does not appear to be good reason for the grant of special leave. The petition is dismissed with costs.

V. N. V. *Petition dismissed.*

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(7) 80 Ind. Cas. 366; 5 L. 329; 6 L. L. J. 240; A. I. R. 1924 Lah. 571; 1 L. C. 100.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 82 OF 1924.

December 18, 1925.

Present :—Justice Sir Hugh Walmsley, KT., and Mr. Justice Chakravarti.

BRAHMOPADA BHATTACHARJEE *alias* CHAKRAVARTI AND OTHERS— PLAINTIFFS—APPELLANTS

versus

RAI MOHAN HALDAR AND OTHERS— RESPONDENTS.

Document, construction of—Disposition of property—Will or gift.

The Court must not construe an instrument prepared by a layman without legal assistance, where the question is as to whether it was intended to operate as a Will or as a transfer *inter vivos*, with too great nicety, or assign too much weight to the exact words the writer uses for a transfer of the property, as if he were accurately weighing the difference between a testamentary instrument and one operating *inter vivos*. In such a case not only the words actually used in the deed should be considered, but also the circumstances should be taken into consideration, and the matter ought to be broadly looked at. [p. 968, cols. 1 & 2.]

Thakur Ishri Singh v. *Thakur Baldeo Singh*, 10 C. 792; 11 I. A. 135; 8 Ind. Jur. 331; 4 Sar. P. C. J. 528; Rafique & Jackson's P. C. No. 79; 5 Ind. Dec. (N. S) 531 (P. C.) and *Udai Raj Singh* v. *Bhagwan Bakhsh Singh*, 6 Ind. Cas. 279; 32 A. 227; 7 A. L. J. 274; (1910) M. W. N. 110; 11 C. L. J. 387; 14 C. W. N. 641; 7 M. L. T. 410; 12 Bom. L. R. 409; 20 M. L. T. 458; 13 O. C. 172; 37 I. A. 46 (P. C.), relied on.

Appeal against a decree of the Second Additional District Judge, 24-Perganas, dated the 21st of January 1924.

Babus *Hiralal Chakravarti*, *Shyama Das Battacharjee*, for the Appellants.

Mr. *A. C. Gupta*, Babus *Radhika Ranjan Guha*, *Satis Chandra Sinha*, *Santi Kumar Roy Chaudhury*, and *Shib Chandra Palit*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This appeal arises out of an application for Probate of the Will of one Judhistir Haldar dated the 21st January, 1913 and is on behalf of the petitioners who propounded the Will against the order of the District Judge of the twenty-four Perganas, dated the 21st January, 1924 by which the petition for Probate was refused. The application for Probate which was made by four out of the five executors named in the Will was opposed by the daughters of the testator Judhistir, by the sons of one of the daughters and also by one of his sons-in-law. The objectors, amongst other matters, stated that the instrument propounded by the petitioners was not a Will on the face of it; and an issue was raised as to whether the document propounded was a Will at all. This issue was tried as a preliminary issue and the learned District Judge without going into the evidence and deciding the other issues which arose in the case found in favour of the objectors on this issue and dismissed the application for Probate. Hence their appeal.

The only question which arises before us in this case for consideration is whether the document alleged to have been executed by Judhistir Mandal was a testamentary deed or a deed of transfer *inter vivos* as was held by the learned District Judge. The learned Judge really based his judgment, to use his own words, on this ground: "It is true that he", that is Judhistir, "thought that he was nearing the end and he wished to make a disposition of his properties; but by the deed he declared that the dedication was to take effect from the date he executed the deed and he appointed himself the first *shebait.* He fixed the manner of succession to the office of the *Shebait.* No doubt there are certain legacies to be paid after his death by the executors; but such a provision is in conflict with his dedication to the idol". The learned Advocate for the respondents has also relied upon this argument in support of the decision of the Court below.

Now, the true rule to be followed in considering a deed in cases like this was laid down by their Lordships of the Judicial Committee in the case of *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (1) and also in the case of *Udai Raj Singh* v. *Bhagwan Bakhsh Singh* (2). In the first mentioned case, their Lordships, after discussing the provisions of the deed at page 801* stated as follows: "Mr. Woodroffe in his argument relied very strongly upon the use of the word 'assign' and upon the reservation of a life-interest to the donor. No doubt both those circumstances tend towards the conclusion to which Mr. Woodroffe wished to lead their Lordships, but they are by no means conclusive. If they had been the words of an English conveyancer preparing an English instrument, they would have afforded a very strong argument: but the instrument was prepared by Lal Sunder, and we must not construe with too great nicety, or assign too much weight to the exact words that he uses for a transfer of property, as if he were accurately weighing the difference between a testamentary instrument and one operating *inter vivos.* We must remember that Wills are comparatively new in any part of India, and are of more recent introduction in Oudh in respect of this class of property. So with respect to the reservation of a life-interest. The Will being not a very familiar instrument to the people who prepare it or who sign it, the testator often does express a great anxiety that he shall not be considered to have parted with anything in his lifetime, and their Lordships have seen here instruments, which most unquestionably were Wills, and intended to operate as such, in which nevertheless there have been expressions upon the face of them intimating that the testator intends to remain the owner of his property until he dies". In the latter case, their Lordships following the same principle stated that in a case like this not only the words actually used in the deed should be considered but also the circumstances should be taken into consideration and the matter ought to be broadly looked at. Now, bearing those principles in mind, let us see what are the circumstances here in the present case. Judhistir was apparently an old man and was apprehending imminent death. He was anxious that there should be rules laid down for the disposition of his properties after his death. In the circumstances as he himself stated that there was in his mind an apprehension of his imminent death, it was not possible that he would either enjoy the property or use it in a particular way. The learned Judge, as I have already pointed out, states that there are conditions in the deed which are clearly testamentary. The sole question, therefore, is "Was the whole object of the deed frustrated by the use of the words upon which the learned Judge has relied?" Applying the principles laid down in the cases referred to, I think it was not. Judhistir was a substantial cultivator living in the interior of the district. He had no legal help in drawing up the instrument. It appears from the clause in the deed relied upon by the District Judge and also by the learned Advocate for the respondents that the anxiety of the testator was that after his death there might be dispute as to the future disposition of his properties and, therefore, he thought—though erroneously no doubt that, unless he used those words, future dispostion of his properties would be in danger. Clearly, those words were not used for the purpose of making any *inter vivos* disposition which would come into operation during his lifetime and they should not, in my opinion, be read as tending to frustrate his very object. It is not a question of mere construing the words used in the deed; but it is a question whether, under the circumstances of the case, we can read these words as used with any other object than that of strengthening the disposition as by a Will. On the whole taking

(1) 10 C. 792; 11 I. A. 135; 8 Ind. Jur. 331; 4 Sar. P. C. J. 528; Rafique & Jackson's P. C. No. 79; 5 Ind. Dec. (N. s.) 531 (P. C.).

(2) 6 Ind. Cas. 279; 32 A. 227; 7 A. L. J. 274; (1910) M. W. N. 110; 11 C. L. J. 387; 14 C. W. N. 641; 7 M. L. T. 410; 12 Bom. L. R. 409; 20 M. L. T. 458; 13 O. C. 172; 37 I. A. 46 (P. C.).

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*Page of 10 C.—[*Ed.*]

a broad view of the matter, I think the testator was really laying down rules for the disposition of his properties after his death and not making any immediate disposition of the same. There are other circumstances which also lend support to this view. The deed was not drawn up on a stamped paper as it would have been if it was a deed of dedication. Throughout the deed is spoken of as a Will. It appointed executors and it was registered as a Will. Therefore, there can be no doubt as to what the object of the executant of the document was. Bearing that in mind, I do not think that the use of the word "dedication" should be given effect to in the sense in which it is ordinarily used in the same way as their Lordships of the Judicial Committee refused to give effect to the word "assign" which was clearly used in the deeds which their Lordships had to consider in one of the cases cited. On these grounds, I think that the view taken by the learned District Judge of the nature of the instrument was not correct. In my opinion the decree of the lower Court should be set aside and the case should be sent back to that Court for trial of the other issues raised. The appellants are entitled to their costs in this appeal—the hearing fee being assessed at three gold *mohurs*. The costs incurred by the parties in the lower Court as well as those to be incurred at the fresh trial will abide the result.

Walmsley, J.—I agree.

N. H. *Appeal allowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 173 OF 1924.

April 14, 1925.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

AJITSING MANIBHAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

GRUNNING & CO.—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXX, rr. 1, 3, 6—Partnership, suit against—Title of suit—Written statements, separate, whether can be filed.

Under O. XXX, r. 1, C. P. C., any two or more persons being liable as partners and carrying on business in British India may be sued in the name of the firm. In such a suit an individual partner may also be sued personally along with the firm. It is not, however, correct to sue persons as partners in the name of the firm by a partner or manager. [p. 969, col. 2.]

Under O. XXX, r. 6, C. P. C., where persons are sued as partners in the name of their firm they must appear individually in their own names but all subsequent proceedings will nevertheless continue in the name of the firm. In such a case, each partner can put in a separate written statement, but each written statement is the written statement of the firm. It is only when a partner is sued personally along with the firm that he may put in a personal defence. [p. 970, cols. 1 & 2.)

First appeal from a decision of the Joint First Class Subordinate Judge at Ahmedabad, in Suit No. 1039 of 1922.

Mr. *G. N. Thakor* (with him Mr. *R. J. Thakor*), for the Appellants.

Messrs. *Little & Co.* and *S. S. Patkar*, for the Respondents.

JUDGMENT.

Macleod, C. J.—The plaintiffs are a firm carrying on business in cotton in Liverpool.

They have filed this suit through their constituted attorney in the Court of the First Class Subordinate Judge at Ahmedabad against the firm of Chandrasing M. Jesingbhai by its partners and managers (1) Ajitsing Manibhai, (2) Chandrasing Manibhai, a minor by his next friend, to recover damages amounting to Rs. 13,870-4-0 and interest and the costs of a Solicitor's bill. In the first place it must be noted that the title of the plaint is not correct. Under O. XXX, r. 1 any two or more persons being liable as partners and carrying on business in British India may be sued in the name of the firm. In such a case the proper title of the defendant is: "*A B* a firm carrying on business in partnership," See Appendix A to the C. P. C., (2) "Description of parties in particular cases." Rule 3 provides for the manner of service of the summons where persons are sued as partners in the name of their firm and r. 6 provides for the manner of appearance of such persons. An individual partner may be sued personally along with the firm: *Taylor* v. *Collier* (1). It is not, therefore, correct to sue persons as partners in the name of the firm by a partner or manager and the proper title of the defendants in the suit should have been:—

"Defendant No. 1. Chandrasing M. Jeisingbhai a firm.

Defendant No. 2 Ajitsing Manibhai a partner in the firm.

Defendant No. 3 Chandrasing Manibhai a partner in the firm."

It does not appear from the way in which the plaint is drafted whether there are three defendants or only one, the firm of Chandrasing M. Jesingbhai.

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(1) (1882) 30 W. R. 701; 51 L. J. Ch. 853.

Although the written statement is headed " Plaintiff. The Grunning Company.

versus

Defendant. Chandrasing Manibhai, a firm".

it is signed by Ajitsing Manibhai for himself and as guardian of the minor Chandrasing Manibhai.

Paragraph 2 states " the suit filed by the plaintiffs against us the defendant. No. 1 and the minor defendant No. 2 is false."

Paragraph 3 states that Ajitsing was only doing the work of management of the firm and was neither a partner nor a proprietor, the plaintiffs had no right to file a suit against him personally or against the person of defendant No. 2. Therefore the suit could not be maintained.

The further defences in the written statement may be summarised as follows :—

Although the plaintiffs stated that they had purchased 100 bales American Cotton January delivery 1921 on behalf of defendants, defendants did not accept the contract as it was received late and even before it was signed plaintiffs asked for margin. Plaintiffs should have closed the transaction. when the market began to go down. If margin was not given the plaintiffs could not leave the transaction outstanding. Damages could only be claimed according to the rate prevailing on the day on which the rates began to go down.

The provisions of O. XXX are very complicated and technical, and are seldom sufficiently studied by practitioners in the Subordinate Courts. A summons under O. XXX, r. 3, shall be served either upon any one or more partners, or at the principal place at which the business is carried on within British India upon any person having at the time of service the control or management of the partnership business there.

It seems that the summons in this case was served on Ajitsing, so that was good service on the firm, since whether he was a partner or not, he admits that he was the manager.

Under O. XXX, r. 6, where persons are sued as partners in the name of their firm, they shall appear individually in their own names but all subsequent proceedings shall nevertheless continue in the name of the firm.

It is not easy to observe the provisions of this somewhat incongruous rule.

Each partner has to appear individually, each partner can put in a separate written statement but each written statement is the written statement of the firm. It is only when a person is sued personally along with the firm that he may put in a personal defence.

In this case there is no written statement of the firm, though it may be said that the defences raised in the written statement of Ajitsing were the same defences as would have been raised in a written statement by the firm.

In this state of the record, the Judge should have drawn the plaintiffs' attention to the provisions of O. XXX, r. 8.

Ajitsing was protesting that he was not a partner. Plaintiffs could disregard the appearance under protest altogether and have the summons served as provided by r. 3, or they could contend that the person served was a partner at the time the cause of action accrued, and apply on that basis either to have the appearance entered struck out, or to have the denial of partnership struck out of the appearance.

None of these courses was chosen by the plaintiffs. The suit proceeded as if the firm had been duly served, as well as the individuals alleged to be partners.

Issues Nos. 1 to 10 were raisad on the merits. The answer to issue No. 11 ' Are the defendants Nos. 1 and 2 liable under the contract' was ' The defendant firm are liable.'

The answer to issue No. 12 ' Are defendants Nos. 1 and 2 personally liable under the plaintiffs' claims' was 'Defendant No. 1 is liable.'

A decree accordingly was passed against the firm of Chandrasing M. Jeshingbhai and against Ajitsing as one of its partners. The firm and Ajitsing appealed and appeared by the same Counsel.

The principal grounds of appeal were: —

1. That the Subordinate Judge had erred in holding that Ajitsing was a partner instead of holding that his mother was the sole proprietor of the firm.
2. That he had erred in not holding that there was no agreement.
3. That he had erred in not holding if there was a valid agreement that the plaintiff should have re-sold the goods at a much earlier date.

4. That the loss actually suffered had not been proved.

Not a single objection was raised with regard to the service of the summons or the frame of the pleadings.

It would not then be equitable for this Court in the circumstances of the case to do more than we have done in pointing out the defects of the procedure in the lower Court, since the merits of the case have in no way been affected thereby.

We accept then the fact that a decree has been passed against the firm and against Ajitsing personally, and that both the firm and Ajitsing have appealed against that decree.

[His Lordship after discussing other points on the merits passed the following order:—] I think the plaintiffs are entitled to succeed, but they are not entitled to interest on the claim before the date of the suit, nor can they recover the amount of their Solicitors' costs before suit. There will, therefore, be a decree for Rs. 13,870 with interest at six per cent. from the date of the suit until judgment with costs in both Courts in proportion, with interest on judgment at six per cent.

Coyajee, J.—[Only the portion of his Lordship's judgment relevant for the purpose of this report is given below:—] While the arguments were proceeding, the learned Chief Justice called the attention of the parties to the defect in the pleadings. A reference to the plaint and the written statement in this case shows that not much regard was paid to the rules which regulate suits against firms (O. XXX, C. P. C., 1908). The parties themselves, however, apparently felt no embarrassment on that account. In a suit against a firm, it is permissible to the plaintiff to make one or more partners defendants in conjunction with the firm. In the plaint in this case Ajitsing is described both as the manager of the firm and a partner. He accepted service of the summons; he signed and put in the one written statement in the case; he also signed the *vakalatnama* which accompanied it. Some of the issues framed in the suit related to the merits of the plaintiffs' claim; but there were others which had reference personally to Ajitsing and Chandrasing. In these circumstances, the decree of the lower Court cannot be disturbed merely on account of this defect unless it affected the merits of the case or the jurisdiction of the Court; and it is not contended that any of those results has followed in this case (s. 99, C. P. C.)

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 89 OF 1925.

April 1, 1926.

Present:—Mr. Hallifax, A. J. C.

Seth KISHANLAL—PLAINTIFF—APPELLANT

versus

BAPU AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 73—Contract for payment of money—Breach—Damages—Method of assessment—Civil Procedure Code (Act V of 1908), s. 35, scope of—"Court rate of interest", meaning of—Court, whether bound to award 6 per cent. per annum.

In ascertaining under s. 73 of the Contract Act the loss or damage caused by a breach of contract for the payment of money all that is to be done is to find out the rate of interest that the person to whom it ought to have been paid, would have got on it in the ordinary way, if it had been paid. The rate or amount of interest which was originally promised and that promised in case the original promise was broken come in only as a guide in ascertaining what rate of interest ought to have been paid and as a maximum. [p. 971, col. 2; p. 972, col. 1.]

There is no such thing as a "Court rate of interest". What is usually so called is merely the maximum rate which the Court may order to be paid on the costs under s. 35 of the C. P. C. [p. 972, col. 2.]

The rate of 6 per cent. per annum may in some cases be the appropriate rate of interest to allow for damages, though the fact that it is the rate mentioned in s. 35, Civ. P. C., does not make it so. [*ibid.*]

Appeal against a decree of the District Judge, Chhindwara, dated the 23rd March 1925, in Civil Suit No. 22 of 1921.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *N. R. Alekar*, for the Respondents.

JUDGMENT.—There is probably no matter into which more totally unnecessary complications are imported than the matter of interest for a debt which was not paid according to the promise. In this case one party paid the other a sum of Rs. 2,400. In consideration of that payment the other party promised to pay Rs. 750 eight months later and three further sums of Rs. 750 one, two and three years after that. No such payment at all was made, and the first party became entitled to compensation for the breach of contract.

Now there is no contract in respect of which it is easier to estimate in terms of money under s. 73 of the Contract Act the loss or damage caused by a breach of it than a contract for the payment of money. All that has to be ascertained is the rate of interest that the person to whom it ought to have been paid, would have got on it in the ordinary way if it had been paid. The other two factors, the amount of the money and the length of time it has been wrongfully retained, we already have in every case. The other matters, the rate or amount of interest which was originally promised and that promised in case the original promise was broken, come in only as a guide in ascertaining what rate of interest ought to be paid and as a maximum. Except for that we are not concerned with the original contract.

The original contract was for the fairly quick payment of the Rs. 2,400 with compound interest at a rate that is almost exactly 11.1 per cent. per annum. That is the equivalent of regular payment of Rs. 750 on the four dates fixed. Still more was promised if the payments were not made punctually, but we need not consider that, because the plaintiff has asked for much less. In the circumstances of this case then it is quite clear that the plaintiff would have been properly and sufficiently compensated for the failure to pay him Rs. 750 in 1908 and each of the three following years by being paid Rs. 2,400 and compound interest thereon at 12 per cent. per annum from the date on which he paid that amount to the other party. A good deal has been said in this Court about simple interest and compound interest. They are not two kinds of interest; the only difference between them is that one paid regularly and the other is not.

The amount claimed as due at the institution of the suit on the 9th of December, 1921 was Rs. 7,410. The amount payable as damages on that date if the calculation is made with interest at no more than 9 per cent. per annum is Rs. 7,836 9 0. It is clear then that the plaintiff was entitled to be paid the amount he claimed on that day. Similarly the amount due on the decree, the 23rd of April, 1925, if interest is calculated at 9 per cent. was Rs. 9,380-8-0, but the plaintiff claims only Rs. 8,796 12-0.

The learned District Judge has given damages in the shape of interest at a number of different rates in a way that could not possibly convey any idea to him or to anybody else of whether the result gives the plaintiff proper compensation or not. The labour expended in deciding whether "proportionate prospective interest" (whatever that may mean) should be awarded or not and when the first default occurred and when the whole sum became due was entirely wasted. It has to be pointed out also that the amount due ought to have been calculated up to the end of the period allowed for redemption, and not only up to the date of the decree, and further that there is no such thing as a "Court rate" of interest. What is usually so called is merely the maximum rate which the Court may order to be paid on the costs under s. 35 of the C. P. C. A rate of 6 per cent. per annum may in some cases be the appropriate rate of interest to allow for damages, though in these Provinces the cases in which it is not too low are few, but the fact that it is the rate mentioned in s. 35 does not make it so.

The result of the complicated account made in the lower Court was that the amount due on the date of the decree was Rs. 6,984. That is equivalent to giving the plaintiff interest at a rate per cent. that exceeds six by a small fraction. The way in which the plaintiff arrived at the sum he claimed in the plaint is only a little less complicated and gives him much less than he thought he was claiming. He obviously intended to claim compound interest at something more than 12 per cent. per annum. What he has claimed is simple interest at 17$\frac{3}{8}$ per cent. per annum for the first twenty months and then compound interest at 12 per cent. for twelve years on Rs. 95 less than was due to him at the beginning of them. The result is a claim for a sum that gives him interest all through at a shade less than 9 per cent. How he worked out the sum of Rs. 8,796-12-0 which he claims in appeal to have been due on the date of the decree I have been unable to discover and the learned Pleader who appeared for him cannot explain. It is, however, less than the amount that ought to have been decreed on that day, which would have been Rs. 9,380-8-0 if interest had been calculated all through at 9 per cent. only.

The amount to be decreed as due on the 23rd of April 1925 is, therefore, Rs. 8,796-12-0. The plaintiff has asked for interest at 12 per cent. per annum, as indeed he did or thought he was doing all along. He is clearly entitled to it, though through want of clear thinking he has asked for a sum as due on the date of the decree which gives him interest at a lower rate. That is, however, no reason for giving him the lower rate after the decree. Interest will, therefore, run at 12 per cent. per annum from the date of the decree to the date now to be fixed as the end of the period allowed for redemption. That date will be the 23rd of June next. The amount due on that day for principal and interest on the mortgage will be Rs. 10,049-6-0. It may be mentioned that interest at 9 per cent. all the way through would have given the plaintiff Rs. 10,453 by that date. The defendants must pay all the costs in both Courts, the amount being added to the sum payable for principal and interest to make up the price of redemption. The decree of the lower Court will be modified accordingly.

G. R. D. *Decree modified.*

OUDH CHIEF COURT.

CIVIL REVISION NO. 196 OF 1925.

January 27, 1926.

Present:—Mr. Justice Misra and Mr. Justice Raza.

SURAJPAL SINGH—DEFENDANT—APPELLANT

versus

DEOKALI—PLAINTIFF—OPPOSITE PARTY.

Practice—Ex parte *decree—Application to set aside—Conditional acceptance—Condition not fulfilled—Death of applicant—Order maintaining decree, effect of—Fresh order.*

Where, on an application to set aside an *ex parte* decree, the Court passes a conditional order to the effect that if the defendant pays in Court a certain sum before a certain date, the decree would be set aside, otherwise the application would stand dismissed, and no payment being made till the prescribed date, dismisses on that date the application, maintaining the decree, it is not any fresh order adverse to the defendant that is passed by the Court, but only effect is given to the previous order, and if on that date the defendant is dead, it cannot be said that any resh injurious order has been passed against a dead man. [p. 974, cols. 1 & 2.]

Debi Bakhsh Singh v. *Habib Shah*, 19 Ind. Cas. 526; 6 O. C. 194; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 35 A. 331; 40 I. A. 151 (P. C.), distinguished.

Application for revision of an order of the Sub-Judge, Rae Bareli, dated the 5th August 1925.

Mr. *Ali Mohammad*, for the Appellant.

Mr. *Bisheshwar Nath Sirivastava*, for the Opposite Party.

ORDER.—This is an application for revision of an order passed by the learned Subordinate Judge of Rae Bareli, dated the 15th of August 1925. The facts of the case which gave rise to this application are as detailed below:—

The plaintiff-opposite party (Deokali) obtained an *ex parte* simple money decree against one Jagdamba Singh on the 16th of January, 1922. On that very date the 16th the said Jagdamba Singh applied for setting aside the decree which had been passed against him *ex parte*. On the 6th May, 1922, the Court passed a conditional order to the effect that if the defendant (Jagdamba Singh) deposited the sum of Rs. 60 in Court on or before the 13th July, 1922, the *ex parte* decree would be set aside, and in case such payment was not made within the time specified in the order, the application for setting aside the *ex parte* decree was to stand dismissed and the original decree maintained. After the passing of this order of 6th May, 1922, Jagdamba Singh died on the 19th June, 1922, and no payment was made either by Jagdamba Singh during his lifetime or by the applicant or any other person claiming to be his legal representative, till the 13th July, 1922. On that date the record was put up before the learned Subordinate Judge who had passed the decree and an information was communicated to him that Jagdamba Singh or his legal representative, if any, had failed to deposit the sum of Rs. 60 in accordance with the terms of the order of 6th May, 1922, the application for setting aside the *ex parte* decree must be deemed as dismissed, and the decree originally passed, maintained. In short, the learned Subordinate Judge gave effect to the order of the 6th May, 1922, which was the order passed in the presence of Jagdamba Singh himself. No new order of any sort whatever prejudicial to the interest of Jagdamba Singh or his legal representative was passed on 13th July, 1922.

On the 31st May, 1923, the decree-holder-opposite party, put in an application for execution asking the Court to implead the applicant, Suraj Pal, and others as legal representatives of the original judgment-debtor, Jagdamba, the deceased, and to take out execution proceedings. On this application Suraj Pal was brought on the record as a legal representative of the deceased Jagdamba by an order passed *ex parte* against him on the 11th of August, 1923. Subsequently on the 11th September, 1923, Suraj Pal, the applicant, raised several objections to the execution of the decree; but no objection was taken by him to the effect that the decree passed *ex parte* against Jagdamba Singh was invalid on the ground that the order maintaining the decree had been passed on the 13th July when Jagdamba was dead, and that his (Suraj Pal's) name had improperly been brought on the record. The Court executing the decree dismissed his objections embodied in the application of the 11th September, 1923, by his order dated the 13th October, 1923.

It has been urged before us in revision that the order passed by the learned Subordinate Judge on the 13th July, 1922, dismissing the application for setting aside the *ex parte* decree and maintaining the original decree was a nullity on the ground that Jagdamba Singh was not alive on that date. Reliance was placed in support of this contention on a ruling of their Lordships of the Privy Council reported as *Debi Bakhsh Singh* v. *Habib Shah* (1). The argument was to the effect that because Jagdamba Singh had been dead on the 13th July, 1922, no order adverse to him should have been legally passed by the Court on that date, on the ground that adverse orders cannot be validly passed against dead persons. We do not see any force in this contention. As is stated above, the learned Subordinate Judge did not pass any fresh order on the 13th July, 1922, but only gave effect in terms to the order passed by him on the 6th May, 1922, when Jagdamba Singh was alive. The order passed on this date (6th May 1922) was admittedly a good and valid order. If Jagdamba Singh or his legal representatives wanted to take advantage of the conditional order passed on the above date it was open to them to do so. If, however, neither Jagdamba Singh nor any of his legal representatives chose to take advantage of that order and failed to deposit the money within the time fixed, the order passed on that date became operative automatically on the 13th July, 1922. It was indeed even unnecessary for the Court to have passed any order at all. It is quite incorrect to say that on the 13th July, 1922, when Jagdamba had been dead any fresh order was passed injurious to the interest of the deceased. We, therefore, hold that the rule of law laid down by their Lordships of the Privy Council in the case quoted above, does not apply to the facts of the present case and the contention of the learned Pleader for the applicant cannot be sustained.

We may also mention that in view of the facts stated in the earlier portion of our judgment, the order passed in the execution proceedings against the applicant, Suraj Pal, that he was to be brought on the record as legal representative of the deceased Jagdamba Singh, was an order which has become final as against him and he cannot thereafter be allowed to challenge the validity of the decree in the course of execution of which he had been impleaded as a legal representative of the deceased judgment-debtor, Jagdamba Singh. In our opinion in the face of this order of the Execution Court it is no more open to the applicant, Suraj Pal, to raise any objection against the validity of the *ex parte* decree. The orders of the 11th of August 1923, and of the 13th of October 1923 are final against him and they cannot be questioned by him any more. We, therefore, are of opinion that in face of the said orders, the present application cannot be maintained.

We are, therefore, of opinion that the order passed by the learned Subordinate Judge of Rae Bareli on the 13th July 1922 enforcing his previous order of the 6th May, 1922 was a perfectly valid order, and that there was no illegality or irregularity committed by him in the exercise of his powers.

We, therefore, dismiss this application with costs.

N. H. *Application dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 8, 1926.

Present:—Viscount Finlay, Lord Phillimore, Lord Blanesburgh, Sir John Edge and Lord Salvesen.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—APPELLANTS

versus

Raja JYOTI PRASHAD SINGH DEO BAHADUR AND OTHERS—RESPONDENTS.

Land tenures—Digwars *or* ghatwal *tenures, whe-*

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(1) 19 Ind. Cas. 526; 16 O. C. 194; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 35 A. 331; 40 I. A. 151 (P. C.).

ther under zemindar—*Burden of proof—Service tenures, kinds of—Ancient grant, interpretation of—Privy Council—Arguments urged for first time—Practice.*

The Privy Council has long established it for itself as a principle of wisdom and prudence that it should be very chary of entertaining an argument which has not been sifted in the Courts below especially when the question to be decided concerns the diversified and complicated Indian Law as to tenure of land. [p. 976, cols. 1 & 2.]

Should the general words of an ancient grant be uncertain they may be fairly explained by subsequent usage. [p. 983, col. 1.]

Duke of Beaufort v *Mayor, Aldermen and Burgesses of Swansea*, (1849) 3 Ex. 413; 154 E. R. 905; 77 R. R. 677, *Van Diemen's Land Co.* v. *Table Cape Marine Board*, (1906) A. C. 92; 75 L. J. P. C. 28; 54 W. R. 498; 93 L. T. 709; 22 T. L. R. 114 and *Watcham* v. *Attorney-General of East Africa Protectorate*, (1919) A. C. 533; 87 L. J. P. C. 150; 34 T. L. R. 481; 120 L. T. 258, referred to.

The question whether certain *digwars* or *ghatwals* are or are not subordinate to the *zemindar* is always one of fact and the burden of proving that they are under him lies on the *zemindar*. [p. 978, col. 2.]

Forbes v. *Meer Mahomed Tuquee*, 13 M. I. A. 438; 14 W. R. P. C. 28; 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R. 614, referred to.

Various forms of service tenures enumerated and defined. [p. 978, cols. 1 & 2]

Appeal from the Calcutta High Court.

Messrs. *A. M. Dunne* and *K. Brown*, for the Appellant.

Messrs. *W. H. Upjohn*, *L. DeGruyther*, *J. M. Parikh*, *G. R. Lowndes*, *E. B. Raikes* and *G. B. McNair*, for the Respondents.

JUDGMENT.

Lord Phillimore.—This suit was brought on the 3rd September, 1914, by the respondent, the Raja of Pachete against the Secretary of State for India and certain Coal and Iron Companies who are, with the Secretary of State, appellants before their Lordships' Board and other parties described as *digwar ghatwals*, alleging that three *mouzahs* known as Kendua, Parira and three-quarters of Garh Parira in the Burdwan District of Bengal were included in his *zemindari*, and that this being so he was the proprietor of the mineral rights under the said *mouzahs*, and that Secretary of State and *digwars* had purported to grant leases of the mineral rights to the defendant Companies, and praying that it might be declared that he was the rightful owner of the minerals and that the lessees and sub-lessees had no right to them and should be restrained by injunction from trespassing and working the minerals, and asking for damages with interest and costs.

The Secretary of State in his defence said that the plaintiff was never within 12 years in possession of the mineral rights claimed by him, and that he and the defendants Nos. 2, 3 and 5 had been for more than the said period openly and as of right in enjoyment of the minerals, and that the three *mouzahs* did not form part of the permanently settled estate of the plaintiff, but had been *digwari chakran* from before the Permanent Settlement of 1793. He further denied the plaintiff's title to the minerals. The other defendant set up similar defences.

Issues having been settled by the Subordinate Judge, the case was transferred by the District Judge to his Court in July, 1917, and heard by him on oral and documentary evidence in the months of April and May, 1918.

On the 28th May, 1918, he delivered judgment supporting all three of the defences raised, *i. e.*, holding that the plaintiff had no title to the villages in suit, that if he had been the landowner he would not have the right to the minerals which would still be in the Crown, and that the defence of adverse possession and consequent limitation was also good.

The appeal being taken to the High Court of Judicature at Calcutta, that Court on the 24th July 1921, reversed the judgment, and while refusing the plaintiff some of the relief which he claimed, made a decree in his favour in terms following:—

"It is ordered and decreed that the plaintiff be and he is hereby entitled to a declaration that the *mouzahs* in dispute and described in the plaint out of which this appeal arises together with the minerals underlying them are included within his permanently settled estate, that he is the rightful owner of the minerals in the *mouzahs* and that none of the defendants has any right to the minerals in the *mouzahs*. And it is further ordered and decreed that a perpetual injunction do issue restraining the defendants from working coal or other minerals in the *mouzahs*."

The Secretary of State and the Companies have appealed to His Majesty in Council from this decree.

The ground upon which the High Court held that the *mouzahs* in dispute with the minerals underlying them were with the permanently settled estate was that they were what is called *thanadari* lands. Having so decided, the Judges thought that the further defence of limitation was not good, nor was the defence good that the minerals under these villages belonged to the Crown. Their Lordships will take the question of ownership first.

The learned Counsel for the respondent Rajá when it came to their turn, while accepting and supporting the reasoning of the Hight Court rested the main strength of their argument upon two other grounds, the first of which comes to be discussed in logical order before the submissions made by the appellants.

This first argument was founded upon the language of the Regulations of 1790 and 1793, which established the Decennial and Permanent Settlements of Bengal, Orissa, and Behar,

Regulation VIII of 1793, sub-s. 4 speaks of the settlement being "concluded with the actual proprietors of the soil whether *zemindars*, *talukdars* or *chaudhris*".

Upon the strength of this and other passages in the Regulations, it was urged that the Government of the day recognised a pre-existing right in the *zemindars* and others and did not confer rights by the Settlement, and consequently that it was possible that lands owned by a *zemindar*—though not *lakhiraj* or *thanadari*—might never have been settled and yet be his property and so might descend to the successors-in-title of the original *zemindar*, having remained unsettled through all these years,

Whether such lands according to the argument were to be reckoned as part of a *zemindari* as to be treated as *de hors* the *zemindari* was not made clear.

The argument receives no support from decided cases and appears at first sight to be contrary to the teaching of the text-book but their Lordships are relieved from considering its force because it was never submitted to either of the Courts in India.

Courts of Final Appeal—whether it be the House of Lords or this Board—have long established it for themselves as a principle of wisdom and prudence that they should be very chary of entertaining an argument which has not been sifted in the Courts below; and if this be true as a general rule, it is especially true when the question to be decided concerns the diversified and complicated Indian Law as to tenure of land.

Not only is there no trace of this point having been brought before the Indian Courts; but it is apparent that the case of the respondent was rested from the beginning on other grounds, para. 2 of his plaint states that the three *mouzahs* in question are "included in the revenue-paying ancestral *zemindari* of the plaintiff known as Chakla Pachete."

The 2nd issue as suggested by the plaintiff was: "Are the *Mouzahs* Kendua, Parira and three-fourths of Garh Parira situate within Chakla Panchkote the premanently-settled *zemindars* of the plaintiff, and are they included within the said Permanent Settlement? and as actually fixed, was in the following words:

"Were the *mouzahs* in suit permanently settled by Government with the plaintiff's ancestors, and is the plaintiff by right of such settlement entitled to the mineral rights under the *mouzahs*?"

These things being so, their Lordships do not feel that they ought to give further consideration to this argument.

The argument, however, as to the kind of recognition which was given to those who were in the position of *zemindari* at the time of the Decennial and Permanent Settlements and the deductions to be drawn not only from the Regulations but from the despatches and minutes of those in authority is not, as will be noticed hereafter, without valuable bearing upon the question, which in their Lordships' opinion is the real question which was intended to be raised, that is, whether the three *mouzahs* were permanently settled with the plaintiff's ancestors and form part of the plaintiff's *zemindari*.

The *zemindari* of the Raja of Pachete is of great size and is said to extend over more than 2,000 square miles, with more than a thousand villages or *mouzhas* upon it. The three *mouzahs* in question are interlocked with the unquestioned portion of the *zemindari* but it is doubtful whether all three are absolutely enclosed in it. The topographical situation is such as to afford some slight presumption that the three *mouzahs* are part of the *zemindari*.

The contents of the plaintiff's estate are to be deduced from the *kabuliyat* given by the then Raja upon the occasion of the

Permanent Settlement of his *zemindari* in the year 1793.

The divergence of the two Courts in India begins with the construction of this *kabuliyat.*

The material parts of it are as follows:—

"This *kabuliyat* is executed by me Maharaja Sri Sri Raghunath Narayan Deb to the effect following:—That my *zemindari* Pargana Punchkoti, etc., appertaining to the Province of Bengal, the paradise of the world, exclusive of Gunjes, Bazars and Hats and of the entire *sayerats* and *mutfara* (ground rents) and exclusive of all *lakheraj* lands whether *sanadi* or *besanadi* of that *pargana*, is settled with me in *mokurrari* as my Tahut for the term of ten years from 1197 *B. S.* to 1206 *B. S.* as per schedule below, at a *jumma* of sicca Rs. 52,853 (fifty-two thousand eight hundred and fifty-three) annually, *i. e.* at *sicca* Rs. 5,28,530 (five lakhs twenty-eight thousand five hundred and thirty) in the total, inclusive of all *abwabs* in force in the said *zillah.* So I agree, and give in writing that I shall pay the said amount of revenue as per separate *kistibandi* without excuse or variation. . . . And I shall file within the current year in the Zilla Record Room a list under my signature, showing village by village the *mofussil* distribution of the *jumma* fixed in the *Sadar* for my Tahut in proportion to the rentals therefrom together with the areas of *talabi* and *betalabi* lands within the four boundaries of the settled Hudda. And in future in the beginning of each year, within the first three months, I shall deliver a list of such distribution of revenue. In case of neglect or delay in this matter, I shall be answerable to the Government. I shall not without the Huzur's permission and advice make any Brahmottar, Debottar, Mahatran, Aima, Midadmas, Piran and Fakiran grants, etc.—any sort of *lakheraj* (tenures)—to anybody in the said *pargana.*"

The schedule, if ever there were one, is missing. There are certain sarsikan papers of 1790 bearing the signature of the Raja, which in the opinion of the District Judge represent the list which the Raja undertook to file within the current year showing not only the *mofussil* distribution of the *jumma* but also the area of the lands whether *talabi* or *betalabi.* These sarsikan papers mention 1,197 villages. They do not contain the three *mouzahs* in question. They contain, however—and this is of some importance—the name of one *mouzah* stated to be occupied by *digwars* and to be paying a rent.

The three *mouzahs* in question in this suit have been in the occupation of the *digwar ghatwals* for as far back as can be traced, certainly for a period anterior to the settlement with the Raja. They may, notwithstanding, be within his *zemindari*; or the *digwars* may hold directly of the sovereign power as co-ordinate with rather than subordinate to the Raja.

In the weighty judgment prepared and delivered in 1855 on behalf of the Board by Mr. Pemberton Leigh (afterwards Lord Kingsdown) in the case of *Raja Lelanund Singh Bahadoor* v. *Bengal Government* (1), an account was given of the three classes of service tenures which are or were not uncommon in India.

The lowest class of *chakran* lands are those held by minor officers of the *zemindar* whom he appoints and with whose services he could dispense, thereupon resuming their lands for the purpose of imposing upon them suitable rent. Next in order come the *thanadars,* Police officials, whom in old times it was the duty of the *zemindar* to provide, whom he allowed to occupy their lands, either rent free or subject only to a quit rent, and in respect of whom the Government made an allowance to the *zemindar* to recompense him for the rent which he had lost.

By Regulation I, s. 8, cl. 4 of 1793, it was provided that the *zemindars* might be relieved of their Police duties; and in that case, the Government might resume the allowances or the produce of the lands, as it thought proper. In such cases, the *zemindars* would in turn resume the lands of their subordinate *thanadars.*

A higher class is that of *ghatwals,* some of whom, as mentioned in Lord Kingsdown's judgment, might be persons of high rank, though in other cases the position of a *ghatwal* might be treated as "something between that of a *chowkidar* and an office peon," to adopt the language of the District Judge in this case.

But whatever their dignity, these *ghatwals* were always of ancient date. It is said by the High Court in this case that the East India Company never treated a *ghatwali* tenure; and though there is some indication in the narrative in Lord Kingsdown's judgment, that there actually were creations of some *ghatwali* tenures in that case, no doubt the action of the East India Company was generally confined to recognition and confirmation. *Digwars* in this district appear to take the same position as *ghatwals* in other districts.

Still the question remains—were the officers of the highest class always subordinate to the *zemindar*, or were they sometimes co-ordinate? In the case of *Raja Lelanund Singh Bahadoor* v. *Bengal Government* (1), it was held that the Raja had made his settlement for his *zemindari* as a whole or block, that the *ghatwali* lands were included in this settlement, and that the *ghatwals* held of him. Indeed, it was agreed and admitted in that case that the *ghatwali* lands formed part of the *zemindari*, the holders paying a quit rent to the *zemindar*.

But as stated in the judgment already quoted, the nature and extent of their rights probably differed in different districts and in different families. That judgment refers to the tenures in Beerbhoom, the holders of which—though no doubt they paid a fixed rent to the *zemindar*—are entitled to hold their lands in perpetuity, subject to the performance of certain duties. (*See* Regulation XXXIX of 1814).

The classes of possible *ghatwali* tenures and their nature are described in much detail in the case of *Kumar Satya Narain Singh* v. *Raja Satya Niranjan Chakravarti* (2), in which the judgment of the Board was delivered by Lord Sumner in 1923, dealing with the Sonthal Parganas. He says:—

"In the Sonthal Barganas there are for practical purposes three classes of *ghatwali* tenures; (*a*) Government *ghatwalis* created by the ruling power; (*b*) Government *ghatwalis*, which since their creation and generally at the time of the Permanent Settlement have been included in a *zemindari* estate and formed into a unit in its assessment; and (*c*) *zemindari ghatwalis*, created by the *zemindar* or his predecessors and alienable with his consent. The second of these classes is really a branch of the first. The matter may, however, be looked at broadly. In itself, '*ghatwal*' is a term meaning an office held by a particular person from time to time, who is bound to the performance of its duties, with a consideration to be enjoyed in return by the incumbent of the office. Within this meaning the utmost variety of conditions may exist. . . . The superior who appoints him, may also in the varying circumstances of the organisation of Hindustan be the ruling power over the country at large, the landholder responsible by custom for the maintenance of security and order within his estates, or simply the private person, to whom the maintenance of watchmen is, in the case of an extensive property, important enough to require the creation of a regular office."

The tenure though peculiar, because of a certain reserved power of selection, nevertheless ranks as hereditary [*Durga Prashad Singh* v. *Trebini Singh* (3)]. Colonel Dalton, Commissioner of Chota Nagpur, in a letter of 14th June, 1869, (Record, part II, page 389), gives a useful account of their origin.

While, therefore, it may well be—and in fact it is ascertained in respect of some tenures in this very case—that the *digwars* or *ghatwals* are subordinate to the *zemindar*, it is always a question of fact whether they are or are not subordinate; and it is upon this footing that the Courts in India and their Lordships have approached the present case.

That the burden was upon the respondent to prove that they are part of his *zemindari* is well settled. The case of *Forbes* v. *Meer Muhomed Tuqueé* (4), where this Board held that the disputed lands were within the geographical limit of the *zemindari* and yet not proved to be of it, is strong on this point (*see* pages 457* and 458*).

Now the point made by the District Judge is that the *kabuliyat* covers the whole estate of the Raja, that it refers to a list of villages and undertakes to show village by village the *mofussil* distribution of the *jumma*, that in fact the list (*i.e.*, the sarsikan papers) does show the revenue set aside for each, and, therefore, in his view, it is not an engagement for a block but a series of engagements for the several villages which are parcel of the *zemindari*.

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(1) 6 M. I. A. 101; 4 W. R. P. C. 77; 1 Sar. P. C. J. 505; 1 Suth. P. C. J. 248; 19 E. R. 38.

(2) 79 Ind. Cas 825; 54 I. A. 37 at p. 50; A. I. R. 1924 P. C. 5; 28 C. W. N. 351; 5 P. L. T. 171; 3 Pat 183 (P. C.).

(3) 48 Ind. Cas. 527; 45 I. A. 251; 24 M. L. T. 407; 28 C. L. J. 508; 9 L. W. 60; 21 Bom. L. R. 569; 46 C. 362 (P. C.).

(4) 13 M. I. A. 438; 14 W. R. P. C. 28; 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R. 614.

ages of 13 M. I. A.—[*Ed.*]

The learned Judges in the High Court are of opinion that the engagement was for the block, and that it was only intended to enumerate the villages which paid revenue.

But the Raja had made a previous return of the *bazizamin* or *lakhiraj* lands within the *zemindari*, in 1771. These villages are not included in that return. Further, he undertakes in the *kabuliyat* to set out in his list the areas of both *talabi* and *betalabi* lands. If these *mouzahs* were in the *zemindari* they should be in some list.

Then there is a point which the High Court makes upon the description. This rests on the words: "my *zemindari* of *Pargana* Punchkoti, etc" There really seems little in this. If the word *pargana* is used in its more technical sense, Punchkoti must be taken as the same as Pachete; and then as his *zemindari* contained other *parganas*, they must be read as enumerated here. It is, however, quite possible that *pargana* is used loosely for *chakla*, a not very technical word which may embrace several *parganas*, and the "etc." may stand for the fraction or *kismet* of Shergarh, which is divided between three *parganas*. Reference upon this head may be made to Hunter's Imperial Gazetteer of India, Volume 7, page 277, under title Panchet. Incidently it may be mentioned that Hunter takes the views that all the villages in this *zemindari* were mentioned in one or other of the two documents.

The word "etc."—or whatever may be its Indian equilvalent—seems to give no assistance in arriving at the answer to the one question: "Is this *kabuliyat* an engagement for the whole block or for a number of villages set out *seriatim*?"

A suggestion made by the High Court was also pressed at their Lordships' Bar by Counsel for the respondent Raja was rested upon the fact that the *kabuliyat* apparently contemplates two documents, one to be delivered in the first year which is to show both the distribution of the revenue village by village and the areas of *talabi* and *betalabi* lands, and the other being the annual document which is to be confined to the distribution of the revenue.

The suggestion is that the sarsikan papers represent the second kind of list and, therefore, would not have any mention of lands within the *zemindari* which paid no revenue and might be called *betalabi*.

It is a possible explanation.

After the sariskan papers, the only early documents are Lala Kanji's report and the lot *bundi* papers of 1795, 1803 and 1807. As to these latter, the argument for the appellants is based upon the fact that when the property of the Raja was to be sold for non-payment of revenue, the Collector was directed to take a convenient unit and that there be put up for sale all the villages in the *pergunnah* within which the three villages in suit are supposed to be topographically situate, and that these three are not included, the Collector's return showing that he had intended to include every village in the *pergunnah* except certain villages already sold.

The argument is of weight, but there is again an explanation to be offered for the respondent. It is said that the sale was for the purpose of procuring money, and that these are not revenue-producing villages, and that supposing that they were as the respondent contends within the limits of the *zemindari*, the rights of the Raja to some possible reversion or some claim to the minerals were in those days so shadowy that they would not be thought of.

This, however, is not the view taken by either of the Courts in India. Both have thought that these villages were omitted because the Government Officers did not think that they were in the *zemindari*.

Now as regards Lala-Kanji's report, both sides rely upon it, but it is more valuable to the respondent than to the appellants. It appears in two forms, one abbreviated and one fuller. It was made in 1799 and has been preserved by reason of its being made the appendix to the report of Captain Hannyngton in 1841.

It is a Police Report in answer to the enquiry whether besides the *digwars* there were any other Police guards in Chakla Pachete—with further enquiries as to the pay of the *digwars* and other Police guards.

Lala-Kanji says that besides the *digwars* there are other guards of three classes, *jagirdars*, *ghatwals*, who are under the *digwars* and village *chowkidars*.

His report states that there were formerly 86 *ghats* under the *digwars*, and that in 23 of them the establishment was kept up and is yet in some places: that 13 were under the Raja who paid them, but that since the fixing of *thanas* and the Government taking from the *zemindar* Rs. 1,600 yearly for *thana* expenses, the *ghatwals* had been dismissed.

Then he says that there were $57\frac{3}{4}$ or $57\frac{1}{2}$ *digwari* villages, the rent of which was fixed in 1771 by Mr. Higginson at Rs. 5,000; but later on he proceeds to say that no rent is paid for these villages except for the one village of Kasthulia. He adds that the *digwars* hold their respective *jagir* villages in lieu of service without payment of rent, and he includes two if not three of the villages in suit, in the list appended to his report which is headed "Particulars about the *jagir mouzahs* of the *digwars* in the Pergunnah Pachete." From all this it is sought to be inferred that he treated these villages or thought Mr. Higginson treated them as within the *zemindari*.

On the other hand, he distinguishes the *digwars* from the *jagirdars* who paid two-thirds rent and received one-third for their service, and he speaks of the *ghatwals* in 13 *ghats* having been dismissed, which is what one would except if they held their lands from the Raja by a service tenure. Then the probability would be that those who looked after the other 23 *ghats* did not hold of the Raja.

Mr. Hunter, Collector, reports in 1794 that the only sum appropriated to Police establishments, is the "resumed *thanadari* allowance" of Rs. 1,662. Counsel for the respondent stress the word "sum," but if there were lands so appropriated, it is curious that they were not mentioned.

Further, Captain Hannyngton—to whom we owe the preservation of Lala-Kanji's report, and who wrote in August, 1841, before the Mutiny and before the great local destruction of papers which the Mutiny brought about—in giving an account of the *digwari* or Police lands in his district, says:—

"These lands have been held from time immemorial by a species of Police termed *digwars* or *jagirdars* or *ghatwals* whose tenures are feudal and hereditary. They are of two classes.

"First, the *digwars* with their followers the *ghatwals*. These held their lands in lieu of wages and absolutely rent-free. It is to be specially remarked that the *digwari* lands were not included in the Permanent Settlement. The *digwars* themselves are appointed (regard being, however, had to hereditary claims) and are liable to be dismissed by the Magistrate. On these grounds it is held that the actual property of the soil is vested in the British Government. This is not denied by either the *zemindars* or the *digwars*." In that report he mentions, incidentally, that it has been ascertained that coal mines exist in one of the *digwar* villages, not however being one of those in suit.

In regard to all this part of the case, it is to be remembered that under Regulation XVIII of 1805, passed for policing the jungle *mahals* of which Pachete was one, the *zamindar* was made a Police Magistrate, and as such would have a hierarchical superintendence of the *digwars* so far as they were required to perform Police duties and care must be taken not to confound this superintendence with what may be called feudal overlordship.

Captain Hannyngton in the same document speaks of the Raja's having made serious encroachments on the *digwari* lands.

Counsel for the respondent relied on this statement and suggested that as there was no evidence that these so-called encrochments had ever been set aside, they must be treated as acts of ownership and valuable assertions of title by the Raja.

But he seeks to strengthen his case, and there is force in his contention, by reference to the same Bengal Regulations of 1793 on which Counsel relied for the proposition which their Lordships have rejected as not raised in the present case.

The argument is this. The Raja or Maharajah was before cession to or conquest by the East India Company—and the argument preferred conquest to cession—a sovereign power tributary to the Great Mogul, but otherwise in possession of sovereign rights. These villages must have formed part of his territory and must be taken to have been at some very remote date granted by him to be held of himself by military service or military or Police service: Therefore, the ownership of the land was in him; and when the Government in 1792 expressed its intention of settling with the proprietors of the soil, this would mean that the Government would recognise him as proprietor of the whole area.

As already stated, there is force in this contention. But there is an opposite side. If the Raja was a sovereign, and his territory was conquered, it was conquered from him as a sovereign and not as a landowner, and it by no means follows that when, to use the Raja's own expression, "he was gradually reduced to a *zamindar*," it would be the intention of the Government to recognise him as landowner throughout the area of his sovereignty; and in particular when it came to lands held on military tenure by public officers, the Government might very reasonably desire that these officers should be responsible to it and be—to use the language already quoted in the judgment delivered by Lord Sumner—Government *ghatwals* created by the ruling power rather than Government *ghatwals* which as the time of the Permanent Settlement were to be included in a *zamindari*.

When to all this it is added that the legal status of a Raja as a tributary Prince is quite vague and uncertain, probably varying with the power and activity of the Emperor at the moment reigning at Delhi, that it is agreed that these *digwars* have existed from time immemorial and may be coeval with the Raja and may have been created or recognised by a soveregin power superior to both, it follows that this class of argument would merely land their Lordships in the region of speculation. The only safe course, therefore, is to see what actually has been written or done.

Much weight was attached by the High Court and by Counsel for the respondent in their arguments to the opinion of Mr. Millet in his report of 1842. He appears to have been acting as legal adviser to the Bengal Government and to have given a legal opinion upon certain materials submitted to him. He assumed certain facts for the purpose of his opinion, but his assumption only shows at best that there was at that time a general opinion among the Government officials, as there was when resumption proceedings were started in the present century, that in some shape or other the *digwars* were tenure holders under the Raja.

Mr. Millet's view (or the view of those who instructed Mr. Millet) is opposed to that of Captain Hannyngton and Colonel Dalton.

The other matters which were relied upon for the Raja were a return made in a *mulki* form in 1841, in which the then Raja included in his list of properties the villages in possession of the two *digwars*. There is no doubt that there are errors in this return, and the mere fact that it does not appear that the Government made a protest against it, does not come to much. Then there is the placing of these lands on the General Register of revenue-paying lands, called "the A register" after the Pargana of Shergarh was transferred into the district of Burdwan in 1871. On what grounds the Collector did this does not appear. That it would not come to the knowledge of the *digwars* seems pretty certain. The Collector, however, had no power to adjudicate upon title; and this matter and the payment of small sums to the Raja in some land acquisition proceedings fall into the class of instances when the Government official apparently took the opposite view to that which had been taken by Captain Hannyngton and the other earlier officers. They make some evidence against the Secretary of State but none against the other appellants.

More important perhaps is the action of the Government—though it proved abortive—in taking steps to effect a resumption of these lands as between themselves and the Raja in the years between 1904 and 1908. But except that these are more elaborate and solemn proceedings, the same observations apply to them as to other official proceedings of late date.

Against the expression of the opinion by Government officials upon which the respondent relies may be set the comparatively early opinion of Captain Hannyngton and that of Colonel Dolton.

There is no evidence except the encroachment censured by Captain Hannyngton of any act of ownership or suzerainty on the part af the Raja. He has not taken the waste land of the *mouzahs*. He did not choose members of the families to be the *digwars*, nor did he approve the choice, except during the period when he was made *Daroga* or head Police Officer.

If there was substantial evidence that the possession of the property had been in accordance with the respondent's contention the explanations which his Counsel have offered in respect of the sarsikan papers and the lot *bundi* papers might be accepted.

But the contrary has been the case. The existence of practicable mines of coal has been known since at least 1860, when as the respondent himself says in his pleading that the minerals under the village of Garh Parira were let by *digwars* to Mr. Erskine. There have been further leases and assignments of leases and workings in at least one of the villages off and on from that time since. A claim was made by the respondent in 1907, but he did not follow it up till he brought the present proceedings in September 1914. Presumption should not be made against but in favour of the existing state of things.

Their Lordships are, therefore, of opinion as indeed were both the Courts in India, that in the ordinary sense of the word these villages were not within the *zemindari* of the respondent, or to put it in another way, both Courts held that they were neither *malguzari* nor *chowkidar chakran.*

The High Court however—and this is the third point to be discussed—decided in his favour upon the theory that they were *thanadari* lands. Whether it is right as a matter of terminology to describe *thanadari* lands as being within the *zemindari* or outside need not be here discussed.

No doubt the holders of *thanadari* land stand in a certain position to the contiguous *zemindar.* If the lands are resumed; they are to be settled with the *zemindar*; and it may be that they may even be described as settled with the *zemindar* in a certain sense, and that there is a sort of superiority in the *zemindar* which might entitle him to the surface of the land in case of escheat. Whether this would give him a claim to the minerals is a further question. But for the purposes of this case their Lordships will assume that such things are possible.

But if so, the respondent is in the same difficulty in dealing with the actual facts. If the minerals should be his because they are under *thanadari* lands, he has been as already pointed out, backward in asserting his rights.

However, in the view of the High Court these are *thanadari* lands, and their Lordships must deal with this view. They got little help in this respect from Counsel for the respondent who preferred the suggestion that they were "like *thanadari* lands."

At first sight the view of the High Court appears contrary to the Regulations.

The Regulation of 7th December, 1792, is as follows:—

"First. The Police of this country is in future to be considered under the exclusive charge of the officers of Government who may be specially appointed to that trust. The landholders and farmers of land, who keep up establishments of *thanadars* and Police Officers for the preservation of the peace, are accordingly required to discharge them, and all landholders and farmers of land are prohibited entertaining such establishments in future." (Colebroke, page 168).

And s. 8, sub-s. 4 of Regulation I of 1793:—

"Fourth. The *jumma* of those *zemindars* independent *talukdars* and other actual proprietors of land, which is declared fixed in the foregoing articles, is to be considered entirely unconnected with and exclusive of any allowances which have been made to them in the adjustment of their *jumma* for keeping up *thannahs* or Police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose: and the Governor-General in Council reserves to himself the option of resuming the whole or part of such allowances or produce of such lands according as he may think proper, in consequence of his having exonerated the proprietors of land from the charge of keeping the peace and appointed officers on the part of Government to superintend the Police of the country...."

But the learned Judges of the High Court took the view that *thanadari* lands though made resumable, were not always resumed. This view is a difficult one to support in the face of the observations of this Board in the cases of *Raja Lelanund Sing Bahadoor* v. *The Bengal Government* (1), *Joykishen Mokerjee* v. *Collector of East Burdwan* (5) and *Ranjit Singh* v. *Kali Dasi Debi* (6).

But a further difficulty is created by the documents in this particular case.

Mr. Leslie, the Collector, reporting in August, 1793, says that at the making of the Decennial Settlement in his district, no allowance was made for Police Officers to any of the *zemindars* except the Pachete Raja who got a deduction from his revenue of Rs. 1,662 for the maintenance of *thanadars.* Mr. Leslie proceeds to say that he has directed the Raja to discharge the *thanadars* employed by him at the end of the present month and to pay to the revenue Rs. 1,662, which it is known he did pay. The sum is slightly differently stated by Lala Kanji as Rs. 1,600.

If these lands were *thanadari,* why have they not been long ago resumed? If they had been resumed, Government would have acquired an increase of revenue from the

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(5) 10 M. I. A. 16 at p. 44; 1 W. R. P. C. 26; 1 Suth. P. C. J. 542; 2 Sar. P. C. J 54; 19 E. R. 879.

(6) 40 Ind. Cas. 981; 44 I. A. 117 at p. 122; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C. L. J. 499; 19 Bom. L. R. 462; (1917) M. W. N. 459; 6 L. W. 101; 2 P. L. W. 1; 44 O. 841; 22 M. L. T. 489 (P. C.).

Raja, and the Raja would have been able to draw rent from the land.

As their Lordships have already observed in dealing with the earlier part of the case, the long established usage and possession is not reconcilable with the theory that these are *thanadari* lands.

In considering the effect of the *kabuliyat* the principles of the decisions in the *Duke of Beaufort* v. *Mayor Aldermen and Burgesses of Swansea* (7) fortified by the observations in the judgments of this Board delivered by the Earl of Halsbury in *Van Diemen's Land Co.* v. *Table Cape Marine Board* (8), and by Lord Atkinson in *Watcham* v. *Attorney-General of East Africa Protectorate* (9) may be applied, *viz*, that should the general words of an ancient grant be uncertain, they may be fairly explained by subsequent usage.

The result is that, in the opinion of their Lordships, these lands are not *thanadari* lands, and the District Judge was right on the first point to be decided, *viz.*, whether these *mauzahs* were or were not within the Raja's *zemindari.* Having arrived at this conclusion their Lordships deem it unnecessary and inadvisable to pronounce upon the other two defences raised by the several appellants. The question whether mines and minerals belonged to landowners or to the Government is a far reaching one, on which they would be unwilling to embark without having the fullest assistance of Counsel.

In a case which came before this Board several years ago, the *Japanese Government* v. *P. & O. Steam Navigation Company* (10) two points of great public importance were raised by the decision of the Court under appeal, and their Lordships having come to the conclusion that they must advise His Majesty to reverse the decision of the Court below on the first ground, abstained from expressing any opinion on the second ground while they carefully explained that in so doing they were not to be held to have given any authority thereby to that part of the decision which they did not touch. Their Lordships would desire to be understood to be acting in the same way in the present case.

The respondent has failed to prove that he has any right to the minerals under these three villages, and the decision of the High Court must be reversed and that of the District Judge restored. This is all that their Lordships have to do. They have not to determine as between the two sets of appellants which is entitled to the mines, nor who is entitled to them.

The appeals will be allowed with costs here and below for both sets of appellants and unfortunately provision must be made for the costs of the abortive hearing in December, 1924. On that occasion, owing to the misconduct of the Solicitor then acting for the respondent, he was not represented; and it was not till after their Lordships had heard the appellants' Counsel for several days and the arguments had been concluded, that it was discovered that the absence of Counsel for the respondent at their Lordships' Bar was due to the misconduct of his Solicitor.

The case has accordingly been set down again and heard anew. As it was due to no fault of the appellants that the respondent was not represented at the first hearing, they must have the costs of their attendance at that hearing. But their Lordships think that the respondent need not be charged with the costs occasioned by his motion to restore his case to the paper and that in respect of this motion which was heard on two occasions, each party should bear his own costs. Their Lordships would humbly advise His Majesty accordingly.

R. L. *Appeal allowed.*

Solicitors for the Appellant:—The Solicitor India Office.

Solicitors for the Respondents:—Messrs. *Downer & Johnson* and *Sanderson, Lee & Co.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 748 OF 1923.

September 21, 1925.

Present:—Mr. Justice Jackson.

PALIKANJI CHETTIAR—DEFENDANT—PETITIONER

versus

KRISHNA IYER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, rr 1, 2—Leave to withdraw suit with liberty to bring fresh suit—Formal defect, what is—Defect in substance, whether ground for granting leave.

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(7) (1819) 3 Ex. 413; 154 E. R. 905; 77 R. R. 677.

(8) (1906) A. C. 92; 75 L. J. P. C. 28; 54 W. R. 498; 93 L. T. 709; 22 T. L. R. 114.

(9) (1919) A. C. 533; 87 L. J. P. C. 150; 34 T. L. R. 481; 120 L. T. 258.

(10) (1895) A. C. 644; L. J. P. C 107; 11 R. 493; 72 L. T. 881; 8 Asp. M. C. 50

Where a defendant has succeeded in showing that certain facts were lacking which were essential to the plaintiff's cause of action, the Court has no jurisdiction to allow the plaintiff under O. XXIII, r. 1, C. P. C., to withdraw his suit with liberty to bring a fresh suit.

On an application to withdraw a suit the Trial Court has only a limited jurisdiction. It is not unconditionally empowered to permit a plaintiff to withdraw his plaint under O. XXIII, r. 1, C. P. C. If the plaint is defective the only sort of defect which attracts the rule is a formal defect, and not a defect in substance.

In permitting a plaintiff to withdraw his plaint by reason of a defect not in form but in substance the Court exercises a jurisdiction not vested in it by law.

Javvadi Chinna Venkataramayya v. *Bandi Veersami*, 88 Ind. Cas. 665; 21 L. W. 282; A. I. R. 1925 Mad. 617, referred to.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif, Periyakulam, dated the 3rd February 1923, on I. A. No. 273 of 1923, in O. S. No. 1395 of 1920.

Mr. *K. Rajah Iyer*, for the Petitioner.

Mr. *W. S. Subrahmania Iyer*, for the Respondent.

JUDGMENT.—The petitioner seeks to revise the order of the District Munsif of Periyakulam, in I. A. No. 273 of 1923, in O. S. No. 1395 of 1920.

The plaintiff sued in 1920 to set aside a sale effected by his guardian in 1895 four years before he reached his majority in 1899. In para. 8 of his plaint he has stated that his guardian informed him that she sold the property because she was deceived by plaintiff's elder brother. In para. 7 it is alleged that the sale-deed contains fraudulent conditions. There is no other mention of fraud. In his written statement the defendant contended that plaintiff having failed to file a suit within 3 years of his attaining majority is barred by limitation (para. 11). Issues were framed, the second issue being: Is the suit in time in so far as it seeks to avoid the sale? One witness was examined and then plaintiff applied under O. XXIII, r. 1, C. P. C. to withdraw his suit with leave to institute a fresh suit. His difficulty was that he was bound to fail on the second issue. The District Munsif allowed the application because "to refuse him the liberty he asks for would be virtually to decide the question of fraud against him without an actual trial, and would work out manifest injustice". As the Munsif observes in his opening sentence there is no allegation of fraud to bring the case under s. 18 of the Limitation Act and there is no such question of fraud in the case to be decided for or against the plaintiff. It cannot be said to be manifestly unjust to decide that no fraud has been proved as required by s. 18 when no such fraud has ever been alleged. What really happened is that after the defendant had succeeded in showing that certain facts were lacking which were essential to the plaintiff's cause of action, the plaintiff said that if he was allowed to re-draft his plaint he would add these essential facts and the Munsif thought it just to allow him to try a second plaint after the first had manifestly failed. It did not occur to the Munsif how very unjust it would be to the defendant, to allow the plaintiff to take up a new ground on matters of fact in this fashion as soon as his original ground was proved untenable. The order has no merits and the only remaining question is whether this Court ought to interfere under s. 115 of the C. P. C. In these matters the Court of Trial has a limited jurisdiction. It is not unconditionally empowered to permit a plaintiff to withdraw his plaint under O. XXIII, r. 1, C. P. C. If the plaint is defective the only sort of defect which attracts this rule is a formal defect. The other sufficient grounds in r. 1 (2) (*b*) do not include defects of substance, otherwise there would be no object in inserting the earlier clause. The Statute could not run (*a*) by reason of some defect in form (*b*) by reason of some defect in substance, and if that were the intention it would simply enact by reason of any defect, and if an illustration were required explaining why defects are limited to formal defects, a better case would hardly be found than that now in question. It would be intolerable if as soon as a defendant had established that on the facts pleaded the plaintiff must fail, the plaintiff were at liberty to take back his plaint and supply additional facts. A law suit would then be like one of those combats in ancient mythology where the wound as soon as it is inflicted is miraculously healed.

I must find that in permitting the plaintiff to withdraw his plaint by reason of a defect not in form but in substance the District Munsif exercised a jurisdiction not vested in him by law. It is finally argued that this Court should not interfere because the fresh suit which the plaintiff was unjustifiably allowed to institute has progressed to some extent. The fact that injustice is about to fructify is no argument in its favour.

As regards the legal rulings on this question I have nothing to add to my judgment in a similar case reported as *Javvadi Chinna Venkataramayya* v. *Bandi Veersami* (1).

The order of the District Munsif is set aside with costs to petitioner.

V. N. V. *Order set aside.*

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(1) 88 Ind. Cas. 665; 21 L. W. 282; A. I. R. 1925 Mad. 617.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 79 OF 1925.
March 12, 1926.
Present:—Mr. Justice Misra.
BHAGWAT PRASAD—PLAINTIFF—APPELLANT
versus
SHER KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 80—Deposition—Identity of deponent, proof of—Execution of document—Illiterate executant—Document signed by another at request of executant—Authority to sign.

Under s. 80 of the Evidence Act the presumption can be made only as to the genuineness of the statement recorded in a deposition. No presumption can be made regarding the identity of the deponent. Where, however, the document containing the deposition is a very old document, the Court can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent. [p. 986, col. 1.]

Where an illiterate person requests another to sign a document for him and the latter signs such document with a pen touched by the former, the signature must be taken to have been made under the authority of the executant himself. [p. 986, col. 2.]

Second appeal from the decree of the Subordinate Judge, Partabgarh, in Regular Civil Appeal No. 96 of 1924, setting aside that of the Munsif, Kunda at Partabgarh, dated the 21st April 1923, in Suit No. 372 of 1922.

Mr. *Radha Krishna*, for the Appellant.

Mr. *Motilal Saksena*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal in a redemption suit. The suit was brought to redeem an unregistered deed of mortgage, dated the 7th July 1850, alleged to have been executed by one Ganga in favour of one Imam Bakhsh for Rs. 9. The mortgaged property consisted of plot No. 163, measuring 1 *bigha*, 1 *biswa*, 12 *biswansis* held in under-proprietary right, situate in village Purkhotampur, District Partabgarh. The plaintiff claimed redemption as an assignee from the heirs of the original mortgagor.

The defendants contested the suit mainly on two grounds: firstly, that the mortgage set up by the plaintiff was not genuine, and secondly, that the suit of the plaintiff was barred by limitation inasmuch as it had been brought more than 60 years after the execution of the mortgage-deed. The plaintiff contended that the suit was not barred by limitation on the ground that in the year 1883 the mortgagee had, in a statement made by him in the Revenue Court, on the 2nd June 1883, acknowledged the mortgage which had the effect of extending the period of limitation under s. 19 of the Indian Limitation Act (Act IX of 1908).

The Trial Court, the learned Munsif of Kunda, District Partabgarh, found on both the points against the defendants and decreed the plaintiff's claim.

In appeal the learned Subordinate Judge agreed with the finding of the learned Munsif regarding the genuineness of the mortgage, but took a different view in respect of the question of limitation. He held that the statement relied upon by the plaintiff had not been proved to have been made by Gambhir Khan, the mortgagee, nor had it been established that Bisheshar Dayal *patwari* who purported to sign the statement on behalf of Gambhir Khan, had authority on his behalf to append his signature. In short the learned Subordinate Judge refused to make the presumption under s. 90 of the Indian Evidence Act (Act I of 1872). On these findings he held that the plaintiff's suit for redemption was barred by limitation and he, therefore, accepted the defendants' appeal, set aside the decree of the learned Munsif and dismissed the plaintiff's suit.

The plaintiff has now come up to this Court in second appeal and the learned Pleader on his behalf raises two main points:—

(1) That the identity of Gambhir Khan the deponent of the statement contained in Ex. 3, had been sufficiently established from the evidence on the record and that, in any case, the statement being an old one there was inherent evidence in that statement which proved the identity of Gambhir Khan and which should not, therefore, have been rejected by the learned Subordinate Judge.

(2) That the learned Subordinate Judge was wrong in not presuming that the sig-

nature of Gambhir Khan had been made by Bisheshar Dayal *patwari*, under the former's authority, the contention being that the presumption as to authority should have been made inasmuch as the said authority was established from the evidence on the record.

As to the first point the law on the subject appears to me to be clear. Under s. 80 of the Indian Evidence Act (Act I of 1872) the presumption has to be made as to the genuineness of the statement recorded. No presumption, however, can be made regarding the identity of the deponent. Where the document containing the deposition of a particular person is a very old document, one can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent. Turning to Ex. 3 I find that the statement commences with the name of Gambhir Khan, son of Imam Bakhsh, resident of Jai Singh Garh, the place where defendants reside, that being the place of residence of their ancestors. It is also admitted that Imam Bakhsh was the father of Gambhir Khan. No room is, therefore, left for doubt that the statement contained in Ex. 3 is the statement of Gambhir Khan, the ancestor of defendants-respondents. In the view which I have taken I am supported by the decision of Daniels, A. J. C. (now Mr. Justice Daniels) in the case of *Sarabjit* v. *Mata Din* (1).

Apart from this I am also of opinion that from the evidence of Ram Narain (P. W. No. 3) the identity of Gambhir Khan has been sufficiently established. The witness deposed to the effect that he had a mutation case on his father's death and had gone to *Tahsil* in connection with that case. Gambhir too had gone there for the purpose of his case. The witness was called in Court and there saw Gambir put in a paper before the Court after getting it signed by Bisheshar Dayal *patwari*, because he himself was illiterate. The learned Subordinate Judge has considered this evidence insufficient to prove the statement of Gambhir Khan contained in Ex. 3. It appears to me that all that was required to be proved was the presence of Gambhir Khan at the time when the paper containing his statement had been put by him before the *Tahsildar*. What appears to me to have happened was that the *Tahsildar* had recorded the statement of Gambhir Khan and after recording that statement handed it over to him for his signature who after getting it signed on his behalf by Bisheshar Dayal, *patwari*, returned it to the *Tahsildar*. No other paper is proved to have been handed over at the time by Gambhir Khan to the *Tahsildar*. It, therefore, appears to me to be quite clear that Gambhir Khan's identity in respect of the statement contained in Ex. 3 has been amply established.

As to the second point, namely, the authority of Bisheshar Dayal *patwari* to sign on behalf of Gambhir Khan, the above mentioned witness, Ram Narain, P. W. No. 3 clearly stated that as Gambhir Khan was illiterate, Bisheshar Dayal signed for Gambhir at his request and with the pen touched by him. This amply proves the requisite authority: *vide Mirza Haidar Ali* v. *Raja Jang Bahadur Khan* (2).

I have, therefore, come to the conclusion that the statement made, by Gambhir Khan, contained in Ex. 3 has been amply proved on the evidence on the record and it constitutes a valid acknowledgment on behalf of Gambhir Khan of his liability in respect of the property held by him as a mortgagee. The acknowledgment contained in Ex. 3 being valid, the plaintiff's claim is within limitation.

The appeal is, therefore, allowed, the decree of the lower Appellate Court set aside and the decree of the learned Munsif restored, with costs in all the three Courts.

Z. K. *Appeal allowed.*

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(1) 60 Ind. Cas. 437; 7 O. L. J. 542.

(2) 6 O. C. 279.

CALCUTTA HIGH COURT.

TESTAMENTARY AND INTESTATE JURISDICTION.

February 2, 1925.

Present:—Mr. Justice C. C. Ghose.

IN THE GOODS OF BHUBANESHWAR TRIGONAIT—DECEASED.

Court Fees Act (VII of 1870), s. 19-I—Hindu Law—Joint family—Survivorship—Letters of Administration, application for—Court-fee payable.

No administration need be taken out to the estate of a Hindu governed by the Mitakshara Law when the estate passes by the right of survivorship to his co-parceners, but where a grant is sought the applicant must comply with the provisions of s. 19-I of the Court Fees Act. The provisions of the section are imperative and the Court has no power to relax them.

FACTS.—A Hindu died leaving behind an undivided younger brother and two undivided sons. The joint family was governed by the Mitakshara Law. An application was made for the grant of Letters of Administration but no Court-fees in compliance with s. 19-I of the Court Fees Act were paid. However, the petitioner produced a certificate from Taxing Officer under s. 19 D of the Court Fees Act. The Registrar in Insolvency objected saying "The *karta* of a joint Hindu family is not a mere trustee. He is also a beneficial owner. He can transfer the whole estate for good cause and confer a good title. He can also demand a partition..............It is, therefore, submitted that no grant can be made without the provisions of s. 19-I being first complied with."

JUDGMENT.—The application cannot be granted as there is no compliance with s. 19-I of the Court Fees Act.

Z. K. *Application rejected.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 149 OF 1925.

April 16, 1926.

Present:—Mr. Justice Misra.

HORILAL—PLAINTIFF—APPELLANT

versus

BACHCHU LAL AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Custom, whether question of fact or law—High Court's power to interfere—Custom regarding zar chaharum—*Finding as to evidence being insufficient to prove custom, whether open to attack in second appeal.*

The High Court in second appeal is not justified in determining whether the evidence produced in a case as to the existence of the alleged custom is or is not credible, though the High Court is competent to examine the evidence and to determine whether the evidence produced establishes a valid and binding custom. [p. 990, col. 2.]

The question whether the facts found in any given instance prove the existence of essential attributes of a custom or usage is a question of law which may be discussed in second appeal but the question whether such a state of facts has been proved by the evidence is merely a question of fact. [p. 990, col. 1.]

Where, therefore, the lower Appellate Court comes to the conclusion that the documentary and oral evidence produced is sufficient to prove a custom regarding "*zar chaharum*," the finding of fact as to custom arrived at by the lower Appellate Court in appeal is binding on the High Court and cannot be attacked in second appeal. [p. 990, col. 2.]

Muhammad Kamil v. *Imtiaz Fatima*, 4 Ind. Cas. 457; 31 A. 557; 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 19 M. L. J. 697; 13 O. C. 183; 36 I. A. 210 (P. C.), *Anant Singh* v. *Durga Singh*, 6 Ind. Cas. 787; 32 A. 363; 14 C. W. N. 770; 12 C. L. J. 36; 7 A. L. J. 704; 13 O. C. 163; 37 I. A. 191; 12 Bom. L. R. 504; 8 M. L. T. 79; (1910) M. W. N. 327; 20 M. L. T. 604 (P. C.), *Kailas Chandra Dutta* v. *Padma Kishore Roy*, 41 Ind. Cas. 959; 45 C. 285; 25 C. L. J. 613; 21 C. W. N. 972, *Kumarappa Reddi* v. *Manavala Goundan*, 44 Ind. Cas. 699; 41 M. 374; 23 M. L. T. 44; 34 M. L. J. 104; 7 L. W. 243; (1918) M. W. N. 350, *Hashim Ali* v. *Abdul Rahman*, 28 A. 698; A. W. N. (1906) 187; 3 A. L. J. 467, *Rao Girraj Singh* v. *Lala Haragobind Sahai*, 4 Ind. Cas. 304; 32 A. 125; 7 A. L. J. 36, *Bai Shirinbai* v. *Kharshedji*, 22 B. 430; 11 Ind. Dec. (N. S.) 869, *Pragi* v. *Baiju*, 4 O. C. 71, *Lalman* v. *Nand Lal*, 20 Ind. Cas. 894; 17 O. C. 1 and *Tilak Ram* v. *Sita Ram*, 30 Ind. Cas. 503; 2 O. L. J. 388, relied on.

Palaniappa Chetty v. *Sreemath Deivasikamony Pandara Sannadhi*, 39 Ind. Cas. 722; 40 M. 709 at p. 721; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917 M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A 147 (P. C.), distinguished.

Kakarla Abbayya v. *Raja Venkata Papayya Rao*, 29 M. 24; 16 M. L. J. 8, dissented from.

Second appeal against a decree and judgment of the Additional Sub-Judge, Sitapur, up-holding that of the Munsif, Biswan, District Sitapur, dated the 6th December 1924.

Messrs. *Radha Krishna* and *Niamat Ullah*, for the Appellant.

Messrs. *R. B. Lal* and *R. N. Shukla*, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for recovery of "*zar chaharum*" in respect of the sale of a house situate in *Mohalla* Tarinpur, town Sitapur. The suit was brought by the plaintiff-appellant who is the owner of the said *mohalla* against the defendant-respondent No. 1 who has purchased a house situate in that *mohalla* from defendant-respondent No. 2 under a sale-deed dated 7th May 1918.

The suit was based on a custom alleged to have been prevalent in that locality. The vendee denied the alleged custom and contended that he was not liable to the plaintiff's claim.

The learned Munsif of Biswan, District Sitapur, who tried the suit held that the custom alleged by the plaintiff had not been established and on appeal the same view was held by the learned Additional Subordinate Judge of Sitapur.

The plaintiff has now come up in second appeal to this Court and it is contended on his behalf that the evidence on the record, oral and documentary, established the custom alleged by the plaintiff. It was also argued that the finding of the lower Appellate Court on the question of custom should not be accepted, because that Court in arriving at that finding had misinterpreted and misunderstood the documentary evidence.

The documentary evidence produced by the plaintiff-appellant in support of the alleged custom consisted of the village *wajib-ul-arz* (Ex. 1) and *fard tasdiq abadi* (Ex. 2). The *wajib-ul-arz* is silent as to custom. It recited custom regarding inheritance and other matters but there is no mention whatever about the custom regarding "*zar chaharum*." The para. 9 which relates to "*abadi*" and "*bazar*" states that a separate *fard* (list) containing the numbers of the houses occupied by *riyaya* (tenants) has been prepared and that they occupy the houses in accordance with the terms mentioned in the *fard*. I have read that *fard* (Ex. 2) and I do not find any column in it specified for recording the custom. There is no doubt that there is a column intended for the purpose of recording the statement of the tenants and under that column opposite some tenants there a record that the custom had been accepted by them (*rewaj manzur hai*) and opposite others that it was not accepted (*rewaj manzur nahin*). We do not find any record in the document showing that particular *rewaj* was accepted by the tenants and what was not accepted by them. At one place opposite No. 18/11 in the column prescribed for the recording of the statements of the occupants we find it recorded that the occupant of the house was not willing to pay the *chaharum* (*hamko chaharum den hangam farokht amla makan ke manzur nahin hai*). It was argued from this that the custom regarding which it was recorded in the column mentioned above whether it was acceptable or not, was the custom relating to *chaharum*. The learned Subordinate Judge declined to draw such an inference and I agree with him.

It, therefore, appears to me that in arriving at the finding relating to the alleged custom the learned Subordinate Judge has not misconstrued the documentary evidence referred to above.

The learned Subordinate Judge then proceeded to discuss in his judgment the rest of the documentary and oral evidence. The documentary evidence consisted of certain sale-deeds produced by the witnesses examined by the plaintiff in proof of the alleged custom and the oral evidence consisted of the same and other witnesses examined to prove the said custom.

As to the sale-deeds the learned Additional Subordinate Judge remarks that no doubt in most of them there is a mention of *chaharum* either to the effect that it had been paid to the landlord or to the effect that it had been left either with the vendee or the vendor for payment of the landlord, but except a few payments others were not proved to have been actually made. The earliest sale-deed stating the custom was dated the 19th April, 1898 (Ex. 9) and others were of the years 1901, 1905, 1908, 1912, 1920 and 1922. The learned Subordinate Judge held that these sale-deeds were of a recent date and were insufficient to prove an ancient custom. It was also pointed out by the learned Subordinate Judge that in the year 1918 there had been a litigation in respect of *haq chaharum*. One Hem Singh, a co-sharer with the plaintiff in the same *mohalla*, had brought a suit against a tenant and the suit had been dismissed by the Subordinate Judge of Sitapur and his judgment was upheld in appeal by the District Judge of Sitapur (Ex. A-1 and A-2). In this litigation also the *wajib-ul-arz* and *fard tasdiq* were produced by the landlord but his claim was rejected on the ground that they did not contain any record of the alleged custom. As to the oral evidence produced by the plaintiff he observed that some of them have ignored the existence of the custom, some of them have deposed about it half-heartedly and only some have admitted it.

The learned Subordinate Judge came to the conclusion that the documentary and the oral evidence produced by the plaintiff-appellant was insufficient to prove the custom.

It was contended before me strenuously by the learned Advocate who argued the case on behalf of the appellant at great length that this finding of fact should be examined and that I should go through the whole evidence again in order to find whether the finding arrived at by the lower Appellate Court was correct or not. The argument advanced was to the effect that the question of custom should be deemed to be a mixed question of law and fact and that the High Court in second appeal should go through the whole evidence in order to find out whether the custom had been established or not. Reliance was placed upon a ruling of their Lordships of the Privy Council reported as *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara*

Sannadhi (1) and upon a ruling of the Madras High Court reported as *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2).

In my opinion the contention of the learned Advocate for the appellant cannot be accepted and a High Court cannot in second appeal be asked to go into the evidence produced in a case in order to see whether the evidence produced is sufficient to establish an alleged custom, when the lower Appellate Court has reviewed the entire evidence and came to the conclusion that the evidence produced is insufficient to establish the custom.

It has been definitely settled by the Privy Council in number of cases that a question as to the existence of an alleged custom was a question of fact. In *Muhammad Kamil* v. *Imtiaz Fatima* (3) the custom alleged in the case was a family custom under which a widow having no male issue and a daughter was excluded from inheritance. Both the Courts in India decided that the alleged family custom had not been established. Their Lordships in appeal observed (page 570*) that the existence of such a custom was a question of fact and as to this question the Courts in India had concurred in their judgment and, therefore, on this point...their Lordships saw no reason why they should not follow the usual practice of accepting the concurrent findings of fact. In *Anant Singh* v. *Durga Singh* (4) the question involved was one of custom relating to the right of a step brother in a Hindu family of Ahbaran Thakurs to share equally with a brother of a whole blood in the succession of a deceased brother. The Trial Court had found the custom to have been proved but the Court of Appeal, the late Court of the Judicial Commissioner of Oudh, took a different view and held that the custom was not proved. Their Lordships agreed with the conclusion of the Court of Appeal and remarked at page 373† that the question involved was one of fact only and their Lordships did not see any reason whatsoever to differ from the opinion of the learned Judicial Commissioner.

It is, therefore, amply clear from the two decisions of their Lordships of the Privy Council quoted above that the question of custom is a question of fact. A custom, however, in order to be a valid and binding custom must be proved to be ancient and invariable and, in my opinion, it can always be argued in second appeal whether the evidence produced in the case fulfils these requirements and so far the question can be considered to be a question of law. It is one thing to say that the evidence produced in a case was not legally sufficient to prove a custom and quite the other thing to say that the evidence produced in the case which had been held by the lower Appellate Court to be insufficient to prove the custom should be held in second appeal to be sufficient to prove the same. In *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (1) upon which great reliance was placed by the learned Advocate for the appellant, the question was whether a local custom authorising and empowering a *shebait* to alienate *devatter* lands, whether alienation be a benefit to the *devatter* estate or not, had been established and their Lordships of the Privy Council discussed the evidence and came to the conclusion that no such ancient custom had been proved to exist. It would be appropriate to quote *in extenso* the judgment of their Lordships of the Privy Council on this point. Their Lordships observed on page 721* as follows :—

> "It has, however, been pressed on behalf of the appellants that there are two findings: one by the Munsif and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved and that, as that is an issue of fact, it must be accepted. No doubt two findings upon questions of pure fact must be accepted by this Board, but the questions of the existence of ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law not fact...
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> There could scarcely be a more glarin

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(1) 39 Ind. Cas. 722; 40 M. 709 at p. 721; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 O. L. J. 154; 6 L. W. 222; 44 I. A. 147 (P. C.).

(2) 29 M. 24; 16 M. L. J. 8.

(3) 4 Ind. Cas. 457; 31 A. 557; 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 19 M. L. J. 697; 13 O. C. 183; 36 I. A. 210 (P. C.).

(4) 6 Ind. Cas. 787; 32 A. 363; 14 C. W. N. 770; 12 C. L. J. 36; 7 A. L. J. 704; 13 O. C. 163; 37 I. A. 191; 12 Bom. L. R. 504; 8 M. L. T. 79; (1910) M. W. N. 327; 20 M. L. T. 604 (P. C.).

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†Page of 32 A.—[*Ed.*]

*Page of 40 M.—[*Ed.*]

instance of the misapplication of the word 'custom,' or a more remarkable instance of forgetfulness of essentials of a custom which modifies the ordinary law."

On the strength of the above remarks it was contended that if a High Court in appeal could be considered to be justified in going through the evidence on the record in order to find out whether the evidence produced established the necessary elements required to prove a valid and binding custom, it could also go through the evidence to find out whether the evidence produced was sufficient to prove the custom. In my opinion the position cannot be maintained. In *Kailas Chandra Dutta* v. *Padma Kishore Roy* (5) it was held by Mookerjee and Beachcroft, JJ., that the question whether the facts found in any given instance proved the existence of the essential attributes of a custom or usage was a question of law which might be discussed in second appeal but the question whether such a state of facts had been proved by the evidence was merely a question of fact.

On page 290* Mookerjee, J., observed as follows:—

"But, although the question of the existence of an alleged custom is a question of fact, it is conceivable that the decision may involve an error of law so as to justify the interference of the High Court in second appeal. Thus, the decision is liable to attack in second appeal on the ground that irrelevant evidence has been received or that relevant evidence has been excluded. The decision may also be successfully attacked on the ground that there is no evidence of the alleged custom, or, as it is sometimes said, that the finding as to the existence of custom is based on legally insufficient evidence. The decision may, again, be assailed on the ground that the facts found do not constitute evidence of the alleged custom. The decision may, further, be liable to attack on the ground that in the determination of the question in controversy, legal principles or tests have been erroneously applied, for instance, that the Court has not correctly appreciated the essential attributes of a custom or has overlooked the distinction between a custom and a usage. Consequently, the question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law, which may be discussed in second appeal. Obviously, the question whether a custom is reasonable or valid, is a question of law. Subject to these qualifications it is plain that the mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal." I am in entire agreement with the remarks quoted above.

I am fully aware that a contrary view was taken in the Madras High Court in the case of *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2) quoted above. I must, however, respectfully dissent from the view taken in that case. As stated above the High Court in second appeal is not justified in determining whether the evidence produced in a case as to the existence of the alleged custom is or is not credible, though the High Court is competent to examine the evidence and to determine whether the evidence produced establishes a valid and binding custom. This case, I may also observe, has been overruled by a Full Bench decision of the Madras High Court reported as *Kumarappa Reddi* v. *Manavala Goundan* (6). It has been laid down in that case that a High Court is precluded from interference in second appeal with the findings arrived at by the lower Appellate Court of actual facts from which the existence of the custom has been inferred, but the inference as to the existence of the custom and the decision as to the validity thereof, are matters of law which can be entertained by the High Court in second appeal.

The view taken by me has also been taken by the Allahabad High Court in *Hashim Ali* v. *Abdul Rahman* (7) and in *Rao Girraj Singh* v. *Lala Haragobind Sahai* (8) and by the Bombay High Court in *Bai Shirinbai* v. *Kharshedji* (9). The same view was taken by the late Court of the Judicial Commissioner of Oudh in *Pragi* v. *Baiju* (10) and in *Lalman* v. *Nand Lal* (11) and in *Tilak Ram* v. *Sita Ram* (12).

I, therefore, hold that the finding of fact as to custom arrived at by the learned Additional Subordinate Judge in appeal is binding on this Court and the appellant is not entitled to attack it in second appeal.

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(5) 41 Ind. Cas. 959; 45 C. 285; 25 C. L. J. 613; 21 C. W. N. 972.

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(6) 44 Ind. Cas. 699; 41 M. 374; 23 M. L. T. 44; 34 M. L. J. 104; 7 L. W. 243; (1918) M. W. N. 350.

(7) 28 A. 698; A. W. N. (1906) 187; 3 A. L. J. 467.

(8) 4 Ind. Cas. 304; 32 A. 125; 7 A. L. J. 36.

(9) 22 B. 430; 11 Ind. Dec. (N. S.) 869.

(10) 4 O. C. 71.

(11) 20 Ind. Cas. 891; 17 O. C. 1.

(12) 30 Ind. Cas. 503; 2 O. L. J. 338.

I was taken through the entire evidence in the case and I should like to state that there was no evidence which was ignored by the Subordinate Judge or wrongly treated as irrelevant or rejected as inadmissible.

The appeal, therefore, fails and is dismissed with costs.

G. H.
R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 900 OF 1922.
April 1, 1926.
Present:—Mr. Justice Broadway and Mr. Justice Fforde.
JAGGI MAL—PLAINTIFF—APPELLANT
versus
ARYA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Land (Redemption and Foreclosure) Regulation XVII of 1806, s. 7—Object of Regulation—Mortgage with conditional sale—Notice to foreclose—Formalities—Bengal Land (Conditional Sales) Regulation I of 1798, s. 2—Omission to mention section—Notice demanding larger sum than due—Effect.

The object of the Bengal Land (Redemption and Foreclosure) Regulation XVII of 1806 is to give a warning to the mortgagor so as to enable him by taking action under the Regulation to preserve his right to redeem. [p. 992, col. 2.]

The omission to mention s. 7 of the Bengal Land (Redemption and Foreclosure) Regulation of 1806 in the notice is not fatal to its validity if the purport of the section is given in the notice. Similarly so long as the purport of s. 2 of the Bengal Land (Conditional Sales) Regulation I of 1798 is given in the notice specific reference to it is not imperatively necessary. [p. 992, col. 1.]

The demand for a larger sum than is actually due at the time of the notice is not a defect fatal to the validity of the notice. [p. 992, col. 2.]

Barkat Rai v. *Ali*, 21 Ind. Cas. 643; 91 P. R. 1913; 341 P. L. R. 1913; 223 P. W. R. 1913, followed.

Second appeal from a decree of the District Judge, Hissar, dated the 31st January 1922, reversing that of the Subordinate Judge, First Class, Gurgaon, dated the 21st April 1921.

Lala *Nawal Kishore*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—On the 29th July 1889 Hukam Chand and others since deceased mortgaged a certain *nauhra* or stable to Bhola Singh for Rs. 1,000. The mortgage was by way of conditional sale for a term of seven years, the condition being that if the principal, interest and costs of repairs were not paid by the end of the said seven years the transaction would be considered to be one of sale. The mortgage was with possession and possession was given to the mortgagee. Nothing was paid and on the 29th May 1919 the heirs of Bhola Singh who had died applied to the District Judge of Hissar for the issue to the surviving mortgagor Hukam Chand of a notice of foreclosure under s. 8 of Regulation XVII of 1806. Notice was issued on the 4th June 1919 and served on Hukam Chand on the 10th of that month.

Before the expiry of the year of grace on the 27th May 1920 Hukam Chand sold the equity of redemption to Jaggi Mal who, on the 7th June 1920, instituted a suit for redemption on payment of Rs. 1,360. It was claimed that the notice issued on the 4th of June 1919 was null and void and that the mortgage was a subsisting one. It was also averred in the plaint that the sum of Rs. 1,360 had been tendered to the mortgagees who had refused to receive it.

The defendants contested the suit and pleaded the validity of the notice and in the alternative claimed a sum of Rs. 3,400 as due on account of principal and interest and the costs of repairs. They also asked for interest till the date of payment.

The Trial Court held that the notice was defective—

(1) because it omitted to state that the redemption was to be effected in the manner provided for by s. 7 of Regulation XVII of 1806;

(2) because s. 7 of Regulation XVII of 1806 was not mentioned in the notice; and

(3) because s. 7 had not been correctly copied out in the notice.

The plaintiff was, therefore, granted a decree on payment of a sum of Rs. 2,180.

The plaintiff appealed against that decree objecting to the amount allowed and the defendants filed cross-objections attacking the finding as to the invalidity of the notice. The learned District Judge held that the notice was perfectly valid and dismissed the plaintiff's suit with costs throughout.

The plaintiff Jaggi Mal has now come up to this Court in second appeal through Mr. Nawal Kishore and Mr. Shamair Chand has represented the respondents.

The first point for determination is whether the notice was valid. It appears that the notice issued was in the form prescribed as No. 165. It is true that s. 7 of the Regulation was not specifically referred to in it and authorities have been cited at the Bar in which this omission has been considered a fatal defect. More recent authorities, however, have laid down that the omission to mention this section is not fatal provided the purport of the section is given in the notice. An examination of the notice shows that the purport of s. 7 is contained therein.

Again it is urged that s. 2 of Regulation I of 1798 should have been specifically referred to. In my opinion so long as the purport of that section is given in the notice specific reference to it is not imperatively necessary. Regulation I of 1798 lays down the procedure to be adopted by a borrower or mortgagor to preserve his right of redemption under deeds of *bai-bilwafa* or conditional sales of land. It lays down that when money is lent on *bai-bilwafa* or on the conditional sale of land the borrower if he desires to redeem the land by payment of the money lent upon it may, if the lender is not in possession of the land, tender or make payment of or deposit in Court the principal sum borrowed and that on such deposit the Court shall issue notice to the lender as prescribed in s. 2. A proviso to that section lays down that the borrower may deposit a sum less than the sum above referred to alleging that the sum so deposited is the total amount due to the vendor and that on such a deposit being made the Court shall receive it and issue notice as prescribed in that section. In the present case the notice issued to Hukam Chand informed him that he should pay a certain sum to the mortgagees and goes on to say, "or the balance of the sum remaining undischarged," so that it is clear that Hukam Chand was notified that he could pay into Court a lesser sum than that mentioned in the notice if he thought fit, the payment of the lesser sum being, of course, at his risk.

After a careful consideration of the Regulations in question and the notice issued I am of opinion that there is no fatal defect in the said notice and that the only error of any importance in the notice is that instead of calling upon Hukam Chand to pay a sum of Rs. 1,000 that is to say the actual sum lent under the conditional sale, he was called upon to pay a sum of Rs. 3,400 as well as to pay interest. The details of this sum of Rs. 3,400 were given in the notice. The principal amount was shown as Rs. 1, 000 interest was shown as Rs. 1,650 and the costs of repairs as Rs. 750. I am in agreement with Mr. Nawal Kishore that in this case only the item of Rs. 1,000 should have been shown as payable. The words of the notice between asterieks commencing with 'together' and concluding with 'thereon' should have been scored through and the attention of the Court is drawn to the necessity of a strict compliance with the rules for filling in the prescribed forms.

The demand for a larger sum than was actually payable at that stage cannot, however, be regarded as a fatal defect in the notice as was held in *Barkat Rai* v. *Ali* (1) by Rattigan and Scott-Smith, JJ. Mr. Nawal Kishore sought to distinguish this case by pointing out that it dealt with a mortgage without possession but it seems to me that the principle enunciated in that authority applies equally to cases of mortgages with possession. The object of the Regulation of 1806 is to give a warning to the mortgagor so as to enable him by taking action under the Regulation to preserve his right to redeem. He was specifically told in this notice that the principal sum payable was Rs. 1,000 and had he deposited that sum in Court his right to redeem would have been preserved, any dispute in regard to other amounts claimed being settled at a later stage. In my opinion, therefore, the view taken by the learned District Judge is correct and the notice in this case was valid.

I would, therefore, dismiss this appeal with costs.

R. L. *Appeal dismissed.*

(1) 21 Ind. Cas. 613; 91 P. R. 1913; 341 P. L. R. 1913; 223 P. W. R. 1913.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 146
OF 1925.
March 19, 1926.
Present:—Mr. Justice Walsh and
Mr. Justice Dalal.
RAM KISHORE SINGH AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
JAI MANGAL SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 4—Mortgage of sir-land by co-sharer to another—Resumption of possession on redemption.

Where a joint *sir*-holder transfers his *zemindari* rights by way of mortgage to his co-sharer, he is entitled on the redemption of his mortgage to recover possession of the *sir* land. [p. 994, cols. 1 & 2.]

Mahesh v. *Hori Khan*, Sel. Dec. No. 9 of 1918, distinguished.

Tameshwar Prasad v. *Maharaj Singh*, 63 Ind. Cas. 114, followed.

First appeal from an order of the Subordinate Judge, Basti, dated the 9th of May 1925.

Mr. *P. L. Banerji*, for the Appellants.
Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand passed by the Appellate Court of the Subordinate Judge of Basti. Objection is not made as to the remand itself, but the appeal is in the nature of a second appeal from a finding of the lower Appellate Court on a question of law.

The plaintiffs and defendants are grandsons of two brothers and owned a certain revenue-paying property in equal shares. They also held *sir* land jointly in the village. In 1906 the father of the plaintiffs mortgaged his share of the *zemindari* property, including the *sir* rights, to the father of the defendants, and the mortgage has now been redeemed. The present dispute relates to actual cultivating possession of *sir* land previously held jointly in equal shares by the parties. Both the subordinate Courts have decided that, on redemption, the plaintiffs are not entitled to possession as cultivators and *sir* holders of the land which they held as *sir* at the time of the mortgage. The reason they give is that immediately on the *zemindari* property being mortgaged, the plaintiffs became ex-proprietary tenants of their share of the *sir* land, and as they did not enforce their possession as such ex-proprietary tenants, they lost their right to do so six months after the date of the mortgage and the other joint *sir*-holders became *sir*-holders of the entire area of land held as *sir* by the plaintiffs and defendants jointly at the time of the mortgage. The theory seems to be that the defendants have become *sir*-holders independently of the mortgage and on the redemption of the mortgage there is no *sir* land in their possession which they may be called upon to deliver.

Under s. 60 of the Transfer of Property Act the mortgagor has a right in the case of a usufructuary mortgage, on payment of the mortgage money at the proper time and place, to require the mortgagee to deliver possession of the property to him. The property here was the mortgaged property in the same condition in which delivery was made at the time of the mortgage, including the *sir*. Though *sir* is not detailed in the mortgage-deed, in the description of the property, the *zemindari* property is stated to include *sir*, forest and other rights. It must, therefore, be presumed that *sir* land was mortgaged along with the *zemindari* property. The defendants' contention that the plaintiffs owned no *sir* at the time of the mortgage has not been accepted by the subordinate Courts and it has been held against the defendants that the plaintiffs were owners of the *sir* land to the extent of one-half at the time of the mortgage. The only provision that s. 60 makes is that the right conferred by the section has not been extinguished by act of the parties or by order of a Court. No such act of parties or order of a Court is pleaded here. What is pleaded is that the right has been extinguished under the provisions of the revenue law. We have, therefore, to see whether this is correct, and if correct, whether the provisions of the revenue law can override the direct directions of the Statute under the Transfer of Property Act.

In our opinion the provisions of the revenue law can be so interpreted as to save the *sir* land of the plaintiffs under the special circumstances of this case. The plaintiffs and defendants were joint cultivators of the *sir* land and there can be no question of any adverse possession among co-sharers. Even accepting that the defendants became ex-proprietary tenants, an ex-proprietary tenant does not cultivate land differently from a *zemindar* cultivating his *sir* land. There was no partition of the *sir* land and it cannot be said that the plaintiffs lost their rights as ex-proprietary tenants simply because the *sir* land was cultivated by the defendants without the help of the plaintiffs. The plaintiffs instead of paying rent to their co-sharers and mortgagees, cultivating the land and deriving profit therefrom, permitted the defendants to cultivate the land so that they themselves may escape the payment of rent. Some such mutual arrangement must have been arrived at between the parties. Under such circumstances the ex-proprietary tenancy rights of the plaintiffs would continue even while the defendants alone actually cultivated the *sir* land, and when the ex-proprietary tenant redeemed the land, he would obtain a return of the *sir* rights in that land. Under s. 4, cl. (12) of Act III of 1901, the provision is that if the ex-proprietary tenant re-gains his proprietary rights in the land held by him as ex-proprietary tenant, the land mentioned in the first proviso to that section shall again become his *sir*. Under that proviso the plaintiffs-appellants are entitled to possession of the former *sir* land on redemption.

The mistake we think the two Subordinate Courts have made is in thinking that after the lapse of six months from the date of the mortgage the plaintiffs lost their rights of ex-proprietary tenancy in the land in dispute even under the special circumstances of the case. As we have pointed out the defendants were not strangers but were jointly entitled to cultivate every inch of the land held jointly by the parties, and after the mortgage they continued to cultivate it, and the plaintiffs instead of paying rent for the ex-proprietary tenancy preferred to permit the defendants to cultivate the land and excuse themselves from payment of rent. Under such circumstances we are of opinion that the plaintiffs did not lose the right of ex-proprietary tenancy in the land in dispute.

We have no desire to dissent from the principle of revenue law laid down in *Mahesh* v. *Hori Khan* (1). The facts of the present case are, however, not similar. In that case the mortgagee was a stranger and in the nature of things could not acquire *sir* rights in the land which was held as *sir* by the mortgagor. At the best, the mortgagee can only be the *khudkasht* cultivator of the land. Under such circumstances the Board of Revenue held that if a joint *sir*-holder transferred his *zemindari* right and did not claim ex-proprietary tenancy right in his share of the *sir*-land, the other co-sharers who had not transferred their *zemindari* would be entitled to hold the entire land as *sir*, and the mortgagee or purchaser would not be able to eject the co-sharers, who had not made a transfer of the *zemindari* property, from any portion of the joint *sir* land. In the present case the *sir*-holders (co-sharers) and the mortgagees were the same persons. So the principle of law enunciated in the ruling of the Board of Revenue does not apply here. In this Court there is a decision of a Bench reported as *Tameshwar Prasad* v. *Maharaj Singh* (2) where under similar circumstances the Court held that the mortgagor on redemption of the mortgage was entitled to recover possession of *sir* land also even though he had relinquished his right as ex-proprietary tenant. The learned Counsel for the defendant-respondent urged that there was a distinction because the ruling was based on the Rent Act of 1882, and under the present Tenancy Act of 1901, the *sir* of a proprietor cannot be mortgaged with possession and the proprietor immediately on the mortgage became an ex-proprietary tenant of the *sir* land. The distinction, however, does not exist in the reported case because in that case ex-proprietary rights had actually arisen, been claimed and had been relinquished. The case, therefore, was one similar to the present one where under law ex-proprietary rights arose immediately on the execution of the mortgage.

In the result we amend the decree of the lower Appellate Court and direct that in the decree for redemption there shall be an order placing the plaintiffs in joint possession along with the defendants of the *sir* land to the extent of one-half. Otherwise the decree and order of the lower Appellate Court are maintained. Parties shall bear their own costs in this Court.

R. L. *Order accordingly.*
N. H.

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(1) Sel. Dec. No. 9 of 1918.

(2) 63 Ind. Cas. 114.

CALCUTTA HIGH COURT.

TESTAMENTARY AND INTESTATE JURISDICTION.
February 3, 1925.
Present :—Mr. Justice C. C. Ghose.
In the goods of GEORGE NASH,
DECEASED.

Will—Executor—Appointment of member of firm, effect of.

Where a member of a firm is appointed an executor under a Will the appointment only applies to a person who was a member of the firm at the date of the Will and also at the date of the testator's death.

FACTS.—After the death of a testator in 1924 an application was made about three months afterwards for the Probate of his Will which was executed in 1911. By the Will the testator had appointed his son and "a member of the firm of Williamson Magor and Co.," as his executors. The application was returned by the Registrars in Insolvency on the ground that there was no affidavit showing that the applicant was a member of the firm of Williamson Magor and Co. at the date of the Will and also at the date of the testator's death.

JUDGMENT.—I agree with the Registrar in Insovency in the view he has taken.

Z. K. *Application rejected.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1072 OF 1925.
April 19, 1926.
Present:—Mr. Justice Jai Lal.
MR. AMAR SINGH AND ANOTHER—
DEFENDANTS—APPELLANTS
versus
JAT MAL AND OTHERS—PLAINTIFFS
CHANAN AND OTHERS—DEFENDANTS
—RESPONDENTS.

Shamilat *land—Building on portion under authority of co-sharer—Suit for ejectment by some co-sharers—Demolition of building.*

A person who, either on behalf of or under the authority of one of the big proprietors and with the permission of majority of them, builds upon a portion of a *shamilat* land cannot be ordered to demolish such building at the instance of other co-owners, unless it is proved that the action of such person in building upon the joint land has caused a material and substantial injury such as cannot be remedied by partition of the *shamilat* land. [p. 996, col. 1; p. 997, col. 1.]

Jhandu Mal v. *Singh Ram*, 87 Ind. Cas. 123; A. I. R. 1925 Lah. 380; 7 L. L. J. 139, *Kalu* v. *Wasawa Singh*, 19 P. R. 1904, *Girdhari Lal* v. *Nand Ram*, 42 Ind. Cas. 275; 98 P. L. R. 1917; 154 P. W. R. 1917, *Achhar Singh* v. *Badhawa Singh*, 11 Ind. Cas. 404; 9 P. R. 1912; 84 P. W. R. 1911 and *Manji* v. *Ghulam Muhammad*, 61 Ind. Cas. 415; 2 L. 73; 3 L. L. J. 75, distinguished.

Gajadhar Ahir v. *Bhikari Lal*, 27 Ind. Cas. 228; 18 C. W. N. 1011 and *Kala Singh* v. *Kahna*, 60 Ind. Cas. 531, relied on.

Second appeal from a decree of the Senior Subordinate Judge, with enhanced appellate powers, Hoshiarpur, dated the 14th January 1925, modifying that of the Subordinate Judge, Fourth Class, Dasuya, District Hoshiarpur, dated the 15th October 1923.

Mr. *Abdul Aziz*, for the Appellants.

Mr. *Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.—The plaintiffs in this case were the proprietors of a $\frac{1}{5}$th share in the village of Hajipur. The suit was instituted against defendant No. 1 Maula Bakhsh for possession of 17 *marlas* of *shamilat* land on the allegations that it belonged to the village proprietary body and that the defendant had taken illegal possession thereof without the consent of such body. The remaining proprietors in the village were impleaded as defendants on the allegation that owing to their various vocations they were unable to join the plaintiffs.

Defendant No. 15 is Mr. Amar Singh Barrister-at-Law, and a proprietor in the village. The plea of defendant No. 1 was that he was an agent of defendant No. 15 and; therefore, no suit lay against him. He also pleaded that his possession was on behalf of defendant No. 15. It was consequently alleged that the house built by defendant No. 1 really belonged to defendant No. 15. The other defendants including Mr. Amar Singh supported the plea of defendant No. 1.

The first Court granted the plaintiffs a decree for joint possession of the land in suit to the extent of two anna share therein against defendant No. 15 but left the parties to bear their own costs. The plaintiffs appealed to the Senior Sub-Judge of Hoshiarpur. Defendant No. 1 filed cross-objections as regards the order about costs and Mr. Amar Singh filed cross-objections on the merits. The Senior Sub-Judge held that Maula Bakhsh did not take possession of the land in suit a few months before the institution of the suit as alleged by the plaintiffs but that he built a *kacha* house thereon about $4\frac{1}{2}$ years before and that this *kacha* house was converted by Maula Bakhsh into a *pakka* building prior to the institution of the suit. He also held that the building complained of by the plaintiffs was constructed by Maula Bakhsh himself as principal and not as agent for Mr. Amar Singh. He, however, held that this was done with the consent of Mr. Amar Singh and some other proprietors. Maula Bakhsh, it appears, has constructed a flour mill worked by an oil engine on the site in dispute. The learned Judge has further held that the plaintiffs had acquiesced in the construction of the *kacha* house by Maula Bakhsh and the use of the site for building a house has been allowed by them and also that the mere fact that the *kacha* house has been re-placed by a *pakka* one does not give any fresh cause of action to the plaintiffs.

He remarks that there is no allegation that the erection complained of caused any special inconvenience to any of the villagers. On these findings he granted the plaintiffs a decree for ejectment of Maula Bakhsh from that part of the land in suit which was not actually covered by buildings and declared that his possession of the land which is under the buildings will be considered to be under all the proprietors. Maula Bakhsh and Mr. Amar Singh have both appealed to this Court and the plaintiffs have filed cross-objections.

Some other facts which are not stated by the learned Senior Subordinate Judge may be mentioned here (1) Mr. Amar Singh owns a 92/226ths share in the village. The entire common land is more than 150 *kanals* and the share of Mr. Amar Singh will be much more than the land which is actually in his possession including the land in suit.

(2) There are other houses, admittedly in the possession of Mr. Amar Singh, which adjoin the land in suit.

(3) Originally the plaintiffs had included in their suit rooms which are in possession of defendant No. 1 but which were excluded from the suit later on. It appears that they were admittedly in possession of Mr. Amar Singh before they were appropriated by Maula Bakhsh to his own use. A reference to the plan will make the position of the buildings referred to above clear.

On these facts the question is what relief, if any, should the plaintiffs be granted.

Counsel for the respondents relied upon the following authorities:—

Jhandu Mal v. *Singh Ram* (1) in which a sale of a part of the village common land by one *kamin* to another was held to be invalid and set aside.

Kalu v. *Wasawa Singh* (2). In this case it was held that a *kamin* must occupy the land given to him for the purpose for which it is granted to him and that he cannot build a mosque or a temple thereon and further that he can occupy the land for his residence so long as he plies his trade.

Girdhari Lal v. *Nand Ram* (3). In this case a non-proprietor denying the claim of the proprietors was held to be a trespasser and ejected as such.

All these cases are clearly distinguishable from the one before me. Defendant No. 1 is neither a *kamin* nor does he deny the claim of the proprietors to the land in suit.

Achhar Singh v. *Badhawa Singh* (4) related to village common land which had expressly been reserved for a road but was utilised for other purposes by one of the proprietors. It was held that the plaintiff proprietor need not prove any special damage in order to entitle him to relief against the offending proprietor. That case is also distinguishable because the land in suit here is not reserved for any special purpose.

Perhaps the strongest case cited on behalf of the respondent is *Manji* v. *Ghulam Muhammad* (5). That was a case in which some of the co-sharers who owned a seven anna share in the village *abadi* occupied the land in suit and *asserted their exclusive title to it.* On a suit by the owners of the remaining nine anna share it was held that the plaintiffs were entitled to a decree for joint possession of the land which was proved to be the property of all co sharers including the plaintiffs and the defendants. This case again is clearly distinguishable from the one before me because here the title of the plaintiffs to the land in suit as co-sharers in the village *abadi* is not denied. The only plea of the defendant is that Mr. Amar Singh, admittedly a big co-sharer in the village *abadi* has appropriated, or allowed the appropriation of the land in suit.

On behalf of the appellants reliance was placed on *Gajadhar Ahir* v. *Bhikari Lal* (6) where a Division Bench of the Calcutta High Court held that a co-sharer if dissatisfied with the appropriation of the common land by another co-sharer should sue for partition of his own share. In that case, it appears that some of the defendants co sharers had appropriated a part of the joint common land and given it for cultivation to other defendants as tenants. The facts of this case are almost identical to those of the present case. In *Kala Singh* v. *Kahna* (7) a Division Bench of this Court held that when a joint owner of land without obtaining the permission of his co-owners builds upon such land, such building should not be demolished at the instance of the co-owners unless they prove that the action of the joint owner in building upon the joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land. In that case also certain non-proprietors had occupied a large area in the village common land with the permission of proprietors who owned a one-third share in the village. The plaintiffs were owners of one-third share and on a suit being brought by them the occupying defendants were ordered to vacate such of the area which was not built upon. They were ordered to vacate this area on the ground that the total area occupied by them was large and on account of it proximity to a tank it was required by the other proprietors of the village. The case before me is much stronger from the point of view of defendant No. 1 because the area occupied is very small and it has been found that its occupation does not do any injury to the other proprietors of the village. It has already been found that he occupied the area under one of the big proprietors in the village and with the permission of a majority of the proprietors.

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(1) 87 Ind. Cas. 123; A. I. R. 1925 Lah. 380; 7 L. L. J. 139.

(2) 19 P. R. 1904.

(3) 42 Ind Cas. 275; 98 P. L. R. 1917; 154 P. W. R. 1917.

(4) 11 Ind. Cas. 404; 9 P. R. 1912; 84 P. W. R 1911.

(5) 61 Ind. Cas. 415; 2 L. 73; 3 L. L. J. 75.

(6) 27 Ind. Cas. 228; 18 C. W. N. 1011.

(7) 60 Ind. Cas. 531.

In para. 225 of Rattigan's Digest of Customary Law the entire case law on the subject is summed up from which it appears that a co-proprietor is entitled to appropriate a part of the village common land provided he does not cause material and substantial injury to other proprietors such as could not be remedied on partition of the joint land. It has not been shown in this case that the plaintiffs have suffered any substantial injury by the appropriation of the land by defendants Nos. 1 and 15. On the other hand, the finding of the learned District Judge on this point is the other way. The share of Mr. Amar Singh being much more than the land which is actually in his occupation including the land in suit I hold that the plaintiffs have no cause of complaint. I also hold following the authorities already cited that defendant No. 1 who is found to be holding the land under Mr. Amar Singh enjoys the same rights as Mr. Amar Singh with regard to the other co-proprietors. There is no question that Mr. Amar Singh could not under the circumstances be ejected from the land in suit if the appropriation thereof had been by himself personally. The authorities already cited showed that it is immaterial whether defendant No. 1 has appropriated the land on behalf of or under the authority of Mr. Amar Singh.

The learned Senior Subordinate Judge granted a decree for the ejectment of defendant No. 1 from that part of the land in suit which in his opinion was not actually covered by any buildings. I do not think there was any justification in this case for making a distinction between one part of the land in suit and the other. A reference to the plan shows that the land which is not actually covered by the buildings is enclosed by a wall and forms a sort of courtyard to the actual buildings and is, therefore, in my opinion a necessary adjunct to the buildings. Moreover the total area of the land in suit is so small that it is not right to make a distinction such as the learned Senior Subordinate Judge has made. The defendants do not deny the title of the plaintiffs. They have never done so. The case is practically of appropriation of a small area actually adjoins his existing buildings. It has been amalgamated with such buildings. I do not think under these circumstances the plaintiffs are entitled to any relief whatsoever not even to a declaration because their title has never been denied.

I would, therefore, accept this appeal and dismiss the plaintiffs' suit with costs throughout and dismiss the cross-objections filed on behalf of the plaintiffs and I order accordingly.

R. L. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 125 OF 1923.

May 5, 1925.

Present :—Mr. Justice Suhrawardy and Mr. Justice Duval.

NARESH CHANDRA BOSE—JUDGMENT-DEBTOR—APPELLANT

versus

KRISHNA BHABINI DASI—DECREE-HOLDER—RESPONDENT.

Interest—Decree silent as to interest—Interest, recovery of, in execution—Damages, recovery of, in separate suit.

Where a decree for maintenance is silent as to future interest, interest cannot be recovered in execution proceedings on arrears of maintenance remaining due under the decree, but it may be recovered as damages for detention of decretal amount by a separate suit. [p. 998, col. 1.]

Seth Gokul Dass-Gopal Dass v. *Murli*, 3 C. 602; 5 I. A. 78; 2 C. L. R. 156; 3 Suth. P. C. J. 514; 3 Sar. P. C. J. 802; 2 Ind. Jur. 329; 1 Ind. Dec. (N. S.) 967 (P. C.), followed.

Mohamaya Prosad Singh v. *Ram Khelawan Singh Thakur*, 15 Ind. Cas. 811; 15 C. L. J. 684, referred to.

Appeal against an order of the Subordinate Judge, 24-Parganahs, dated the 2nd March 1923.

Babu *Karunamoy Ghose*, for the Appellant.

Babu *Abinash Chandra Ghose*, for the Respondent.

JUDGMENT.—This appeal by the judgment-debtor is directed against an order of the lower Court, dated the 2nd March 1923. The decree-holder obtained a decree in respect of maintenance due to her from the estate of the judgment-debtor's father. The decree was for a certain sum but there was no mention in it that the plaintiff was entitled to interest on the sum decreed. The lower Court on the application of the decree-holder allowed her interest at the rate of 6 per cent. per annum on the arrears from the time they fell due and has also directed the maintenance to be calculated from the 1st *Chaitra* 1322. The maintenance was fixed at Rs. 275 a month. The judgment-debtor had already before suit paid Rs. 200 on account of the month of *Chaitra*. The execution, therefore, related to Rs. 75 for that month. The appellant contends that the order of the lower Court allowing interest on the decretal amount and allowing maintenance from the beginning of the month of *Chaitra* is bad in law.

With regard to the first point, it is hardly necessary to examine the law on the point as it has been settled by their Lordships of the Privy Council in the case of *Seth Gokul Dass-Gopal Dass* v. *Murli* (1). There their Lordships have said that where a decree is silent as to future interest, interest cannot be recovered by proceedings in execution of the decree, but it may be recovered as damages by a separate suit. It cannot be disputed that an Execution Court is not entitled to go behind the decree and to vary it in execution proceedings. The right of a person standing in the position of the decree-holder to recover damages on account of detention of the money to which he is entitled is fully discussed in the case of *Mohamaya Prosad Singh* v. *Ram Khelawan Singh Thakur* (2). Mookerjee, J., following certain decision of the Judicial Committee has held that where a certain sum of money is due to the plaintiff by way of *malikana* he is not entitled to claim interest but is entitled to claim damages in lieu of interest. The question arose in a suit. The plaintiff claimed interest on the principal money due to him as *malikana*. If a plaintiff is not entitled to claim interest on the sum due to him under claim similar to the decree-holder's claim even in a suit, it cannot be maintained that he is entitled to claim interest in execution proceedings. The decree-holder must pursue the proper remedy which is by bringing a suit for damages for detention of the decretal amount. This question must, therefore, be decided in favour of the appellant.

The next objection to the order of the Court below is that the decree-holder is not entitled to maintenance from the month of *Chaitra*. It appears from an examination of the record that the husband of the decree-holder died some time on the 28th *Chaitra* 1316, and presumably she is entitled to maintenance from the date of his death month by month. In the decree passed the plaintiff claimed maintenance for the period before suit as well as for future maintenance. The decree disallowed the plaintiff's prayer for maintenance before suit and granted her a decree for future maintenance at the rate of Rs. 275 a month. The suit was instituted on the 10th April 1916 (28th *Chaitra* 1322). According to the reading of the decree the plaintiff is entitled to maintenance from the date of the institution of the suit, namely, the 28th Chaitra 1322. She is accordingly entitled to maintenance for three days of *Chaitra* which will come to about Rs. 10. The order of the lower Court will, therefore, have to be modified. The decree-holder's claim for interest is disallowed and she will get her maintenance from the 28th *Chaitra* which we assess at Rs. 10. The appeal is accordingly allowed with costs which we assess at two gold *mohurs*.

R. L. *Appeal allowed.*

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(1) 3 C. 602; 5 I. A. 78; 2 C. L. R. 156; 3 Suth. P. C. J. 514; 3 Sar. P. C. J. 802; 2 Ind. Jur. 329; 1 Ind. Dec. (N. S.) 967 (P. C.).

(2) 15 Ind. Cas. 911; 15 C. L. J. 684.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

First Civil Appeal No. 73 of 1925.
March 29, 1925.
Present:—Mr. Hallifax, A. J. C.
RAMCHARAN and another—Defendants—Appellants
versus
SARWAR KHAN and another—Plaintiffs—Respondents.

Contract Act (IX of 1872), s. 73—Suit based on breach of contract and for damages—Maintainability—Tort—Person in wrongful possession—Damages for loss—Burden of proof.

In one and the same suit one defendant may be sued for breach of contract and the other for damages for wrongful detention of goods, both claims being covered by two parts of the same section of the Contract Act, *i. e.*, s. 73. [p. 999, col. 1.]

The word "tort" does not occur in the law administered in India except in cases of actionable wrongs where the English Law has to be applied because no Indian Statute covers them. [*ibid.*]

After an owner who has been wrongfully dispossessed has given evidence as to the loss caused to him, it is for the defendant to prove that the loss was less than the amount claimed.

Jailalsao v. *Lal Fatehsingh*, 75 Ind. Cas. 826; 20 N. L. R. 826; A. I. R. 1924 Nag. 117, followed.

Appeal against a decree of the Sub-Judge, First Class, Seoni, dated the 28th March 1925, in Civil Suit No. 9 of 1923.

Mr. *V. Bose*, for the Appellants.

Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—The first ground of appeal is that the plaintiffs' suit is not maintainable in its present form inasmuch as the claim against the first defendant is based on breach of contract while that against the other two defendants is based on tort. This matter was discussed at some length in the lower Court. The answer is that the word *tort* does not occur in the law administered in India except in cases of actionable wrong where we have to apply the English Law because no Indian Statute covers them. I have never met such a case, and this is certainly not one; both claims are covered by the two parts of the same section of the Contract Act, s. 73.

The suggestion in the petition of appeal, that the contract came to an end eighteen months after it was made and neither party was bound to perform any part of it that was incomplete, has not been mentioned in argument. What is urged for the appellants is that they never broke the contract, that all the trees in the forest of the proper size were duly cut except about fifty which the plaintiffs said were of no use to them, and that the plaintiffs were not prevented from taking away any timber at all but did in fact take way all that was cut. The evidence that has been held in the lower Court to prove the contrary is so clear and conclusive that it would be a waste of time to discuss it any further.

There remains only the question of the amount of damages. The plaintiffs originally claimed Rs. 6,000 or as much more as might be found due to them, offering to pay the necessary Court-fees on the balance. In the lower Court they were awarded Rs. 3,200 and they have now filed a cross-objection praying that that amount should be increased to Rs. 6,000. Their claim is now definitely limited to that amount. The system on which the amount of damages has been calculated in the lower Court is certainly a possible system, but some of the necessary factors are absent, and at least one of the factors that are present, (the fact that the plaintiffs paid the defendants Rs. 3,700) has been ignored.

But there is a simpler and more certain system. The defendants retained property belonging to the plaintiffs, consisting of the timber already cut and of the trees of the proper size still standing, and if we can ascertain the value of that property at the time at which the defendants detained it, the whole question is settled very simply. In the deposition of the plaintiff Sarwar Khan taken on the 17th of September 1923 at the first hearing of this case he gave a list of all the cut and uncut timber, as far as he knew, of which he had been deprived, and the prices at which he could have sold it on the spot. Taking the lowest price given by him in each case and omitting all the timber of which he was unable to give details, the value comes to Rs. 6,400.

This statement is corroborated by a considerable body of unimpeachable evidence, and there is nothing at all to rebut it. After that evidence had been given, the only way in which the defendant could avoid a decree for at least Rs. 6,400 was by showing that the loss caused to the plaintiffs by their wrongful act in keeping the timber was less than that amount, as was explained in *Jailalsao* v. *Lal Fatehsingh* (1). That they have not even attempted to do, preferring to give a lot of false evidence to show that they were justified on various speciously subtle grounds in doing what they did, some of which proves the plaintiffs' loss to have been greater than Sarwar Khan's estimate.

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(1) 75 Ind. Cas. 826; 20 N. L. R. 826; A. I. R. 1924 Nag. 117.

The defendants' appeal will be dismissed and the plaintiffs' cross-objection will be allowed. The decree of the lower Court will be modified to a decree ordering the defendants to pay to the plaintiffs the sum of six thousand rupees, with interest thereon at 12 per cent. per annum from the 1st of April 1922 till the date of payment and all the costs incurred by them in both Courts.

R. L. *Appeal dismissed.*
N. H.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1983 OF 1925.
April 29, 1926.
Present :—Mr. Justice Campbell.
ISHER SINGH—PLAINTIFF—APPELLANT
versus
WIR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Parties—Appellant dying without substitution in lower Appellate Court—Necessary parties in second appeal—Adverse possession—Plaintiff vendee from person without title—Open user for more than 12 years—Prescription.

Where some of the appellants die in the lower Appellate Court without their legal representatives being brought on the record, the decree of the Trial Court remains good against them even though the appeal is accepted and in a second appeal by the opposite party they are not necessary parties. [p. 1001, col. 1.]

The plaintiff had purchased the site in suit by a deed from a person who had no title to it. The deed was not registered but was attested by a *lambardar* of the *patti.* On another land purchased by the plaintiff he had constructed a house and he had been using the land in suit as an appurtenance to his house. He had enclosed it with a hedge and had been using as a carpenter's yard for more than 12 years :

Held, that the plaintiff's possession had ripened into ownership. [p. 1001, col. 2.]

Framji Cursetji v. *Goculdas Madhowji,* 16 B. 338; 8 Ind. Dec. (N. S.) 703, distinguished.

Second appeal from a decree of the District Judge, Sialkot, dated the 10th June 1925, reversing that of the Subordinate Judge, Third Class.

Lala *Hargopal,* for the Appellant.

Dr. *Nand Lal,* for the Respondent.

JUDGMENT.—This was a suit by one Isher Singh for possession of a small spot of land within the limits of the Narowal Municipality in the Sialkot District. The defendants were numerous owners of Patti Barsal of Narowal. The plaintiff alleged that he had been dispossessed by these persons $1\frac{1}{2}$ or $1\frac{3}{4}$ years before suit and that he was the proprietor. He claimed to be so on two grounds, firstly, that he had purchased the plot from one Wasawa Singh on the 6th of March 1909 and the other that in any case had established ownership rights against the defendants by adverse possession.

The Trial Court held that the plaintiff and one Ahmad Bakhsh had purchased from Wasawa Singh on the 6th of March 1909 a piece of ground and that the plaintiff had subsequently bought out Ahmed Bakhsh. This ground, was held by the Trial Court to have been partly in the village of Jamman and partly in Narowal Patti Barsal, and it was further found that the portion in Narowal was the plot in dispute and that Wasawa Singh was not proved to have been an owner in Narowal Patti Barsal or to have had any right to dispose of the plot in suit. The rest of the ground sold lying within the boundary of Jamman village was found to be on the north of the plaintiff's house and to be unquestionably his property so far as the defendants are concerned.

On the other point, that of adverse possession, the Trial Court upheld the plaintiff and granted him a decree. The defendants appealed to the District Judge who reversed the Trial Court's decision and dismissed the suit on the sole ground that taking the facts to be as held by the Trial Court, the plaintiff had not established adverse possession for the period during which he had held possession according to the Trial Court, namely, from the 6th of March 1909 till December 1921.

The plaintiff has come to his Court on second appeal. During the pendency of the appeal and before the hearing he submitted an application stating that two of the original defendants Mian Singh and Labhu *alias* Buta had been shown as appellants in the lower Appellate Court and for that reason were shown in the present appeal as respondents, whereas these two persons had in fact died before the appeal in the District Court was decided, namely, on the 24th of April 1923 and on the 5th of May 1925. The application asked that their legal representatives should be joined as respondents to this appeal, and the prayer was granted subject to all just exception. At the hearing before me the learned Counsel for the respondents has pointed out that the application for joining the legal representatives was not made within the requisite period from the alleged deaths and further said that he was not in a position to contradict the affidavit of the appellant that the death had occurred on the dates stated. In this situation the affidavit must be accepted and it must be taken that Mian Singh and Labhu died before the decision of the appeal in the District Court. There was thus no decree in their favour by the District Court and the original decree against them in the Trial Court was not reversed. Their legal representatives, therefore, are not necessary parties to the present appeal. I set aside the tentative order impleading these legal representatives and in lieu thereof direct that the names of Mian Singh and Labhu *alias* Buta be struck out from the list of respondents.

The facts found by the Trial Court were as follows:—The sale by Wasawa Singh of the land, including the plot in dispute, was made by deed which was attested by Mit Singh *lambardar* of Patti Barsal and apparently Wasawa Singh did know the exact boundary of the two villages but considered rightly or wrongly that the plot in dispute belonged to him. From the 6th of March 1909 till the 18th of December 1921 the plot in dispute was used as an approach to Ishar Singh's house and remained as such in Ishar Singh's possession. It was also enclosed by him with a thorn hedge and used as a place for carrying on his trade as carpenter. The plaintiff had bought the land as a portion of entire plot, to the other portion of which he had acquired a sound legal title, and he began to use the plot in dispute in the belief that he had legal title to it also. The defendants live within Narowal Municipality and the plot is on a main thoroughfare. It cannot be said that the plaintiffs' user was without the defendants' knowledge and in fact he has used the plot for over twelve years under a title to the knowledge of the defendants as an approach to his house.

The learned District Judge proceeded to hold that, because the plot was a vacant site, possession of it could not become adverse against the owner, and he relied on *Framji Cursetji* v. *Goculdas Madhowji* (1) and some other cases which followed that ruling. The Bombay case is a well-known one, and it concerned a small piece of land held to have been of no present use to its owner and to have been convenient in many ways to his neighbour who far more than twelve years without objection made use of it in various ways, these various ways being the erection of structures of a flimsy and temporary character consisting of a privy, sheds for live-stock and a hut for a *ghariwallah*. The defendant moreover admittedly had a right of passage across the part of the land for the purpose of access to the well. In these circumstances it was held that such user as that described was insufficient to give title to the land by adverse possession.

The circumstances of the present case are materially different. Here the plaintiff purchased the site by deed from a person who has been held to have had no right to sell. The deed was not registered but it was attested by a *lambardar* of the *patti* to which the land belonged. On other land purchased by the same vendee the plaintiff has constructed a house and he has been using the land in suit as an appurtenance to his house. He has enclosed it with a hedge, a fact which distinguished the case very conspicuously from the Bombay case, and he has been using it as a carpenter's yard. The place is not tucked away in a corner but lies on a main thoroughfare.

If the facts are these and if the plaintiff has held possession in this manner from March 1909 till December 1921 his possession has been adverse for that period against the defendants. Since the decision of the learned District Judge is on a purely preliminary point the appeal must go back to him for re-decision. It is of course quite possible that he may come to a different conclusion on the facts than that arrived at by the Trial Court.

The learned District Judge's judgment appears to contain in its last paragraph two findings of fact by the learned District Judge himself. One is a dissent from the Trial Court's decision that there was no other approach to the plaintiff's house except over the plot in dispute. Whether this was so or not does not appear to me to make any great difference to the question of adverse possession. The other is that the plaintiff has not proved that the defendants dispossessed him two years ago and that the defendants had been in possession for more than two years. This finding also does not effect the situation, since the suit was instituted on the 1st of

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(1) 16 B. 338; 8 Ind. Dec. (N. S.) 703.

March 1924 and the finding of the Trial Court is that the plaintiff was in possession up to the 18th of December 1921, a date more than two years from the date of suit.

I accept the appeal and set aside the order of the learned District Judge. The case is returned to him for a fresh decision. The remand is under O. XLI, r. 23, C. P. C., and, therefore, stamp on the present appeal will be refunded. The other costs in this Court will follow the event.

R. L. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 237 OF 1925.
March 17, 1926.
Present:—Mr. Findlay, Officiating J. C.
GOVINDA AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
KRISHNAJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Widow, sale by—Partial necessity—Principle to be applied—Time-barred debts of husband.

In a case where the validity of a sale by a Hindu widow is in question and it is only in part supported by legal necessity, the proper principle to be applied is not whether the bulk of the sale consideration was taken for legal necessity, but whether the portion which was not taken for the said purpose was such a small fraction of the total consideration that it might reasonably be left out of account. [p. 1002, col. 2.]

Jai Narain Pande v. *Bhagwan Pande*, 80 Ind. Cas. 1006; 44 A. 683; 20 A. L. J. 621; A. I. R. 1922 All. 321, *Sanmukh Pande* v. *Jagarnath Pande*, 83 Ind. Cas. 838; 46 A. 531; 22 A. L. J. 417; A. I. R. 1924 All. 708; L. R. 5 A. 289 Civ. and *Bhadaji* v. *Ganeshrao*, 83 Ind. Cas. 70; 20 N. L. R. 4; A. I. R. 1924 Nag. 109, followed.

If a sale has been made in order to discharge a debt the essential point involved is whether on the date of the sale there was any pressure on the widow to meet this debt. The fact of its being time-barred is not conclusive on the question of the obligation resting on the widow to discharge. [p. 1003, col. 1.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 28th February 1924, in Civil Appeal No. 80 of 1924.

Mr. *M. R. Bobde*, for the Appellants.

Mr. *K. A. Potey*, for the Respondents.

JUDGMENT.—It is unnecessary at present to detail the main facts of this case for the simple reason that, in my opinion, it will have to go back to the lower Appellate Court for disposal. The main question involved in this appeal is whether there was legal necessity for the sale of the house by *Musammat* Radhabai to the defendant-respondent, Shamrao: *cf.* 3 D. 5. Under this sale-deed the consideration was Rs. 450, and the recitals therein contained mentioned that the consideration was required by the widow for payment of the debt of the creditor, Hirasao, who held the mortgage deed (3 D. 3). The balance was said to be required for the expenses of a pilgrimage.

The Judge of the first Court held that Rs. 198-4 0 was for legal necessity, being the amount due to the said creditor Harisao; the balance of the consideration, the Subordinate Judge held, was not for legal necessity.

The finding of the Additional District Judge is to the effect that legal necessity was proved, not only for the amount of Rs. 198 4-0 but probably also some Rs. 30 were required for the maintenance of the widow between the date of the sale and her re-marriage.

As regards the debt due to Harisao, the Additional District Judge has apparently entirely overlooked the endorsement on the mortgage-deed (3 D.-3), an endorsement, dated 14th May 1921, apparently signed by Harisao to the effect that the deed had been satisfied on 14th May 1921, long before the transaction we are concerned with occurred. On this all vital point alone the question involved would require reconsideration by the lower Appellate Court. But, apart from this, it seems to me that the Additional District Judge has approached the question of legal necessity in this case from an entirely wrong point of view. In a case like the present when the validity of such a sale is in question and when the sale is only in part supported by legal necessity, the proper principle to be applied is not whether the bulk of the sale consideration was taken for legal necessity, but whether the portion which was not taken for the said purpose was such a small fraction of the total consideration that it might reasonably be left out of account: *cf* *Jai Narain Pande* v. *Bhagwan Pande* (1), *Sanmukh Pande* v. *Jagarnath Pande* (2), and *Bhadaji* v. *Ganeshrao* (3). We have to determine what portion of the consideration was for legal necessity and it was the duty of the Additional District Judge to approach the case from this point of view. Instead of doing so, he has laid stress on the fact that there was another bond of Govindrao, the deceased husband of *Musammat* Radhabai, *viz.*, 3-D.4. But he overlooked in this connection the fact that this debt had been payable in six months from the date of its execution and was on the date of the present sale time-barred. No doubt, the fact of its being time-barred is not conclusive on the question of the obligation resting on the widow to discharge it, but the essential point involved is whether on the date of the sale there was any pressure on the widow to meet this debt.

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(1) 80 Ind. Cas. 1006; 44 A. 683; 20 A. L. J. 621; A. I. R. 1922 All. 321.

(2) 83 Ind Cas. 838; 46 A. 531; 22 A. L. J. 417; A. I. R. 1924 All. 708; L. R. 5 A. 289 Civ.

(3) 83 Ind. Cas. 70; 20 N. L. R. 4; A. I. R. 1924 Nag. 109.

Then, again, the Additional District Judge went somewhat astray in his remark in para. 8 of this judgment that the vendee might have had his doubts regarding the legal necessity as to the sum of Rs. 250. If this is what the Additional District Judge holds, as a matter of fact, it goes strongly against the case of the respondents. I cannot see that the Additional District Judge was entitled to go out of his way to make out a fresh case for the respondents to the effect that Radhabai was likely to have required the balance or part of the balance of the consideration for her maintenance. We have clear cut recitals in the sale-deed in question, and on this alone I think the question of legal-necessity had to be determined. In view, however, of the failure of Additional District Judge to notice that the mortgage-debt, which was said to form the main specific item of legal necessity, had apparently been satisfied long before, as well as of the fact that the Additional District Judge has approached the whole question involved from a wrong point of view, I think it is desirable that the lower Appellate Court should have an opportunity of re-trying this appeal in view of the questions of fact involved.

Lastly, I desire to add that, even if the question of legal necessity should be held against the respondents, the present seems to me a case in which the lower Appellate Court will have to consider carefully whether it should exercise its discretion in giving the present appellants the decree for specific performance which they desire. As this appeal is to be remanded for re-trial, it is open to the lower Appellate Court to re-consider all the questions of fact involved anew. There are indications on the record that the appellants entered into the agreement in suit with full knowledge that they were buying a disputed title and there are also indications that they knew of the sale in favour of the respondent No. 3. Enquiry in this connection will also be pertinent as to whether the price to be paid, *viz.*, Rs. 325 was an adequate or inadequate one. On the other hand, in connection with the amount of the consideration received by *Musammat* Radhabai for her sale, a very important question arises, should the Additional District Judge hold that only half or less than half the consideration was required for legal necessity. That question is whether the needs of the moment for meeting debts bearing the character of legal necessity, could not have been adequately met by a mortgage of the property or some such arrangement rather than by an out and-out sale thereof. All these matters must now be considered by the Judge of the lower Appellate Court.

The judgment and decree appealed against are reversed and the case is remanded to the lower Appellate Court for re trial of Appeal No. 80 of 1924 with advertence to the above remarks. The costs incurred in this Court will follow the event. There will be no certificate for refund of Court-fee.

G. R. D. *Case remanded.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 115 OF 1925.

February 3, 1926.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Boys.

SURAJ MAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat CHHOTE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. X, r. 2—Examination of person appearing on behalf of party—Statement, whether binding on party.

Any statement made by a party to a suit while being examined under O. X, r. 2, C. P. C., is binding only on the person who made the statement to the same extent as the statement made by a Pleader engaged by him may be binding on him; but a statement made by a person who merely appears to prosecute a case or to look after it on behalf of a party, not personally present or who is unable to be present, does not stand on the same footing. If the statement made by him in Court in regard to any material fact is admitted or accepted by the party concerned or his Pleader to be correct, it may help to narrow down the issues; but it is open to the party to say that the statement was not made under his instructions. [p. 1005, col. 1.]

Janki Prasad v. *Arku Lal*, 2 A. L. J. 777, relied on.

First appeal from an order of the Additional District Judge, Meerut, dated the 1st April 1925.

Mr. *Nehal Chand*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—The plaintiff, *Musammat* Chhote, is the daughter of one Jhandu, who died in 1905, leaving some estate in respect of which the name of *Musammat* Lali was entered in the revenue papers on his death. *Musammat* Lali died in 1910. The allegation of the plaintiff was that she was a minor on the date of her death and that the defendants, taking advantage of her minority, got their names recorded in the revenue papers in respect of the estate left by Jhandu deceased and standing in the name of *Musammat* Lali, although they had no right to the same. *Musammat* Chotte brought this suit for possession of the said property with mesne profits, claiming to be entitled to the benefit of s. 7 of the Indian Limitation Act. She stated that she was about 20 years old on the date of the institution of the suit. The defendant-appellants contested the suit on three grounds. Their first plea was that Jhandu had left a son about a year old, who died a month later, and that the plaintiff was not the heir of the last male holder. The other ground was that the plaintiff was 32 years old on the date of the suit and that the claim was consequently barred by limitation and adverse possession for more than twelve years. The third plea was that one of the properties claimed by the plaintiff, namely, a certain *gher* or enclusure, did not belong to Jandhu, through whom the plaintiff claimed to derive her title.

On the date fixed for the determination of issues the plaintiff was not personally present. Her Pleader was present and was accompanied by Bhartu, the brother of her husband, who was apparently acting as a *pairokar*, or agent deputed to look after the suit. The Court examined Bhartu under O. X, r. 2 of the C. P. C. and asked him whether Jhandu had left a son at the time of his death; and his reply was that there was such a son in existence at the time of the death of Jhandu about a year old and that the boy had died a month after his death. The Court thereupon asked the Pleader for the plaintiff whether he agreed to accept the statement of Bhartu; and his reply was that Bhartu was the *pairokar* of the plaintiff and that she "should" be bound by his statement. The Court thereupon framed certain issues, which were far from exhaustive on the points raised in the defence, and dismissed the claim on the preliminary ground that the plaintiff was, on the statement of Bhartu, not an heir of Jhandu under the Mitakshara Law applicable to the case. The lower Appellate Court, however, held that since Bhartu was not a recognised agent but had merely accompanied the Pleader of the plaintiff to help him in the case, the plaintiff was not bound by his statement.

Order X, r. 2 of the C. P. C. provides that "at the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his Pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party." The answers given by Bhartu were not recorded on oath, but as provided by r. 3, the substance of the examination was reduced to writing by the Judge and forms part of the record.

The authority of a person accompanying a Pleader merely to prosecute a case or to look after it is necessarily limited. Such a person may not be a recognised agent within the meaning of O. III, r. 2 of the C. P. C. Bhartu had no power-of-attorney from the plaintiff, authorising him to appear and act on behalf of the plaintiff. He was only appearing as a person interested in the case by reason of his relationship with the plaintiff, who was a *pardanashin* lady; and whatever weight might have been attached to his statement, had it been recorded on oath as a witness present in Court or cited by a party, the answer given by such a person in answer to an enquiry made by the Court to clear up any material question arising in the case would not necessarily bind the party on whose behalf he appeared to prosecute the case. As observed in *Janki Prasad* v. *Arku Lal* (1) the aforesaid provision is intended to enable a Court to ascertain what were the questions in controversy between the parties and is not intended to be in substitution for a regular examination on oath. Any statement made by a party, while being examined under that provision, is binding only on the person who made the statement to the same extent as the statement made by a Pleader engaged by him may be binding on him; but a statement made by a person who merely appears to prosecute a case or to look after it on behalf of a party, not personally present or who is unable to be present, does not stand on the same footing. If the statement made by him in Court in regard to any material fact is admitted or accepted by the party concerned or his Pleader to be correct, it may help to narrow down the issues; but the Pleader for the plaintiff in the present case was careful enough not to commit himself definitely to what Bhartu has stated. He thought that it should bind the plaintiff, but it is open to the plaintiff to say that that statement was not made by Bhartu under her instructions. In these circumstances the decision of the Court below cannot be disturbed. The appeal is dismissed with costs including in this Court fees on the higher scale.

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(1) 2 A. L. J. 777.

N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 18 OF 1925.
March 22, 1925.
Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.

SAT NARAIN LAL—JUDGMENT-DEBTOR —APPELLANT
versus
GANGA JAL *alias* GANGA AND OTHERS —DECREE-HOLDERS—JUDGMENT-DEBTORS— RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution of decree—Execution stayed till decision of another suit—Suit decided by Trial Court—Decree-holder's duty to continue pending execution—Limitation.

Where execution proceedings are stayed till the decision of another case, no sooner the latter case is decided it is the duty of the decree-holder to take out execution proceedings notwithstanding the fact that the judgment-debtor may have in the interval filed an appeal, and if the decree-holder fails to do so within three years execution of the decree would be barred. [p. 1006, col. 1.]

Desraj Singh v. *Karam Khan*, 19 A. 71; A. W. N. (1896) 188; 9 Ind. Dec. (N. S.) 46 and *Ruddar Singh* v. *Dhanpal Singh*, 26 A. 156; A. W. N. (1903) 221, followed.

Madho Prasad v. *Draupadi Bibi*, 61 Ind. Cas. 417; 19 A. L. J. 174, referred to.

Letters Patent Appeal against a judgment of Mr. Justice Walsh in Execution Second Civil Appeal 1132 of 1924, dated the 2nd February 1925, and printed as 87 Ind. Cas. 205.

Messrs. *M. S. Bajpai* and *Gadadhar Prasad*, for the Appellant.

Mr. *Mushtaq Ahmad*, for the Respondents.

JUDGMENT.—We are of opinion that this appeal must be allowed, and we think that in all probability Mr. Justice Walsh would have decided this matter differently if there had been called to his attention the cases of *Desraj Singh* v. *Karam Khan* (1) and *Ruddar Singh* v. *Dhanpal Singh* (2).

Ganga Jal obtained two decrees against Sat Narain Lal, the judgment-debtor, on the 12th of May and the 11th of June 1917, respectively. They were decrees of the Bombay Court and were transferred to Jaunpur for execution. Thereupon Sat Narain Lal commenced a suit alleging that these decrees had been obtained by fraud. The judgment-debtor asked that execution proceedings should be stayed until the decision of his suit, and the Munsif, who was already in control of the execution proceedings in the Court of Jaunpur, made an order "Execution proceedings shall be stayed until decision of the regular suit." This was on the 20th February 1918. When the end of June was approaching and the Munsif was desirous of showing how expeditiously he had cleared his list, he passed the following order with regard to the application in execution, "As the regular suit is not decided the case be struck off. Costs on the judgment-debtor." This had the incidental advantage of improving the Munsif's list, but it had the disadvantage of causing a great deal of difficulty and argument in several Courts, and was not an order sanctioned by any rule.

The suit of the judgment-debtor was proceeded with and on the 9th of December 1919 it was found by the Munsif of Jaunpur that the allegations of fraud were unfounded and that the Bombay decrees were good decrees. The judgment-debtor filed an appeal and that was decided on the 30th of March 1922, again adversely to the judgment-debtor. Thirteen months after, on the 23rd of April 1923, the decree-holder applied for execution of his decree, and not unnaturally the judgment-debtor objected. The objections were repelled by the first Court. The lower Appellate Court said the objections were well-founded and that the proceedings in execution were time-barred. Mr. Justice Walsh, on the authorities presented to him, came to the conclusion that the execution proceedings were not time-barred and that Ganga Jal could enforce the decrees.

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(1) 19 A. 71; A. W. N. (1896) 188; 9 Ind. Dec. (N. S.) 46.
(2) 26 A. 156; A. W. N. (1903) 221.

From a consideration of the authorities and especially the two we have mentioned in the earlier part of our judgment, *Desraj Raj* v. *Karam Khan* (1) and *Ruddar Singh* v. *Dhan Pal Singh* (2), we are of opinion that the matter can be disposed of without difficulty. We think that these two cases establish this proposition, namely, that if there be an obstacle opposed to the execution proceedings, as there was in this case, namely, the order that execution proceedings shall be stayed until the decision of the regular suit, as soon as that obstacle is swept away by a Court of competent jurisdiction, namely, the Trial Court, the duty again arises upon the decree-holder to take execution proceedings within three years, notwithstanding the fact that the judgment-debtor may have in the interval filed an appeal. It has been contended before us that the phrase used by the Munsif "execution proceedings shall be stayed until decision of the regular suit," meant that the stay order not only operated in the Court of first instance, but also in the lower Appellate Court, in the High Court and presumably if the case was of a nature in which it was possible to go to the Privy Council then in the Privy Council also. We do not read that order in that way at all, and we believe that the true construction of the words used by the Munsif is that execution was stayed until the suit instituted in the Munsif's Court was heard and determined, and that on the 9th of December when the decree adverse to the plaintiff was pronounced, at that very moment the bar to execution proceedings disappeared, and it was open to the decree-holder and was his duty at once to apply that the previous execution proceedings, which had been struck off on the 29th of June 1918, be restored and execution proceeded with. To that application there of course would have been opposition, and then it would have been open to whatever Court had jurisdiction to try the question of a further stay to look into all the circumstances. One of the material circumstances would have been the nature of the evidence which the plaintiff brought forward in the Court of the Munsif of Jaunpur to support his allegations of fraud and the likelihood of an appeal being successful. That is to say quite different considerations applied on the 20th of February 1918 to those which would have applied on the 9th of December 1919, and thereafter when the matter in issue between the plaintiff and the defendant had already been decided by one competent Court adversely to the plaintiff, the judgment-debtor, and a Court might very well on an objection by the judgment-debtor to the continuance of execution proceedings have made an order giving to the decree-holder full permission to execute his judgment notwithstanding the pendency of an appeal. It has not, of course, been argued that the mere pendency of an appeal operates as a stay, but it is said that by virtue of this order of the 20th of February 1918, the stay, as we have said, continues right away through in Court after Court. We are unable to agree with that contention at all, and there has been cited to us the case of *Madho Prasad* v. *Draupadi Bibi* (3) in which although there was an injunction restraining the sale "pending the final decision of the suit," a Bench of this Court held that the injunction granted by the Appellate Court terminated, and the right to make the application accrued on the date of the dismissal of the suit by the Trial Court. Mr. Justice Piggott had very little doubt about the matter. Mr. Justice Walsh assented, but it is clear that he felt some difficulty. He does, however, say at page 179* of the report "if it were not for the presence of the word "final" in this order, and if the language had merely been 'pending the decision of the suit' I might have had no difficulty in agreeing with my learned colleague, but if my opinion had been asked, after looking at those authorities, I think I should have come to the conclusion that the use of the word 'final' by two Judges of this Court must have meant the disposal of the suit by a final unappealable order." Now in the case under consideration the word "final" does not appear at all, and we are satisfied that this case is covered, and is indistinguishable from the principles enunciated in the two cases we mentioned at the outset of our judgment.

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(3) 61 Ind. Cas. 417; 19 A. L. J. 174.

*Page of 19 A. L. J.—[*Ed.*]

The position, therefore, on the 9th of December 1919 was that the bar which came into existence on the 20th of February 1918, disappeared by the decree pronounced in favour of the decree-holder and that from the 9th of December 1919 and thereafter there was no obstacle of any kind which stood in the decree-holder's way to make either a fresh application for execution or asking that the formal order which had been "struck off" might be restored.

In these circumstances we set aside the decision of the learned Judge of this Court, we restore the decision of the lower Appellate Court and we declare that the application for execution made on the 23rd of April 1923 was on that date beyond time. Having regard to the judgment-debtor having set up in the Munsif's Court at Jaunpur a case based on fraud, which failed, and having appealed unsuccessfully, we are of opinion that no order as to costs should be made in this and the connected appeal.

R. L. *Order set aside.*

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 163 OF 1922.
March 11, 1926.
Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.
Kumar KAMAKHYA NARAIN SINGH, MINOR, THROUGH MR. A. M. WALTER, MANAGER, RAMGARH WARDS ESTATE
—PLAINTIFF—APPELLANT
versus
JAWAHIR KHAN AND OTHERS—
DEFENDANTS—RESPONDENTS

*Chota Nagpur Tenancy Act (VI of 1908), s. 258—Settlement entries—Suit for declaration that entries are wrong, whether maintainable—Burden of proof—Ramgarh Raj—*Jagirs *and maintenance grants, nature of—Jagodih Lat, whether resumable—Bengal Decennial Settlement Regulation VIII of 1793, s. 7.*

A suit for declaration in a Civil Court that a certain tenure which has been entered in the Settlement records as non-resumable is in fact resumable is not barred by the provisions of s. 258, Chota Nagpur Tenancy Act. [p. 1017, col. 2.]

Jagirs and maintenance grants in Ramgarh and Chota Nagpur are resumable on the failure of the lineal male descendants of the grantee. [p. 1015, col. 1.]

Ram Narain Singh v. *Chota Nagpur Banking Association*, 33 Ind. Cas. 321; 43 C. 332 at p. 348, referred to.

The holders of Jagodih tenure have the status of dependent *taluqdars* holding under the Ramgarh Raj and are to be considered as lease-holders only within the meaning of s. 7, Bengal Decennial Settlement Regulation VIII of 1793. [p. 1016, col. 2; p. 1017, col. 1.]

Jagodih Lat is a *jagir* tenure held under the Ramgarh Estate and is resumable on failure of the lineal male descendants of Raja Lal Khan the grantee and is not a *shamilat* or *shikmi* tenure in the sense in which the terms are used by the Revenue Officers in the Record of Rights published in 1914. [p. 1018, col. 1.]

Per *Mullick, J.*—Where it is admitted before the Settlement Officer that the defendants are holding land within the ambit of the *zemindari* of the plaintiff who is paying revenue for the same, the onus of showing the nature of their title is upon the defendants and upon a failure to show that they have a tenancy therein, the plaintiff is entitled to resume. But where the Settlement Officer holds that the defendants are owners of a non-resumable tenure, the onus is shifted upon the plaintiff to rebut the presumption created by the Record of Rights. [p. 1021, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Hazaribagh, dated the 18th April 1922.

Messrs. *L. P. Pugh, S. S. Ahmad* and *S. M. Mullick*, for the Appellant.

Messrs. *S. H. Imam, C. S. Bannerji* and *S. N. Palit*, for the Respondents.

JUDGMENT.

Miller, C. J.—The plaintiff, a minor, is the proprietor of the Ramgarh Raj suing through the manager of his estate which is under the management of the Court of Wards. He instituted the suit out of which this appeal arises claiming a declaration that the tenure ordinarily called Jagodih Lat consisting at present of 41 villages is an ordinary *jagir* within his *zemindari* and is resumable on failure of the direct male line of the grantee and that the entries in the Record of Rights, finally published in 1914, describing it as a *shamilat* or *shikmi taluk* and non-resumable are incorrect. The defendants are the present holders of the tenure and others claiming through them.

The villages comprised in Jagodih Lat form part of Pargana Chai, and this, together with many other Parganas, was settled with the plaintiff's ancestor, Raja Maninath Singh of Ramgarh, by the Permanent Settlement, and it can no longer be disputed that Jagodih is comprised within the plaintiff's *zemindari*.

It is the plaintiff's case that under the Moghul Emperors and for some centuries before the British acquired the Diwani of Bengal, Bihar and Orissa in 1765, the Rajas f Ramgarh were the paramount chiefs of a large tract of hilly country north of Hazaribagh including Ramgarh, Chai and Champa and many other Parganas a number of which were held under them by petty chiefs under service tenures, or *jagirs*, granted originally for life, but which subsequently, by custom became descendible in the direct male line of the grantee, being defeasible on failure of his lineal male descendants and that Jagodih was a tenure of this nature. He further relies upon the Permanent Settlement made by the East India Company with his ancestor, Raja Maninath Singh, and the effect of the Settlement Regulations. In addition he contends that the question now agitated was decided in a suit between the ancestors of the parties in 1793 and cannot again be re-opened.

The defendants, on the other hand, contend that the Jagodih Chiefs were independent *talukdars* paying not rent to the Ramgarh Raja as their overlord, but revenue through him to the Moghul Emperor, and that had they been so minded, they could have obtained a Settlement direct from the East India Company under the provisions of the Settlement Regulations, and in particular Regulation VIII of 1793, but that, notwithstanding this omission, and the fact that Jagodih was comprised in the Settlement with the plaintiff's ancestor as part of the Ramgarh Raj, they ought not to be treated as lease-holders holding under the Raja of Ramgarh, but as *talukdars* still paying their revenue through him, and that their estate is not resumable by the Ramgarh Raja in any event. They further contend that the villages in question were their ancestral *nankar* villages, that is revenue free, in which they hold absolute proprietary rights.

During the recent Survey and Settlement operations in the Hazaribagh District, the Settlement Officer directed the Jagodih tenure to be recorded in the *khewats* as a *shamilat taluk* held under the Ramgarh Raj and as non-resumable, and it was so recorded in the Record of Rights finally published in 1914. The plaintiff accordingly instituted the present suit in 1920, before the Additional Subordinate Judge of Hazaribagh claiming the declaration already mentioned. The learned Judge dismissed the suit and the plaintiff has preferred this appeal.

Two main questions arise for consideration. The first concerns the relationship existing between the Ramgarh Raja and the holder of Jagodih before the Permanent Settlement, and the second is what effect, if any, the Permanent Settlement had upon the relationship previously existing between the parties. The plaintiff's case is that for many years before the Permanent Settlement, the Ramgarh Rajas were in possession of Jagodih and the other Parganas of Chai and Champa, but from time to time granted *jagirs* of these Parganas, or of certain villages therein, to the Chai Chiefs whom they had reduced to subjection, and certain documents purporting to show such grants have been tendered in evidence. These documents are challenged by the defendants either as spurious or inadmissible.

It is hardly surprising that after a lapse of about a century and a half direct and conclusive documentary evidence of the grants under which the defendants' ancestors held should be difficult to obtain, and it has been necessary to investigate a number of official reports and records of contemporary transactions in order to ascertain the relationship existing between the Ramgarh Rajas and those who held interests under them in their *zemindari*. It is necessary to bear in mind that the hilly country round Hazaribagh is really part of the jungle plateau of Central India known in Mughal times as the Jhakhand "remote, forbidding and barbarous," and was inhabited by a number of turbulent petty chiefs, nominally vessels of the Maharaja of Chota Nagpur, but continually fighting amongst themselves, and probably paying tribute only when compelled to do so, or when they required his support against their neighbours. It appears to have been first brought under Muhammadan subjection in 1585. The founders of the Ramgarh family according to the report of Mr. Robinson, Commissioner of Chota Nagpur in 1876, an abstract of which is re-produced in the Hazaribagh district Settlement Report, (1908 to 1915) compiled by Mr. Sifton, the Settlement Officer, were Singh Deo and Bagh Deo who took service with the Maharaja of Chota Nagpur in the fourteenth century. Taking advantage of the disturbed state of the country they quarrelled with the Maharaja of Chota Nagpur and led a body of armed adventurers into Karanpura, defeated Kappar Deo, the Chief of Karanpura, and in time Bagh Deo, the younger and more enterprising brother made himself master of 22 Parganas in that part of the country. The genealogy of this family as taken from Mr. Robinson's report, is set out in the Hazaribagh Settlement report at page 25. The names of the earlier Rajas are not important, but it may be mentioned that from 1604 to 1661 Hemut Singh is said to have reigned as Raja at Badam which was then the family seat. His grandson Dalil Singh is said to have reigned at Ramgarh from 1677 to 1724 and was succeeded in turn by his grandson Bishun Singh (1724 1763). Bishun died childless and was succeeded by his brother Makund (1763-1772). Makund quarrelled with the English who at that time had not subdued the country. Tej Singh, a descendant of Singh Deo, the brother of Bagh Deo the founder of the family, was *fouzdar* or Commander-in-Chief to Makund and he offered his services to the English to subdue Makund and conquer the country. He led an army into Ramgarh in 1772 and defeated Makund who fled for his life. Tej Singh was then put in possession of the Raj by the English but died next year and was succeeded by his son Raja Pareshnath Singh (1773 1784). After Pareshnath came his son Raja Maninath Singh with whom the Permanent Settlement was made and who died in 1812. It would appear, if Mr. Robinson's report is reliable, that one at least of the Chai Parganas, namely, Rampur was conquered by Basdeo Singh when he established himself in the Ramgarh territory in the fourteenth century. When the Rajas of Ramgarh first acquired dominion over Jagodih is left uncertain but it appears that in the time of Hemut Singh (1604-1641) an assessment of the rent or revenue payable to the Raja by all the villages in the Ramgarh estate was made. This was called the *kamil jama*. Mr. Leslie, Collector of Ramgarh, writing to the President of the Board of Revenue on the 5th August 1792 says "About 150 years ago the *zemindar* of Ramgarh caused an estimate to be made of the yearly value of each village in his *zemindari* which, when completed, was called the *kamil jama* and has never undergone any alteration;" and in an earlier letter dated the 9th July 1788 writing to Mr. Shore, then President of the Board. Mr. Leslie gives a list of the *jagirdars* holding under the Ramgarh Raja and the *kamil jama* of each, together with the number of villages held by them. This list includes Raja Lal Khan of Jagodih who held 15 villages at a *kamil jama* of Rs. 1,982. It would appear, therefore, that Jagodih was a dependent of Ramgarh in the time of Hemut Singh. How long it remained so, or when first the Jagodih Chief threw off his allegiance and asserted his independence, is not known, but it appears that between 1729 and 1764 it was conquered and re-conquered on several occasions. Some account of the disturbed condition of the country in Chai and Champa and neighbouring Parganas between 1719 and 1769 may be gathered from the report of Sitab Rai to the Board of Revenue. Sitab Rai according to Harrington's Analysis (Volume II, page 3) was a servant of the Company having direction of the details relative to the settlement and collections in the Bihar District for a few years after the acquisition of the *Diwani* and until supervisors were appointed in 1769. From his report, made apparently in or shortly after 1769, it would appear that in 1719 Kamdar Khan was the renter of Narhat Samoy under the Moghul Government and the Raja of Jagodih used to pay tribute to him. Dalel Singh who was then Raja of Ramgarh decoyed Magar Khan, Raja of Jagodih, out of his fort at Brigsa put him to death and took possession of his estate and eight *taluks*. He and his successor Bishun Singh remained in possession for 7 years until 1726, when with the help of an army sent by the Aumil of Narhat Samoy, the Jagodih Raja was restored. Six years later, in 1732, Bishun Singh again got possession and drove out the Jagodih Raja, who fled to Itkhore, the chief of which was his uncle, Raja Subaran Singh. These two Rajas then applied to the Raja of Tikari, Sunder Singh, for assistance and about a year or so later Sunder Singh marched on Ramgarh and by treachery secured Bishun Singh in confinement and exacted a ransom of Rs. 80,000 and made him deliver up the Parganas. The Raja of Jagodih, however, does not appear to have got possession for Sunder Singh himself remained in possession for 5 years. Then in 1738 or thereabouts Sunder Singh, being at enmity with Ali Verdi Khan, the Nawab of Bihar, was attacked by the latter and fled, and Bishun Singh with the Nawab's participation again got possession and kept it for 9 years until 1747. The following year the Rajas of Jagodih and Rampur invoked the assistance of Kamdar Khan who marched with an army and put the Jagodih Chiefs again in possession of the country. They retained possession, however, only for a few months for about that time Bisweswar Pundit and other Mahratta Chiefs invaded the country, and Bishun Singh, taking advantage of the situation, made large presents to the Mahrattas to put him in possession of Jagodih. The Mahrattas made terms with Kamdar Khan with the result that Bishun Singh again got possession of Jagodih and other Parganas. It would serve no useful purpose to relate in detail the varying fortunes of the different claimants who fought with each other for mastery over these hilly tracts until order was finally restored by the British. It is sufficient to say that this property changed hands on other occasions until it was finally brought under subjection by the Raja of Ramgarh in 1763. The political situation during this period was complex. The *Subedar* or *Nawab Nazim* of Bihar, though nominally the representative of the Emperor, lived a long way from Delhi, and his tribute was not always prompt or regular. His renters exacted such tribute as they could from the petty chiefs and *zemindars*. The latter were continually fighting amongst themselves for supremacy over large tracts of country. The Mahrattas sometimes took a hand, waging a guerilla warfare and exacting, where they could, such sums as the chiefs of the country were prepared to pay to buy them off. The British during the latter half of the eighteenth century were also sending occasional expeditions into this part of the country, and in 1759 Muhammad Ali Gohur, the Emperor's son, invaded Bihar in order to recover the country from the Nawab and instal himself in his place. He made a second incursion in 1760 after his father's death and when he had declared himself Emperor under the name of Shah Alam. The local chiefs took advantage of the disturbed situation to further their own interests making alliances with one side or the other as appeared to them most likely to further their interests and so matters continued with varying fortunes until 1763 when Makund Singh who succeeded his brother Bishun as Raja of Ramgarh in that year reduced all Chai and Champa to his allegiance.

From 1764 onwards the Settlement of Jagodih and the other Chai Parganas was always made with the Rajas of Ramgarh although the Chai Chiefs made efforts to have their independence recognised. The first document produced in support of this part of the case is Ex. 23 a Settlement of Jagodih and other Parganas with Raja Makund Singh for the year 1178 *F.* (1771 A. D.) at a *jama* of Rs. 9,001 after deducting *nakar inam*. The next (Ex. 24) is a Settlement with Raja Makund Singh for three years 1179 to 1181 *F.* (1772-1774 A. D.) at a *jama* of Rs. 21,000. The next Settlement was for 5 years 1181 to 1185 *F.* with Raja Tej Singh at a consolidated *jama* of Rs. 30,000 and finally we have the Decennial Settlement with Raja Maninath for the years 1197 to 1206 *F.* at an annual *jama* of Rs. 40,001 reduced by deduction of *sayer* and expenses to a net annual *jama* of Rs. 28,100. This was further reduced by an order of the Board of Revenue in 1792 by certain allowances for excise, markets, etc., to Rs. 26,567. This Settlement includes, *inter alia*, Pargana Chai which embraces Jagodih, Rampur, Paroria, Danarh and Itkhori. The settlement which was afterwards made permanent provides "You shall not without the order of the *Hazur* resume Devotar, Brammhotar Mahotar Aimas, Madatmash of *pirs* and *faqirs*, orchard land, *lakhraj*, tanks and *istamrari* villages without obtaining order from the *Hazur* nor are you to make fresh Settlement of the same unless you get a *sanad* from the *Hazur* to do so. You shall raise in time usual earth work within your boundary limits. In case of negligence on your part you shall be liable for the loss accruing therefrom, you shall guard and watch over the highways within your boundaries carefully so as to enable travellers and passers-by to journey over them peacefully and safely. You will not harbour thieves and robbers within your jurisdiction. If, per adventure anybody's property be stolen or robbed, you will conformably with Criminal Regulations search for and produce the thieves and robbers with the property".

From this it will be seen that the grantee became responsible to Government for keeping the peace within the *zemindari* a task previously carried out with the assistance of the *jagirdars* holding under the Raj whose *sanads* generally provide that they should maintain a certain number of armed men.

It appears from the documentary evidence in the case and from Mr. Sifton's Settlement Report (pages 86 and 87) that the question of resuming the *jagirs* was raised at the time of the Decennial Settlement. Mr. Leslie, the Collector, complained to the Board that the value of the Ramgarh Estate was greatly reduced by the alienation of most of the lands in *jagir* and recommended resumption on the death of the existing incumbent on the ground that the services for which the *jagirs* were assigned were no longer required. At the same time he pointed out that the custom of the devolution of the *jagirs* from father to son had become so established that he feared any sudden innovation would be attended with bad consequences. I have already referred to this letter of July 1788 in which he included Lal Khan of Jagodih as one of *jagirdars* of Ramgarh. In the later correspondence in 1792, after referring to the *kamil jama*, Mr. Leslie states that it had been thought expedient to require the *jagirdars* to pay a certain annual revenue in lieu of maintaining the people specified in their *sanad*, a measure which caused considerable discontent at first and the proportion of the *kamil jama* which they should pay was not finally determined until the time of Mr. Dallas who fixed it at 6-annas in the rupee on the *kamil jama*. This measure, however, had not proved satisfactory as this rate of payment although easy in some cases was intolerable in others and the *zemindar* had been obliged to grant reductions in his *Mufassil* Settlement to several people whose revenue was excessive. He further states that the *jagirdars* had in many cases fallen into arrears, as their lands had not been cultivated, and they had taken up the position that they were independent of the *zemindar* and could not be dispossessed. He makes certain suggestions for alleviating the situation, and, in the event of the Board not approving his proposals, he asks for a determination on the point whether the *zemindar* has the right to resume the *jagir* in case the *jagirdar* falls into arrears and secondly, whether on the death of the *jagirdar* his heirs have the right to get possession on the same terms, or whether the *zemindar* may resume the land and increase the rent or levy a fine for renewal. The Board replied that they conceived it optional with the *zemindars* to resume such of these tenures as they might think proper either upon the death of the present incumbent or upon their being unable to discharge the revenue assessed on their lands and, after resumption fix such assessment as they might think proper under the general Regulations. From that time onwards the *jagirs* in Ramgarh have come to be regarded as resumable, but by the custom in the family established and supported by legal decisions the *zemindar* cannot resume except upon failure of the lineal male line of the grantee.

I may now turn to the documents relied on by the plaintiff as showing that the Jagodih Rajas held their lands under a *jagir* tenure from Ramgarh. The plaintiff's case is that the Ramgarh Rajas were the paramount chiefs of that part of the country for centuries before the advent of British rule. He further contends that although Ramgarh may have lost its dominion over Jagodih from time to time during the disturbed period in the first half of the eighteenth century, nevertheless from 1763 onwards they were always masters of the country, and in fact from about that time they retained possession, and by way of maintenance, and in return for certain services, the nature of which is not very clear but probably included the maintenance of certain armed men, they made grants of a few villages in their Parganas to the Chai Chiefs including Jagodih. The first document is a duplicate *sanad* dated 1762 (Ex. 13) but it relates only to five villages in Champa which were granted as *baiswan (jagir)* by Bishun Singh to Lal Khan the then Raja of Jagodih. The learned Judge criticises the authenticity of this document adversely on the ground that it is not in accordance with the allegation in the plaint which states that 16 villages set out in Sch. A of the plaint were granted by a *patta* dated *Aghan Badi* 5, 1819 *Sambat* (1762 A. D.) whereas the *sanad* produced includes only the first 5 villages mentioned and is dated *Aghan Badi* 3, 1819 *Sambat*. The document certainly does not mention any villages in Chai but only those in Champa, but the explanation would appear to be that the plaintiff was relying upon a similar document set out in the *rubakari* (Ex. 1) in the suit between the Jagodih Chiefs and Maninath Singh decided in 1793 when the former endeavoured to assert their right to a proprietary interest in these Parganas and failed. This document is set out at length in the *rubakari* in that suit and is followed by what is either a continuation of it or a separate document, but the writing in the copy of the *rubakari* produced is in parts so mutilated that it is unintelligible, and it is difficult to decipher some of the most important entries, but whether it is part of the same or a different grant, the remaining 11 villages referred to in Schedule A are there named. It is a *baiswan* grant which is a description of *jagir* according to Mr. Sifton, assigned for a particular purpose (see Hazaribagh Settlement Report page 86). The learned Judge also thought that the grant could not have been made in *Aghan* 1819 which corresponds with 1170 *F*, because according to Sitab Rai's report Lal Khan was in possession of Jagodih for 6 months in 1762. It is, however, by no means clear from Sitab Rai's report that the Raja of Ramgarh was out of possession in November or December 1762 which would correspond with *Aghan* 1819 *Sambat*. It was in 1169 *F*. (1761-1762 A. D.) according to Sitab Rai that Mir Kasim the Nawab sent an army under Buali Khan to depose Kamdar Khan who had rebelled. The Jagodih Chiefs joined Buali Khan, while Bishun Singh sided with his old enemy, Kamdar but was defeated, and Lal Khan and the other chiefs of Chai and Champa got back their estates, but for 6 months only, as the Raja of Ramgarh re-gained Jagodih and the other *taluks* by bribing the Government Officers. This was probably in the middle or latter part of 1762. Then in 1170 *F*. (1762-1763 A. D.) according to the report another expedition was sent under Assadullah against the Rajas of Kharagpur, Birbhum, Pachait and Kamdar Khan who had rebelled and who had been encouraged by the Raja of Ramgarh. Again Ramgarh was defeated and again Lal Khan and the other *talukdars* were restored. This was according to the report towards the first part of 1170 *F*. It seems, therefore, quite likely that Jagodih was in possession of the Raja of Ramgarh in November-December 1762 and that the second expedition as in the beginning of 1763, for the first part of 1170 *F*. would include the early months of 1763. It was later in the same year when war broke out between the Nawab and the English that Makund Singh, on Bishun's death, finally subdued the Chai Chiefs and brought the whole of Chai and Champa within his *zemindari*. Now if Bishun Singh was in possession of Jagodih at the end of 1762 it seems to me by no means improbable that the Raja of Jagodih would accept from him a few villages out of his lost estate for his maintenance coupled with certain duties. If he was offered them, he was hardly likely to refuse as his whole estate was gone. Ramgarh was undoubtedly the most powerful and enterprising *zemindar* in the neighbourhood and although the Chai Chiefs had from time to time recovered their own, with outside assistance, during the previous half century, their tenure had been a very precarious one and the Ramgarh Raja had been in actual possession for the greater part of that period. Although this document by itself is of little value as evidence of the actual question in dispute it is an indication, if it can be relied on at all, that Lal Khan took a *baiswan* grant of certain villages in Champa, and the document set out in the *rubakari* shows that these as well as other villages in Chai were taken by him on similar terms. Other documents set out in the same *rubakari* show *baiswan* grants of certain villages yielding an income of about Rs. 1,500 to two other Chai Chiefs, namely, those of Itkhori and Rampur in 1766 and 1769. Between 1784 and 1785 the same Rajas including Lal Khan executed bonds in favour of Maninath Singh of Ramgarh agreeing to pay rent for their villages described as *jagir* villages. These documents are set out in the *rubakari* of the 17th December 1793 in the suit already mentioned. That relating to Jagodih is signed on behalf of Lal Khan by the pen of Sumer Singh. It acknowledges a rent of Rs. 656-12-0 and agrees to pay it by instalments. The learned Judge's criticisms of this document hardly appear to me to be justified. The date of the document is 1841 *Sambat*, not 1839 as the learned Judge assumed. This appears clear from the judgment in the case itself in which these documents are referred to with their dates. The learned Judge's reason for doubting the authenticity of the document by reference to the rent mentioned in the *awarza* of 1839 *Sambat* may, therefore, be disregarded. The *awarza* for 1841 *Sambat* is not on the record but that of *Assin* 1842 *Sambat* shows a rent of Rs. 649-4-0 and that of *Assin* 1843 shows a rent of Rs. 656-8-0 which agrees with the bond. The rents appear to vary from year to year. I hardly think that one should regard old documents of this nature in a hypercritical spirit, as explanations which might have been forthcoming at the time they were made may no longer be available after the lapse of so many years. The learned Judge also says that it has not been shown that the originals no longer exist and, therefore, secondary evidence is not admissible. The evidence shows, and there seems no reason to doubt it, that a search was made in the record room of the Court of Wards for these old documents and such as could be found have been produced. A search was also made at Calcutta, Patna and Ranchi to find if the original records of the suit of 1792 in which the documents had been exhibited still existed but no trace of the record could be found. The copy of the *rubakari* was produced from the Commissioner's record room at Ranchi. It was to the plaintff's interest to produce the originals of these documents if he could do so, and I consider that the search made for them was a genuine one and failed. The secondary evidence is, therefore, in my opinion, admissible. The fact that the bond of 1841 *Sambat* (1784 A. D) was signed on behalf of Raja Lal Khan by the pen of Sumer Singh is also relied on by the learned Judge as showing its inadmissibility for there is no evidence that Sumer Singh had authority to sign on behalf of his master. This matter, however, is of small importance for subsequent documents that Raja Lal Khan had agreed to pay rent for these villages.

It appears from other documents in the *rubakari* that in 1782 Mr. Dallas the British representative in that part of Bihar finding that the Raja of Ramgarh was unable to pay the revenue owing to default on the part of the *jagirdars* sent Lala Daryao Singh to make collections direct from the *raiyats* of the *jagir* villages. He directed him for the present to collect two annas in the rupee and as regards the balance according to orders that would be passed later. It appears that Lala Daryao Singh applied for orders as regards collection of rents from the *talukas* of Raja Lal Khan of Jagodih and Shibnath Singh of Rampur and Mr. Dallas directed him to get bonds executed by them for rent in accordance with the *khasra* papers. The bonds signed by Raja Lal Khan as well as by Shibnath of Rampur and Bahadur Sahi of Itkhori were no doubt executed in accordance with such instructions and they were all signed by the agent on behalf of the respective Rajas. There appears to be little doubt as to the genuineness of the bond signed in 1784 on behalf of Raja Lal Khan of Jagodih. If this is so it is an acknowledgment that he held the villages under a *jagir* tenure. The rent appears to have been fixed at 4-annas in the rupee on the *kamil jama* and in 1786 a suit was instituted by Maninath Singh against Lal Khan and Shibnath Singh for realisation of the rent due of the villages then held by them fixed at one-fourth of the *kamil jama*. In that suit a compromise was come to, the defendants agreeing to transfer a quarter of their villages in lieu of the present and future rents for the whole. This agreement is evidenced by an *ekrarnama* signed by Raja Lal Khan and Raja Shibnath Singh on the one hand and by a similar document signed by Raja Maninath Singh of Ramgarh on the other. The suit came before Mr. Leslie who was at that time Collector and the *ekrarnama* of Raja Maninath Singh was delivered to the defendants in his presence and bears the signature of Mr. Leslie. The document signed by the defendants in that suit is to the following effect:—

"Whereas Raja Maninath Singh instituted before the *Hazur* a suit against us for Rs. 1,330-12-0 being one-fourth of Rs. 5,323 the total amount of rents of the villages held by us but we could not discharge ourselves from the liablity for one fourth of the entire rent, therefore, we of our own accord and free-will give up one-fourth of the villages detailed below for the satisfaction of the one-fourth share of the rent. The said Raja Maninath Singh shall cultivate the villages to the extent of one-fourth share and appropriate the produce thereof on account of rent. In future we shall not interfere with him in respect of the said villages. When we will pay off the said rent to the extent of one-fourth of the entire *jama* to Raja Maninath Singh we will take possession of our villages. Therefore we have given in writing these few words in the shape of an *ekrarnama* so that it may be of use when required."

The word translated "rent" in that document is "*malguzari*". In the corresponding document signed by Maninath Singh the words used are "*malguzari sarkar*" which may mean Government revenue or may mean rent paid to a superior. The rent payable by Lal Khan fixed at one-fourth of the *kamil jama* was acknowledged to be Rs. 655-8-0 which corresponds very nearly with the rent acknowledged in the bond of 1784.

About this time the Jagodih Rajas were endeavouring to obtain from the Government Officers on the spot an acknowledgment of their proprietary interest in their estates. They appear to have produced documents in support of their title before Captain Camac, Mr. Chapman and Mr. Dallas and at one time it would appear that they very nearly succeeded. They had obtained some sort of promise from Tej Singh during the short time he was in possession of the Ramgarh Raj that he would confer the *rajgi* upon all three Rajas and on the 1st June 1782 Mr. Dallas wrote to Lal Khan and Shibnath Singh that the *sanad* and *khillat* had been received from Calcutta in the previous month. In a later letter of the 14th January 1783, nothing apparently having been done, Mr. Dallas again writes to them saying "Your application has been received. The facts mentioned therein have been learnt. This year the country is in such a state owing to drought. I will, however, see to it sometimes after when the country will be better off". But no Settlement was ever made by Government with these Rajas.

After the Decennial Settlement had been concluded with Maninath Singh, the three Rajas of Jagodih, Rampur and Itkhori instituted a suit before Mr. Hunter the District Judge of Ramgarh against Maninath Singh claiming to have the *milkiat* and *malguzari* rights in the Chai Parganas restored to them. The earlier part of their petition in that suit is mutilated and in parts undecipherable but they admit that certain villages in the *taluk* had been given to them for their enjoyment by Makund Singh. The case made by them was that the whole of these Parganas were originally their ancestral property but that Makund Singh had forcibly deprived them of their property and that the villages which they still held had been given to them by him for their enjoyment. These villages they refer to as their *nankar* villages. They were in fact nothing of the sort, although the term may have been loosely used in respect to villages which they held rent free after the commutation made in the rent suit in 1786, whereby they handed over one-fourth of the villages in lieu of rent. They complained that Raja Makund Singh had forcibly taken possession of Pargana Chai and claimed that their *milkiat* and *malguzari* rights therein should be restored to them. The case made by the defendant in that suit was that he and his ancestors had been in possession of the Chai Parganas for three generations and had received Settlement from the East India Company and that the plaintiffs had got *jagirs* for services of the villages they still possessed and that they were paying rent like other *jagirdars*. The plaintiffs replied that the Government revenue had been paid by them and their ancestors down to their times and that Pargana Chai their ancestral property had never been included in the Ramgarh District or Karanpura by the *sheristadar* at *Sadar*. They produced some old *kabuliyats* of dates between the years 1727 and 1732 showing they had Settlement with the Mughal Government at that time. These were no doubt accurate as they had regained possession from Bishun Singh during those years but they lost possession again just afterwards and from 1763 they never again got possession except over the villages granted by the Raja of Ramgarh. From the evidence in that case it appears that the plaintiffs admitted that they had been dispossessed of their *malkiat* rights since 1171 *F.* (1763-1764 A. D). The *sazawal* Daryao Singh also gave evidence from which it appears that he was sent by Mr. Dallas in 1782 to attach the crops in Pargana Chai as there was a deficit in the revenue of Ramgarh. The money collected was deposited towards the revenue payable by the Raja of Ramgarh. The evidence showed that the collections from the plaintiffs' villages were made in the same way as in the case of the other *jagirdars* and that the plaintiffs in that suit held *jagirs* from the time of Makund Singh. The Court found that the plaintiffs had been out of possession of the *milkiat zemindari* since 1171 *F.* a period of over 30 years and as the cause of action arose more than 12 years before the institution of the suit and before the acquisition of the *Diwani* it was time-barred and the claim was dismissed. From this decision there was an appeal to the Provincial Court of Appeal at Patna, but the judgment of the District Judge was affirmed and a second appeal to the *Sadar Diwani Adaulat* shared the same fate.

It should be remembered that the scheme of the Settlement Regulations was to ascertain the rights of the parties as they existed at the date of the acquisition of the *Diwani* in 1765 and to settle the land with those who were the actual proprietors at that time, ignoring any earlier titles unless they still subsisted. Under s. 12 of Regulation VIII of 1793 the Collectors were to acquaint the *talukdars* whom they might adjudge not to be actual proprietors of the land composing their *taluks* and who consequently continued under the *zemindars* or other actual proprietors that, if dissatisfied with their decision, they were at liberty to sue for the right of property in their *taluks* and in the event of their establishing such right, they were to be saparated from the *zemindars* or other actual proprietors and allowed to pay the revenue assessed upon their *taluks* to the public treasury. This, however, was subject to the provisions of s. 14 of Regulation III of the same year which prohibited the Courts from trying the merits of any suit where the cause of action arose before the 12th August 1765 or, with certain exceptions, where the cause of action arose 12 years before the suit commenced.

It was contended on behalf of the respondents that the suit of 1793 did not include a claim for the proprietary interest in the villages of which the plaintiffs in that suit were already in possession, but I think it must be taken on a perusal of the record of the suit that the Jagodih Rajas were claiming proprietary rights over the whole of their Parganas of which according to their case they had been deprived. They state in their plaint "Raja Maninath Singh of Ramgarh is in possession of the *milkiat* and *malguzari* Rs. 6,501 besides the *zirats* which is our own *jama* of five *mahals*". They were claiming apparently the whole of that which was lost which was their *milkiat* right; and had they proved that they were entitled as proprietors, even to the villages which they still held, and not as *jagirdars* I think that they would have been entitled to a declaration as to that part of the property. Evidence was called on both sides as to the terms on which they held these villages. It was their case that the rent was collected during the time of Mr. Dallas under some sort of *parwana* granted by him and that they were paying as proprietors, but a body of evidence was called on behalf of the Raja of Ramgarh including that of Daryao Singh the *sazawal* sent by Mr. Dallas to collect the rent, to show that he collected the rent from them as *jagirdars* in the same way as he collected it from the other *jagirdars* and credited it to the revenue payable by Ramgarh. There seems to have been no object in calling this evidence unless it were to prove that the Jagodih Rajas were holding those villages as *jagirdars* and not as proprietors. The Court seems to have accepted the evidence for the defendant on this question and dismissed the whole claim on the ground that the plaintiffs had been out of possession of the proprietary right from before 1765. I consider, therefore, that the present respondents are precluded by that decision from re-opening the question of their proprietary interest.

I hold further that on the evidence before us it is amply proved that the Raja of Jagodih held the villages at that time in his possession under a *baiswan* or *jagir* grant from Ramgarh. These villages, then numbering 21 reduced to 15 after the rent suit of 1786, are the nucleus of the present 41 villages of the tenure. The bond of 1784 the genuineness of which is corroborated by the compromise in the rent suit of 1786 admits that they were *jagir* villages and the *amalnama* issued by Raja Maninath Singh in 1784 (Ex. 14) is further corroboration of the *jagir* grant. The Court in the suit in 1793 seems to have taken the same view. Moreover, it is significant that as late as 1848 Raja Shibraj Khan, the descendant of Lal Khan and ancestor of the present respondents, in his petition to Government giving the history of *taluka* Jagodih, states "The said Raja Makund Singh through his high handedness brought the *zemindari* in his possession and occupation but left out several villages out of the aforesaid *mahal* for the maintenance of the dependants of the ancestors of your petitioner the Raja". Maintenance grants in Ramgarh and Chota Nagpur like *jagirs* are resumable on failure of the lineal male descendants of the grantee. In fact it would appear that at all events up to recent times no grants were ever made in Ramgarh of a larger interest than a tenure descendible in the male line. Woodroffe, J., in *Ram Narain Singh* v. *Chota Nagpur Banking Association* (1) when discussing the nature of *mokarrari istamrari* leases which were first granted in Ramgarh in about the year 1864 states:—

"Before that date there had been no absolute transfers in Ramgarh, the nearest approach to such transfers being *jagirs* descendible in the male line."

(1) 36 Ind. Cas. 321; 43 C. 332 at p. 348

If my decision on the above points is accepted it is unnecessary to consider the effect, if any, of the Settlement Regulations upon the status of the Jagodih Rajas, but in case the present suit may go to a higher tribunal I propose to state my conclusions upon this question.

The entry in the Record of Rights to the effect that the tenure is not resumable by the Raja of Ramgarh in any event can only be justified on the assumption that the tenure-holders have an absolute proprietary interest in the land and are not lease-holders. It is the respondents' case that at the time of the Permanent Settlement they were in the position of independent *talukdars* and, although they have lost their rights with regard to the other villages in the *taluk* they at all events retain the right of independent *talukdars* with regard to the villages which they still possessed at the time of the Settlement. This argument is based upon the assumption that the suit of 1793 did not include those villages. Under the provisions of Regulation VIII of 1793, as already stated, it is provided by cl. (4) that the Settlement, under certain restrictions and exceptions therein specified, shall be concluded with the actual proprietors of the soil of whatever denomination whether *zemindars*, *talukdars* or *chaudharies*. The *talukdars* to be considered the actual proprietors of the land composing their *taluks* are set out in s. 5 and are to be regarded as independent *talukdars* entitled to a separate Settlement with Government. The distinguishing feature of this class is, as I read the section, that they have either acquired their land from the *zemindar* or other actual proprietor by sale or gift making over to them the proprietary rights, or have received from Government grants of a similar nature directing them to pay their revenue through some other *zemindar* and not direct to Government. The respondents rely upon the third clause of s. 5 and say that they are *talukdars* whose *taluks* were formed before the *zemindar* or other actual proprietor of land to whom they now pay their revenue or his ancestors succeeded to the *zemindari*, and they further point to s. 6 which provides that proprietors of *taluks*, who now pay the public revenue assessed upon their lands through a *zemindar* or other actual proprietor of land, and whose title-deeds contain a clause stipulating that their revenue is to be paid through him, shall continue to pay their revenue through such *zemindar* or other actual proprietor of land as heretofore. Assuming that for certain short periods under the Mughal Emperors and before the acquisition of the *Diwani* they had Settlement of their *taluks* and were paying revenue direct to the treasury or through some renter such as Kamdar Khan or some other *zemindar* they lost all rights in their *zemindari* before 1765 when Raja Makund Singh finally drove them out; and the Settlement made by the British Government took notice only of those rights which still subsisted on the 12th August 1765. From that date onwards they cannot be said to come under the provisions of cl. (6) as they can produce no title-deeds containing a clause stipulating that their revenue is to be paid through Ramgarh or any other proprietor after that date. Had they wished to assert such a right after the property was settled with Ramgarh, they should have brought a suit to establish such right under the provisions of cl. (12) of Regulation VIII. I am assuming, of course, that the villages comprised in their tenures were not included in the suit of 1793. Questions having arisen as to the time within which such a suit could be brought it was provided by Regulation I of 1801, s. 14, (after reciting the necessity of fixing a period for the institution of such suits) as follows:—

"It is hereby required all that *talukdars* who as the proprietors of the lands composing their *taluks* may consider themselves entitled under s. 5, Regulation VIII, 1793 or any other part of that Regulation to be separated from the *zemindars* to which their *taluks* are attached, shall prefer a written application to the Collector of the *zillah* in which their *taluks* may be situated, for the separation thereof, within one year from the date of this Regulation, under penalty of forfeiting all title to separation under Ragulation VIII, 1793, if they shall omit to apply as directed within the prescribed period, at the expiration of which the portion of the section above mentioned shall be considered extinct with regard to all *taluks* for which no claim to separation may have been then preferred; and such *taluks* shall thereafter be considered as dependent *taluks*, not entitled to be separated from the *zemindaris* to which they may be attached, though in other respects the rights of the *talukdars* are not meant to be in any degree affected by the Regulation."

The effect of this section appears to me to be that the holders of the Jagodih tenure are reduced to the status of dependent *talukdars* holding under the Ramgarh Raj and are to be considered as lease-holders only, within the meaning of s. 7 of Regulation VIII of 1793. It is true that their rights in other respects are not affected but they cannot be both dependent and independent. If dependent they are mere lease-holders under the Ramgarh Raja and cannot have a greater interest than that of other lease-holders holding under that Raj at the time of the Permanent Settlement. The highest form of tenure known in Ramgarh at that time was a *jagir* resumable on the death of the male heirs of the body of the grantee. The grantee in this case was Lal Khan.

With respect to the Settlement Officer, Mr. Sifton, who decided this question for the purposes of the Record of Rights, I think his conclusion was based upon very inadequate materials. He says "After reading the evidence produced I am satisfied that these tenures are not of the same origin as the *jagirs* founded by the Padma Raja and his predecessors. They have hitherto been regarded and treated as *shikmi* or *shamilat taluks* and they probably existed as independent properties before the Ramgarh Raj was established, and I can find nothing in their recent history to change the status of the holders of these *taluks*. As they were not originated by the Ramgarh Raj I find them to be not resumable by the *zemindar*. They will be noted in the *khewat* as not liable to resumption." In his Settlement report at page 26 he says "Jagodih, Rampur, Paroria, Itkhori and Barsote are *shamilat taluks* the owners of which have always claimed that they are not tenure-holders of the Ramgarh Raj, and that a separate revenue ought to have been assessed on their estates. I have not been able to find out any definite history of the *taluks* but the fact of their appearing with separately assessed revenue at the time when even the Chota Nagpur Raj was paying its revenue through the Ramgarh Raj suggests the possibility of these *shikmi talukdars* having been also in reality independent as they claim." If by this he means that they were separately assessed by Government as independent *taluks* after 1765 there is no evidence to support him. If he means that they were independent at some period or other before that date, then this ignores the fact that in 1765 when the British took over the administration of the country their independence had vanished and the Ramgarh Raj was by conquest the proprietor. Moreover it would appear that Mr. Sifton had not the advantage we now possess of having before him the old documents showing *baisway* grants or the other documentary evidence adduced in this suit which is confirmatory of those grants.

A further point was raised on behalf of the respondents that the present suit was barred by the provisions of s. 258 of the Chota Nagpur Tenancy Act which applies to land Settlements in Ramgarh. The section provides that save as expressly provided in the Act, no suit shall be entertained in any Court to vary, modify or set aside, either directly or indirectly, any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceedings under (*inter alia*) s. 89 except on the ground of fraud or want of jurisdiction. It is contended that the order passed by the Revenue Officer which resulted in the final publication of the Record of Rights was an order passed under s. 89 and cannot now be questioned. The latter section gives the Revenue Officer power on application, or of his own motion, within 12 months from the making of any order or decision under ss. 83, 85 or 86 to revise the same, whether made by himself or by any other Revenue Officer. It is contended that the order passed by Mr. Sifton was an order revising the previous order made by his subordinate under s. 83 which prescribes the procedure for considering objections to the entries made in the draft record. An objection to the entries in the draft record with regard to Jagodih was heard and decided in favour of the present respondents, and Mr. Sifton whose intention appears to have been to reserve this question for himself afterwards decided it in the same manner. When applied to subsequently, he stated that the order made by him was not and did not purport to be taken under s. 89, and added that his order would not be any bar to any subsequent civil suit to determine the status of the tenure. However, that may be, it seems clear that any order passed under s. 83 relates to the draft record only. The draft has now served its purpose and final publication has taken place and the present suit is not one seeking in any way to interfere with the draft record which is merely a preliminary publication. With regard to the Record of Rights finally published, s. 84, cl. (3) provides :—"Every entry in a

Record of Rights so published shall be evidence of the matter referred to in any such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect." This provision is similar to that in s. 103-B (3) of the Bengal Tenancy Act which creates a statutory presumption in favour of the correctness of the finally published record but implies the right to bring a suit averring the contrary. In my opinion the present suit is not barred by s. 258 of the Chota Nagpur Tenancy Act.

What the exact significance of the terms *shamilat* and *shikmi* may be it is not necessary to enquire—authorities differ as to their meaning but, in my opinion, the appellant is entitled to a declaration that Jagodih Lat consisting of the villages named in Schedule E of the plaint is a *jagir* tenure held under the Ramgarh Estate and is resumable on failure of the lineal male descendants of Raja Lal Khan, and that it is not a *shamilat* or *shikmi* tenure in the sense in which those terms are used by the Revenue Officer in the Record of Rights published in 1914.

A point was raised by Mr. Bannerji, who appeared on behalf of the respondent No. 24, Maharaj Bahadur Singh, who has acquired some interest by purchase in *Mouza* Petula one of the villages named in Schedule E of the plaint as appertaining to Jagodih Lat. He contends that *Mouza* Petula appertains to *taluk* Rampur and not to Jagodih and that he has been unnecessarily made a party to the suit. There was no evidence one way or the other to show whether the village claimed by this respondent is the same Petula as that mentioned in the documents in this case or whether it has subsequently been transferred to Rampur. This question cannot be determined in the present suit and must be left open.

The decree of the Additional Subordinate Judge is set aside with costs against the defendants who appeared at the trial, and in lieu thereof a decree will be passed granting the declaration above mentioned. The appeal is allowed with costs against the respondents who have appeared other than the respondent No. 24 who will bear his own costs.

Mullick, J.—The lands in suit lie within the *zemindari* of Ramgarh which is situated in the Hazaribagh District, in the Chota Nagpur Division of the Province of Bihar. The Moghuls to whom the hilly and jungle country in Chota Nagpur was known as the Jharkund did not conquer it till 1539, preferring before that time the easier route for their armies along the Ganges Valley to Bengal. In 1659 Prince Muhammad, the son of Aurangzeb, appears to have struck out a new route through Sherghati and through Ramgarh and with a force of 12,000 cavalry attacked the fort of Monghyr in the rear. At the time of the death of Aurangzeb in 1707 the Administration of Bihar was conducted by the Nawab Nazim of Bengal who had his seat at Murshidabad, through a Governor and Deputy Governor at Azimabad or Patna, who collected the revenues either directly through their officers or through *amils* or renters. One such renter Kamdar Khan plays an important part in the history of Ramgarh and was in possession of Pargana Chai at various times between 1750 and 1760. About that time the Mahrattas in their expedition against Bengal marched through Ramgarh and assisted the Chief of Ramgarh against the Chiefs of Chai. On the 12th August 1765 the *Diwani* of Bengal, Bihar and Orissa passed into the hands of the East India Company and they became the *de facto* rulers of Bihar. Between 1763 and 1772 Captain Camac on behalf of the Company brought *killa* Ramgarh into complete submission and in 1790 a Decennial Settlement was concluded of the Ramgarh Estate with Raja Maninath Singh, which was made permanent in 1799.

The Rajas of Ramgarh trace their descent through two brothers Baghdeo and Singhdeo who acquired 22 Parganas from the Moghuls in the 14th century.

Between 1604 and 1661 Hemat Singh, the Raja of Ramgarh, had his capital at Badam. In 1670 Dalel Singh, the successor of Hemut Singh, is said to have removed the capital to Ramgarh 30 miles to the east in order to escape the pressure of the Muhammadan occupation. It is supposed that the Chiefs of *taluk* Jagodih began first to come into prominence about this time. In 1719 Dalel Singh captured and murdered the Jagodih Chief Meger Khan and he kept the *taluk* for 7 years. Dalel Singh died in 1724 and was succeeded by his son Bishun Singh who ruled till 1763. About 1726 Ranmust Khan, the Chief of Jagodih, got back his *taluk* with the aid of Ali Namal Khan the *amil* of Narhat Semoy; but his son Mahipat Khan was again driven out by the Raja of Ramgarh. Between 1734 and 1739 Sunder Singh, the Raja of Tikari in *Zilla* Bihar, captured and kept possession of the *taluk*. In 1739 Bishun Singh re-captured it and kept it for 9 years but in 1748 he was driven out by Kamdar Khan, whose assistance the Chai Chiefs had invoked. Shortly after this the Mahrattas invaded the country and assisted Bishun Singh to re-gain Jagodih, but Kamdar Khan again defeated Bishun Singh and came to an arrangement with him in 1752 by which he kept Pargana Chai for himself and gave the country south of the Barakar to Lal Khan and the other Chai Chiefs and to the proprietor of Ramgarh. This arrangement lasted till 1760. In 1760 war broke out between the Emperor at Delhi and the Nawab Nazim and Kamdar Khan joined the former. But he was defeated and eventually sought shelter from Ramgarh and gave up the country to the north of the Barakar to Bishun Singh.

In 1762 the Chai Chiefs re-gained possession for about 6 months with the help of Buali Khan who was acting on behalf of the Nawab Nazim but Bishun Singh again re-gained possession either by bribery or by force.

It is said that about this time the Chief of Jagodih admitted the proprietary right of the Raja of Ramgarh and accepted a *jagirdari pottah*.

But the Chiefs of Chai do not appear to have acknowledged Bishun Singh's authority for long and in 1764 they were again invaded by Makund Singh, who had succeeded Bishun Singh in 1763. They were reduced into complete submission and it does not appear that they ever re-gained their independence after 1764.

In 1772 Makund Singh rebelled and was driven out by the British forces and Tej Singh was installed as the Chief of Ramgarh. Tej Singh, however, did not live long and died the following year and was succeeded by his son Pareshnath who ruled till 1784. Pareshnath's son, Maninath, was the proprietor till 1812 when he was succeeded by his son Sidnath. The plaintiff in the present suit is the descendant of Sidnath.

The plaintiff alleges that his predecessor Bishun Singh conquered Parganas Chai and Champa in or about 1762 and gave part of the conquered country in *jagir* to Lal Khan, the ancestor and predecessor-in-interest of defendants Nos. 1 and 2. It is alleged that the territory thus given comprised *Mouzas* Churchu, Khirgaon, Oreya, Alounja and Nimakhap in Pargana Champa and Saharjama, Barahmoria, Basaria, Chakarsar, Suratpore, Kharaundha, Debo, Enaitchak, Machla, Abu Parsa and Patula in Pargana Chai, that is to say Nos. 1 to 5 and 6 to 16 of Schedule A of the plaint. Between 1762 and 1780 *Mouzas* 1 to 5, 9, 13 and 15 of Schedule A were taken back by the Ramgarh Raj and 14 new *mouzas* were substituted therefor, so that the tenure comprised the 21 *mouzas* given in Schedule B. In 1782 the rent of these 21 *mouzas* was fixed at Rs. 656-12-0 and a *kabuliyat* was taken therefor from Raja Lal Khan by Maharaja Maninath Singh. As Lal Khan defaulted in the payment of rent Maninath brought a suit in the *Diwani Adalat* and a compromise was effected by which Lal Khan surrendered *Mouzas* Barahmoria, Maujurhand, Padaria, Deosar, Koed, Doeya as security for the rent payable in respect of the 21 *mouzas*, and it was agreed that these *mouzas* were to be released by the proprietor as soon as the tenure-holder could find other security for the rent.

The tenure was thus reduced to the 15 *mouzas* mentioned in Schedule C.

It is alleged that between 1786 and 1914 twenty-six hamlets or new *mouzas* were established on the site of the 15 *mouzas* and that the tenure now comprises the 41 *mouzas* enumerated in Schedule E. These have been recorded by the Settlement Officer in the *khewat* of *Mouza* Jagodih as falling within the estate of Raja Ramnarain Singh and as constituting a non-resumable *shikmi taluk* which was purchased by Rai Debendra Chandra Ghose, the predecessor of defendants Nos. 3 and 3 (*a*) and Rai Jadu Nath Mukherji the predecessor of the Mukherji defendants, in execution of a decree obtained against Raja Hiram Khan and others.

The sense in which the Settlement Authorities have used the word "*shikmi*" is to be gathered by reference to page 90 of the Final Report of the Survey and Settlement Operations in the District of Hazaribagh published in 1917. In that report Mr. Sifton, the Settlement Officer, makes the following observations in para. 227 in regard to *shamilat taluks*:—

"In the Ramgarh Estate there are 5 *shikmi* or *shamilat taluks*; their origin has been referred to above. The claim made by the *talukdars* that they were independent chiefs and at the time of the Decennial Settlement only happened to be paying their revenue through the Raja of Ramgarh as the Raja of Chota Nagpur was also doing may be true. When their applications to Government at the Decennial Settlement for a separate assessment to revenue were rejected, three of the *talukdars* to avoid paying an annual rent to the Ramgarh Estate, each made over separately to that estate a number of villages representing in value the amount of their shares of revenue, and held the balance of their property as rent-free."

He also writes in para. 65 as follows "Jagodih Rampur, Itkhori, Paroria and Barsote are *shamilat taluks* the owners of which have always claimed that they are not tenure-holders of the Ramgarh Raj and that a separate revenue ought to have been assessed on their estates. I have not been able to find out any definite history of the *taluks*, but the fact of their appearing with separately assessed revenue at the time when even the Chota Nagpur Raj was paying its revenue through the Ramgarh Raj suggests the possibility of these *shikmi talukdars* having been also in reality independent as they claim."

An objection having been taken by the proprietor of Ramgarh to the entry *shikmi taluk* in respect of *Mouza* Jagodih and the other *mouzas* in suit, the Settlement Officer on the 1st February 1914 passed an order as follows:—

"Order in case under s. 89, Chota Nagpur Tenancy Act:

"I have heard Pleaders and Counsel upon the question of the nature of the terms of Rampur, Jagodih, Itkhori and Paroria and Barsote. I reversed my orders until I should have had an opportunity of studying the paper-books of two proceedings in the High Court on the relevency and meaning of which the parties were at variance. It is not necessary for me at this stage to write a detailed judgment as the parties will have an opportunity after final publication or proceedings in a formal suit. After reading the evidence produced I am satisfied that these tenures are not of the same origin as the *jagirs* founded by the Padma Raja and his predecessors. They have hitherto been regarded and treated as *shikmi* or *shamilat taluks* and they probably existed as independent properties before the Ramgarh Raj was established, and I can find nothing in their recent history to change the status of the holders of these *taluks*."

As they were not originated by the Ramgarh Raj I find them to be not resumable by the *zemindar*. They will be noted in the *khewat* as "not liable to resumption."

In para. 21 of his plaint the plaintiff states that the cause of action arose in 1914 when the Record of Rights was finally published, and in para. 22 he prays for the following reliefs.

"(1) It may be declared that the tenure ordinarily called 'Jagodih Lat' consisting of villages in Schedule 'E' hereto annexed is not '*shamilat*' or '*shikmi*' *taluk* of the Ramgarh Estate, nor is it "non-resumable" as recorded in the *khewats*.

"(2) It may be further declared that it is an ordinary *jagir* under the Raj and is resumable by it on failure of the direct male line of the grantee and under certain other circumstances, and the entries in the *khewats* are incorrect."

A joint written statement was filed by defendant No. 3 Rai Debendra Chandra Ghose Bahadur and by No. 5 Lokendra Nath Mukherji, No. 6 Odhindra Nath Mukherji, No. 7 Harindra Nath Mukherji, No. 8 Digendra Nath Mukherji and No. 9 Parendra Nath Mukherji jointly. They contended that *taluk* Jagodih was a *shikmi taluk* at the time of Decennial Settlement paying revenue through the Maharaja of Ramgarh, that it was not, and never had been, a tenure appertaining to the Ramgarh Estate and that the Settlement Entry was correct.

Defendants Nos. 11 and 13 Jhagru Sahu and Bhagwan Das took the same grounds as the above defendants but further pleaded that the *Mouzas* Debo and Petula were originally included in *taluk* Jagodih and that by arrangement with the proprietor of *taluk* Rampur they were exchanged for *Mouzas* Pado, Ingania and Phuledaria of that *taluk*. They also claimed that they had purchased proprietary rights in villages Padaria, Kakraula and Machola and have purchased the *jagir*, *khorposh* and *khairat* rights in several villages in the Jagodih Estate and also a *mokarrari* interest in *Mouza* Bhagar.

Defendant No. 24 Maharaj Bahadur Singh claimed to have purchased *Mouza* Petula and other *mouzas* in execution of a decree obtained by Damri Sowdagar against Kuar Deo Narain Sahi. He contended that this *mouza* was in *taluk* Rampur and that he had been unnecessarily impleaded in the present suit.

Defendant No. 22 Ramkumar Lal Bhagat stated that in 1878 his brother purchased *Mouza* Debo in execution of a decree obtained against Kuar Deo Narain Sahi, and that the *mouza* was included in *Mouza* Rampur and that he had been unnecessarily made a party in the suit.

Defendant No. 3 having died during the pendency of the suit his son, the defendant No. 3 (*a*) now represents his interest. It appears that by purchase he has acquired the interest of some of the Mukherji defendants. This defendant and defendant No. 24 are the only contesting defendants appearing in the present appeal.

The following facts are either admitted or established beyond doubt:

(1) That the 41 *mouzas* in suit are situated upon the site of Pargana Chai, Champa and Barsote as existing at the time of the Decennial Settlement.

(2) That the site was settled at the time of the Decennial Settlement as part of the *zemindari* of Ramgarh.

(3) That they were recorded in 1914 by the Settlement Officer as lying within that *zemindari*.

(4) That the *zemindari* bears No. 28 on the revenue roll of the District of Hazaribagh which was constituted in or about 1831.

(5) That the defendants do not claim that the lands were ever revenue free. On the contrary their case is that they were assessed to revenue which was paid for convenience through the Maharaja of Ramgarh.

Now as it was admitted before the Settlement Officer that the defendants were holding land within the ambit of the *zemindari* of the plaintiff and that he was paying revenue for the same, the onus of showing the nature of their title was upon the defendants and upon a failure to show that they had had a tenancy therein, the plaintiff was entitled to resume. But the Settlement Officer having held that the defendants were owners of a non-resumable tenure the onus is shifted upon the plaintiff, and the question is whether he has given sufficient evidence to rebut the presumption created by the Record of Rights. It is necessary to bear this in mind in examining the evidence adduced by the plaintiff.

On the 11th September 1792 Raja Shiva Nath Sahi of Rampur, Raja Bed Khan of Jagodih and Raja Bahadur Sahi of Itkhori in Pargana Chai, Balaghat, laid a suit before the *Diwani Adalat* at Chata in *Zilla* Ramgarh against Raja Maninath Singh *zemindar* of *Zilla* Ramgarh valued at Rs. 6,501 alleging that he had misappropriated the income of their villages in Pargana Chai. The prayer was made in the following words:—

"The usual practice as regards one-fourth of our villages has been contravened, we are, however, ready to pay the rent. Raja Maninath Singh of Ramgarh is in possession of the *milkiat* and *malguzari* Rs. 6,501 besides the *zairats*, which is our old *jama* of 5 *mahals*. It is, therefore, prayed that the said person may be summoned and justice done so that our *milkiat* and *malguzari* right may be restored to us."

The plea of the defendants was that the plaintiffs were *jagirdars* and that the *jagirdars* have been paying rent year by year.

The number of *mouzas* in suit was 40 ½ and the valuation represented one year's rental.

It was decided by Mr. Hunter, the District Judge in a judgment delivered on the 17th December 1793 that inasmuch as the cause of action had arisen previous to the 19th August 1765 the suit was barred under the provisions of the Code of 1793, and also that inasmuch as the cause of action had accrued 12 years prior to the institution of the suit it was also barred under the same Regulations.

There was an appeal to the Provincial Court of Appeal at Azimabad (Patna) which was dismissed on the 29th August 1794. There was then a second appeal by the plaintiffs to the *Sadar Diwani Adalat* which also was dismissed on the 18th November 1795. The material portion of the judgment of the Court runs as follows: "The appellants admit that they were dispossessed of the *zemindari* claimed by them previously to the Company's accession to the *Diwani*, and that it is established in evidence of the witnesses that they have never been restored to the possession of it since that period, that it does not appear that they subsequently preferred any claims to the property in any Court of competent jurisdiction within the period limited by the Regulations nor have appellants assigned any satisfactory reasons for having neglected to prefer their claims. The Court, therefore, considering the admission of appellants' claims precluded in the first instance by s. 14 of the Regulation of 1793 which is extended to the *Sadar Diwani Adalat* by s. 7 of Regulation VIII of 1793 they resolve and decree that the decree passed in this case on the 29th August 1794 by the Provincial Court of Appeal for the Division of Patna affirmed and that the appeal be accordingly dismissed".

In this suit a large number of the documents were filed by both parties and witnesses were also examined. The contents of the documents were embodied in the judgment of the Court in full and are, therefore, admissible in evidence without the production of the originals. The District Judge, Mr. Hunter, did not pronounce it upon their genuineness or probative value, and it will be necessary in the present appeal to consider the evidentiary value of some of these documents.

The earliest documents of title produced in the suit of 1792 were 7 *kabuliyats.*

The first is by Raja Ranmust Khan and other *talukdars* of Parganas Chai, Champa and Rampur in the year 1135 *F.* (corresponding to 1728) in favour of Qazi Muhammad Majid. The annual *jama* or revenue was fixed at Rs. 6,503-11-0 "after deduction of one-fourth" and the executants agreed that "they would, after the deduction of the *nankar* allowance, pay the said amount as usual season after season, instalment after instalment into the treasury of the *sarkar.*" It is suggested that Qazi Muhammad Majid was a representative of the Governor of Bihar at that time. On the back of the *kabuliyat* there is a memorandum showing that out of the revenue demand of Rs. 6,503-10-9 a sum of Rs. 3,765 was estimated as the *nankar inam* leaving a balance of Rs. 2,738-10-9 payable as rent. The *talukdar* Ranmust Khan appears to have been assessed at Rs. 3,130 of which Rs. 1,925 was *nankar* and Rs 1,205 rent.

There are three similar *kabuliyats* by Raja Ranmust Khan for the years 1731, 1732 and 1733; and three more by Lal Khan the successor of Ranmust Khan and by Raja Ratan Sahi the *talukdar* of Rampur for the years 1758, 1759 and 1760 in favour of Maharaja Sunder Sahi Bahadur who, as we have seen, was the *zemindar* of Tikari in *Zilla* Bihar. This *zemindar* acquired considerable power in the time of Ali Verdy Khan, who was the Governor of Bihar and afterwards Nawab Nazim at Murshidabad, and it is established that he invaded Ramgarh and held possession of that District for seven years.

It is not explained how the *kabuliyats* came to be in the possession of the grantees as in the ordinary course of things the *pattas* and not the *kabuliyats* should have been retained by them; and as regards the three *kabuliyats* alleged to have been executed in favour of Sunder Singh of Tikari, they cannot possibly be genuine for Sunder Singh died in 1759 and the period of his occupation of Ramgarh was between 1734 and 1739. There are also other defects in the *kabuliyats* in favour of Sunder Singh which make it impossible for us to place any reliance upon these documents.

With regard to the other four *kabuliyats,* we know that Hemut Singh, the proprietor of Ramgarh, who ruled from 1604 to 1661 made a *kamil jama* or assessment of revenue for the whole of the Pargana Chai which was eventually the basis of the Decennial Settlement. We also know that Dalel Singh the successor of Hemut Singh killed the Jagodih Chief and drove away his son in or about 1719. This may be regarded, therefore, as the second conquest of the *taluk* Jagodih. Bishun Singh held the estate from 1724 to 1763 and effected the third conquest of Jagodih in 1762. Makund who succeeded Bishun Singh carried out the fourth conquest in 1764. It is difficult, therefore, to see how Raja Ranmust Khan could have executed any *kabuliyat* in favour of Qazi Muhammad Majid in 1728 and 1731, 1732 and 1733. In my opinion these *kabuliyats* are of no value whatsoever.

The next document is a *patta* dated the 3rd *Aghan Badi, Sambat* 1819 (which corresponds to 1762 A. D.) granted by Maharaja Sri Bishun Singh to Raja Lal Khan in respect of five villages in Pargana Champa yielding an income of Rs. 1,502. This document was produced in the suit of 1792. It was partly in *Urdu* and partly in *Hindi.* The *Mouzas* Churchu, Khirgaon, Oreya, Alaunn and Nauamap or Nimakhap are mentioned in this document as yielding an income of Rs. 752. The grant is headed "*baiswan*" which is derived from the word "*baitna*" to sit and means "assigned for a particular purpose" (see page 86 of Sifton's Settlement Report.) The contents of this document and the meaning of some of the words are obscure but this much is clear—that it was granted for *mahal* Jagodih and certain villages among which were included Sabergaon, Jagodih, Ambagit Tapa Barmoria, Ichak, Rampur Patti, Surtipur and Karni Kzraundha, Inayat Chak, Kzramba Tappa, Jagodih Karamba and Tappa Machola, Parsa, Rangpur Patti, Balegaon and Tappa Bedul. The document also shows that the income of these villages was to be appropriated to the upkeep of the members of the grantee's family and retainers. A similar *patta* given by Makund Singh in 1769 to Raja Shibnath Sahi of Rampur in respect of certain other villages shows that the grantee was to spend a sum of Rs. 15 per year on account of the salaries of Rajput gunners. There is another *sanad* of 1766 granted by Makund Singh to Raja Gulab Sahi of Rampur which also is a *baiswan* grant. But the Schedules and figures on these three *sanads* cannot be satisfactorily explained and all that they show is that Lal Khan, Gulab Sahi and Shibnath Sahi got grants of certain villages as *baiswan* tenures in 1762, 1766 and 1769 from the proprietor of the Ramgarh Raj. The fact is important because it is the case of the defendants that they have always remained independent of the Ramgarh Raj except in so far as their revenue was payable through the Ramgarh Raj. The findings that the defendants were at any time *baiswan* tenure-holders would be destructive of the case of the defendants.

The grant of a service tenure in 1762 also accords with the known facts of history.

It appears from Sitab Roy's report that Ramgarh was invaded by the Mahrattas about 1748 and that Kamdar Khan, the *amil* of Narhat Semoy, for a payment of Rs. 22,000 agreed to deliver up the property of Jagodih Rajas to them for two months. After the Mahrattas left, Kamdar Khan attacked Bishun Singh, and in 1752 Bishun Singh and Makund Singh gave up to Kamdar Khan the whole of the country north of the Barakar which includes Pargana Chai, while Lal Khan and other *talakdars* and the Raja of Ramgarh took the territory south of the river. In 1761 war broke out and Kamdar Khan joined the Shahjada of Delhi (who was afterwards Shah Alam) against the Naib Subedar Ramnarain, who was the Deputy at Patna of the Nawab Nazim. Kamdar Khan was defeated and in order to secure shelter within the *zemindari* of the Raja of Ramgarh he released to Bishun Singh the property of the Jagodih *talukdar* notwithstanding the latter's remonstrances. It is intelligible, therefore, that the Chief of Jagodih should at this time have accepted a service grant from Bishun Singh. But Bishun Singh did not retain the rulership long. Shortly afterwards Buali Khan, one of the Generals of the Nawab Nazim Kasim Ali, attacked Kamdar Khan and defeated him. He also defeated his co-rebel Bishun Singh at Ramgarh and he put Lal Khan in possession of the *zemindari* north of the Barakar annexing for the Nawab Nazim the territory to the south. Shortly after this the proprietor of Ramgarh upon payment of Rs. 55,000 secured a release from the Nawab Nazim of the territory south of the Barakar and 6 months later he by bribing the officers of the Muhammadan Government for a sum of Rs. 20,000, secured possession of the territories to the north also. In 1763 Makund Singh and Bishun Singh were both defeated by Asdullah Khan, the Moghul General at Ramgarh and Asdullah then restored Lal Khan to his *zemindari*. Bishun Singh died in that year and was succeeded by Makund Singh and Asdullah having been called away to assist the Nawab Nazim against the British and Kamdar Khan who had been reinstated also having retired to Pachete for the same purpose, Makund Singh re-conquered the whole of Parganas Chai and Champa. In 1765 the East India Company took over the *Diwani* of Bengal Bihar and as Makund Singh would not pay the Government due from him he was attacked by Captain Camac and Captain Goddard in 1769 and finally in 1772 he was deposed and Tej Singh was declared to be the proprietor.

The plaintiff produces a *patta* granted by Sher Ali Khan on the 19th February 1770 (the date 1185 in the document appears to have been an error in printing). The document bears the seal of the Qazi of the Parganas Palamau, Nagpur, and purports to be granted to Raja Makund Singh *talukdar* of *zillah* Jagodih, etc., with effect from 1178 *F.* which corresponds to 1771 A. D. The revenue is entered as Rs. 9,501 Benares coin and a sum of Rs. 500 is declared to be the grantee's allowance on account of *inam nankar*. The document recites that a sum of Rs. 5,500 is payable for Jagodih, Rampur, Paroria, Rs. 1,600 Itkhori and Dehas Rs. 401 for Kodarma, Rs. 2,000 for Jeyrampur, Buzurg, Komo, Markacho, Nawaladha and Barsote. This document was produced in Mr. Hunter's Court in the suit of 1792, and there is no reason for doubting its genuineness. It shows that the *taluk* Jagodih was assessed to revenue by the Mughal Government as part of the estate of the Raja of Rampur. Mr. Sifton in his Settlement Report appears to think that it indicates that the *taluk* was separately assessed and that the Raja of Rampur was merely the agent for transmitting the revenue to the Moghul Government. There is no ground for such a finding. The document recites that the sum of Rs. 9,501 has been fixed and assessed as the consolidated annual *jama* of the said *zilla*. The details of the various tracts of territory assessed are shown; but there is nothing to suggest that there was any division of the revenue or that the Raja of Ramgarh was not responsible for the whole of it.

Next Makund Singh received a *patta* from Sitab Roy for the years 1179, 1180 and 1181 *Fs.* in March 1772 for the Parganas of Sherghati, Chai, Champa, etc., at Rs. 21,000 per year. The details of this document are not altogether free from obscurity, but this much is certain that revenue was assessed on account of Chai and Champa.

Next on the 30th June 1773 Tej Singh was granted a *patta* by the East India Company at Rs. 30,000 for the years 1181 to 1185 without deduction of *nankar*. This document is not disputed and its authenticity was admitted by the Jagodih Chiefs in the suit before Mr. Hunter in 1792. After the death of Tej Singh, Paresh Nath Singh in 1781 made an engagement for Rs. 40,000 inclusive of Rs. 10,000 on account of *nazrana*.

The significance of these Settlements with the Rajas of Ramgarh cannot be overrated. Makund Singh had crushed the Chai Chiefs in 1764 and was the only person who could engage for the revenue. After Kamdar Khan's death in that year he successfully defied the power of the Nawab Nazims and paid no revenue for several years. In 1770 Kamdar Khan's successor Waris Ali was compelled to make terms with him and took an engagement for Rs. 27,000. Mr. Sifton states in his report that this was the annual revenue but it would seem from Sitab Roy's report that this was the revenue for three years. It seems impossible to believe that either in 1770 or 1771 or 1772 the paramount power would have paid any regard to the Chai Chiefs who had been completely and finally subdued.

But the Chai Chiefs having assisted Captain Camac against Makund Singh it does appear that both he and his successors for a time entertain some idea between 1772 and 1781 of making separate Settlements with the Chai Chiefs but the intention was never carried into action in consequence of Paresh Nath's objections and at the Decennial Settlement they remained tenure-holders as before.

The intentions of the British Officials and of the Raja of Ramgarh in reference to the Chai Chiefs may be gathered from the following documents:—

Shortly before his accession Tej Singh wrote a letter dated the 25th *Assin* (without year) to Babu Shib Nath Singh, the *talukdar* of Rampur, in which he uses the expressions "but you are in the same position as I." It is suggested that this is an admission that *taluk* Rampur was co-ordinate in status with Ramgarh; but the letter does not necessarily bear this interpretation.

Shortly after this Captain Camac sent a *parwana* to Lal Khan acknowledging his services and informing him that he wished that an engagement for revenue should be taken for him by Government or that he should receive *malkhana* as a proprietor. There is no date on this letter, but it must have been written immediately after Captain Camac's conquest.

In 1772 Tej Singh is alleged to have written a letter to Captain Camac through Chaudhury Nirmal Singh and Mahtha Dharamdeo in which he observes that as Captain Camac had at Patna raised the question of the title of the Rajas of Chai, he (Tej Singh) would give the "*rajgi*" to all the three Rajas (that is to say Jagodih, Rampur and Itkhori) and would receive the proper amount of rent (revenue) from Rajas and pay it to Government. The plaintiff in the present suit denies the genuineness of this letter, but there is no reason to doubt its authenticity.

In 1777 Paresh Nath sends a *parwana* to his *karpardazes* and peons informing them that the *Hakmi* (the landlord's rent) in respect of *nankar* paid by Raja Lal Khan had been remitted from before and that no one should interfere in this matter. It is contended that this order indicates that about this time Lal Khan was claiming to hold some villages rent free on the ground that their income represented the *nankar* allowance due to him as a *malik* or proprietor and that Paresh Nath admitted the claim. I do not accept this contention and think that as the services for which the *jagir* had been granted had not yet been commuted Paresh Nath very properly declined to take revenue from the villages, The use of the word *nankar* merely indicates that the villages had been held before 1762 in lieu of *nankar* allowance. After that date and certainly after 1764 the *talukdar* could not have been entitled to hold any villages as *nankar*.

On the 3rd December 1781 we find that Mr. Chapman, who had taken over charge from Captain Camac of the civil administration of Ramgarh, writes to Lal Khan and Shib Nath Sahi of Rampur promising to decide his case on his return from Calcutta. On the 5th December there is another letter from Mr. Chapman on the same subject. Apparently Pareshnath had as usual not been able to pay his revenue and a Sajawal had been put in by the East India Company to collect it on his behalf. Mr. Chapman informs Lal Khan and Shib Nath Sahi that he had deputed Lala Subans Rai for making the collection of one-fourth of the rents of the villages held by them and that he would decide the case relating to their claim on account of *nankar* on returning from tour. He advises them that "they should approach the Lala and pay to him the said one-fourth rent and appropriate to themselves the three-fourths share of the produce." In the event no decision was given and it is clear that whatever Pareshnath may have intended in 1777 the East India Company never at any time recognised the claim of the proprietor of Jagodih to hold any land rent or revenue free. It is said that collection through Subans Rai was an admission by Government that revenue was payable direct by Jagodih on the footing that he was either an actual proprietor or an independent *talukdar*; but the fact seems to be that the collection was made on behalf of Ramgarh and with the assistance of his *sheristadar*. The evidence of Daryao Singh in the suit in 1792 clearly establishes this. Mr. Dallas, who succeeded Mr. Chapman wrote on the 1st June 1782 that a *sanad* and a robe of honour had been received from Calcutta which suggests that on Lal Khan's representation the East India Company had decided to recognise Lal Khan as entitled to engage for the revenue and on the 3rd September of the same year Mr. Dallas acknowledged receipt of some revenue sent by Lal Khan. It appears, however, that on coming to know of the proposal Pareshnath objected and the *sanad* and the *robe* of honour were never delivered. Meanwhile the collection of revenue by the Sajawal proceeded and on the 2nd October 1782 Daryao Singh, the Sajawal, was informed by Mr. Dallas that Raja Pareshnath's *sheristadar* was being sent to assist him in writing up and comparing the account. On the 17th November 1782 Mr Dallas directs Daryao that he should collect 2 annas in the rupee from the *jagir* villages. On the 14th December Mr. Dallas asks Daryao Singh to take bonds from Lal Khan and Shib Nath for their rent, and on the 14th January 1783 Mr. Dallas informs Lal Khan that he will inquire into his objections (it is not known what their nature was) after the country has recovered from the drought and that in the meantime he should not "give way to anxiety." I think it is clear that Lal Khan's efforts to obtain recognition of his title as actual proprietor to engage for Government revenue never succeeded although at one time it very nearly did so. Pareshnath died in 1784 and Lal Khan appears for the moment to have given up the contest and the same year he executed a bond acknowledging a rental of Rs. 656 12-0 per annum as payable for his "*jagir* villages," The document is dated October 1784 and was filed before Mr. Hunter in 1793. In order to show how the rent was arrived at the plaintiff produces a duplicate *amalnama* from his *sherista* purporting to be an order from Raja Maninath Singh confirming the grant of villages previously made to Raja Lal Khan and informing the *raiyats* and Mahatas accordingly. This document shows that a total of 21 *mouzas* comprised the grant of which a portion was *khas jagir* yielding an income of Rs. 1,652 and the rest a *jagir* for the maintenance of the grantee's seven brothers producing an income of Rs. 712. A quarter of the total income of Rs. 2,582 comes to Rs. 645 which is about Rs. 12 short of rental shown in the bond. The rent, however, does not appear to have been paid and Maninath Singh sued Lal Khan and Shib Nath Singh in the Court of the *Zilla* Judge at Chatra in Ramgarh and in that suit a compromise was effected on the 1st December 1786. This compromise shows that Raja Lal Khan was holding 21 *mouzas* of which the *kamil jama* was Rs. 1,982 and the *malguzari* was Rs. 655 8-0. Six villages were surrendered to the proprietor of Ramgarh as a security for the payment of this *malguzari* and it was agreed that as long as the arrangements were not made for the payment of this amount the villages would remain in the possession of the proprietor, An attempt has been made to show that this compromise recognized Lal Khan's liability to pay revenue and not rent; but the expression "*malguzari sarkari*" may mean both rent and revenue, and as I will show later that before the Decennial Settlement rent in the English sense was not undertlsood and that every occupier of land was liable to pay revenue to the State whether he was a *raiyat*, tenure-holder or proprietor. I do not think, therefore, that anything turns on the meaning of the expression "*malguzari sarkari*" in this compromise petition. That Lal Khan definitely admitted his status as a *jagirdar* further appears from a letter written by Mr. Leslie, the Collector of Ramgarh, to the President of the Board of Revenue on the 9th July 1788, in which he submits a return showing the *kamil jama* of each *jagirdar* including Raja Lal Khan in that category. He reports that 15 villages are in Lal Khan's possession and that he is liable to pay three annas in the rupee on the *kamil jama* of 1782. Apparently he was asked to report upon the actual produce of the *jagirs* and he replies "it is not in my power to give you any estimate of their present produce, being apprehensive that an inquiry into this matter on my part might be the means of creating a disturbance. Though from the nature of the tenure by which the *jagirs* are held, as will appear from the enclosed *sanad* and translation, many cases, it will be supposed, might occur in which they would revert to the Raja, yet the custom of their devolving from father to son is now so established that I fear any sudden innovation would be attended with bad consequences, and I see no other way of breaking through it, (should you think such a measure expedient) than by permitting the Raja to resume them on the death of the present incumbents." The sample *sanad* attached to Mr. Leslie's letter shows that the *jagirdar* was liable to maintain peons probably for guard duty. No reply was given at the time by the Board to Mr. Lesile's suggestion that the *jagirs* should be resumed on the death of the holder but they accepted the finding that the Chai Chiefs were *jagirdars*.

Frustrated in their attempts to get a separate Settlement the Chiefs of Jagodih, Rampur, Itkhori thereupon sued for the establishment of their proprietary *milkiat* right in the Court of Mr. Hunter. Judgment was given by the Trial Court on the 17th December 1793, by the Provincial Court of Appeal on the 29th August 1794 and by the *Sadar Diwani Adalat* on the 8th November 1795. It appears that in 1800 a further attempt was made by Raja Petambor Sahi, Rampur Balaghat, for recovery of proprietary right to 4 *mahals* within the Pargana Chai. That suit was dismissed by Lieut. Col. Freyer on the 18th June 1800 who found in his judgment that as Mr. Hunter had dismissed the plaintiff's claim to 5 of the *mahals* in the earlier suit on the ground that the plaintiff had been out of possession since 1764, this suit also was liable to dismissal on the same ground.

For the next 40 years we do not hear anything more about the Chiefs of the Pargana Chai, but on the 22nd November 1839 Mr. Ouselay, the Agent to the Governor General, wrote to Lieut. Thomas Simpson, the Personal Assistant to the Governor-General's Agent, asking him to submit a statement of estates, *jagirs* and their *malguzars* and he enclosed in his letter a form (Ex. 11 (*a*) to be filled up. In reply a *mulki* form was filed by Bed Khan on the 17th August 1842 containing a statement of "*goshwara* villages" in his possession appertaining to *mahal* Jagodih, the "remarks" column of which contains a history of the Jagodih Chiefs. It is there stated that only 21 *mouzas* were left as *nankar* to Bed Khan, ancestor of Raja Lal Khan and 39½ *mouzas* to Raja Shib Nath Sahi grandfather of Raja Gauhar Sahai after Makund Singh had treacherously captured their country; that after Mr. Camac invaded Ramgarh, Lal Khan and Shib Nath Singh helped to win over Tej Singh to Mr. Camac's side and Tej Singh was recognised as the proprietor of Ramgarh and that Tej Singh acted perfidiously in not causing Lal Khan's *nankar* villages to be separated from Ramgarh; that after the death of Tej Singh Mr. Camac's intention to recognise the Jagodih Chief's right to separation was not carried out owing to the opposition of Raja Pareshnath Singh. Bed Khan further asserted that no rent was realised for his *nankar* villages from the time of Nawab Kasim Ali but that Maharaja Maninath Singh upon his accession claimed a one-fourth share, and as he threatened a suit an *ekrarnama* was executed by him on the 17th November 1795 under which he accepted 6 *mouzas* of Jagodih as security for rent of the *nankar* villages leaving the remaining 15 *mouzas* in the possession of Bed Khan. On the 27th August 1842 Sidhnath Singh, the son of Maninath Singh, filed an objection against Bed Khan's *mulki* form asserting that Bed Khan was his *jagirdar* and had no proprietary interest in *mouza* Jagodih. He also objected that he could not file his own form till Bed Khan had filed a revised form. The order of the Collector upon this objection was that the Maharaja of Ramgarh was at liberty to state in his *mulki* form the right which he considered the Chiefs of Jagodih and Rampur to possess and to make such entries in his own form as he thought proper.

On the 21st January 1848 Raja Sheoraj Khan filed a statement in the office of the Agent to the Governor General in answer to a request for information as to particulars of the title under which he held and stated that he was holding *taluk* Jagodih in Pargana Chai as *zemindar* and proprietor by virtue of a maintenance grant given by Raja Makund Singh and that he was holding 15 of the 21 villages covered by the grant in accordance with the terms of an *ekrarnama* executed by the Raja Maninath Singh.

In 1859 a Survey was undertaken of the Ramgarh District and in consequence of an order made by the Superintendent of Survey the proprietor Maharaja of Ramgarh filed a statement containing certain particulars of the villages held by him. In this statement he declares that 16 *mouzas* in *taluk* Jagodih were held as *jagirs* for good will and service by Raja Sheoraj Khan and Raja Bed Khan.

Seventeen years later the local authorities did not accept this view and on the 3rd April 1876 a report was submitted by Mr. Robinson, the Commissioner of the Chota Nagpur Division, to the Assistant Secretary to the Government of Bengal on the land tenures of Hazaribagh in which the following account appears:—

"*Shamilat* or *shikmi taluka.* In para. 5 I have mentioned that Pargana Chai was composed of five petty Rajas. These Rajas were semi-independent only paying tribute to Raja Lal Khan and when merged into Ramgarh continuing to pay tribute to the Ramgarh Raja. When the country was taken by the English and its Settlement was being made these Rajas endeavoured to get Settlements made with them direct but their efforts failed and though they were maintained each in his Raj they were directed to pay their tribute which was then converted into a fixed rental to the Raja of Ramgarh. The Rajas of Rampur, Jagodih, Paroria and Itkhori accepted these terms and have been made *shikmi talukdars.* The Raja of Pitij, who was a resident of Gaya, refused to agree and made over his *taluk* to the Raja of Kandi, into whose estate this *taluk* has merged and the title has been lost. Similarly the Raja of Parsote succeeded in saving his estate from being merged into that of Ramgarh and the estate was made *shamilat taluk* as also was Pargana Kodarma but the circumstances relating to this last and its severance from the Ramgarh Estate, etc., are related in a separate Chapter. There is a legend that there were two more such *shikmi taluks, viz*, Tiliyaand Gola but they have long been extinct and have merged into the Ramgarh Estate."

It is contended by the appellant that this report was the basis of the statements made by Mr. Hunter (afterwards Sir William Hunter) in his Statistical Account of Hazaribagh and Mr. Lister in his Gazetteer for the Hazaribagh District and Mr. Sifton in his Settlement Report of the District regarding the status of the Chai Chiefs and that Mr. Robinson was completely in error in regarding the Chief of Jagodih as a proprietor, his proper status being that of a tenure-holder governed by the ordinary rule as to resumption applicable to *jagirs* in the Ramgarh Estate.

In addition to these documents there is a set of *awarzas* prepared in the Office of the Raja of Ramgarh ranging from 1774 to 1900 (Ex. 15 series to Ex. 21). The earliest Ex. 15 (*r*) which is dated 1782 shows that Raja Lal Khan held a *jagirdari* tenure of 21 *mouzas.* The income from each *mouza* purports to be shown against it the total being Rs 2,480. The *rok hakmi* or the landlord's demand is shown at 6-annas in the rupee, that is, Rs. 930 and a collection of Rs. 317 is shown as having been made through Daryao Singh. This document is obviously intended to relate to the period when Mr. Dallas gave orders that the *jagirdars* should pay 6-annas in the rupee on their *kamil juma.* A similar document of 1785 shows the landlord's rent at Rs. 649-4-0 and obviously relates to the period after the *jagirdars* had executed the *kabuliyat* or bond of 1784 by the pen of Sumer Singh on the 7th *Kartick Sudi*

Sambat 1841. In the *awarza* (Ex. 15(*t*)) for the year 1786 the rent is calculated at 4-annas in the rupee and is shown as Rs. 656 8 0 It relates to the period after the compromise when six of the *mouzas* were assigned to the landlord as security for rent. The landlord's rent, after making allowance for the depreciation in the currency, is entered as Rs. 640 and accords with the figure shown in the compromise petition filed by Maninath Singh in the Collector's Court printed at page 75 of the paper-book. Owing to exchange of villages the gross income of the 21 villages is shown as Rs. 2,602 in 1786, but after the compromise the income of the 15 villages remaining in the *jagirdars*' possession is shown in the *awarza* of 1788 (Ex. 15 (*g*)) as Rs. 1,982 and it remains at this figure till 1863. In the *awarza* for 1774 (Ex. 15 (*a*)) the income is shown as Rs. 1,899 and so also in 1776, 1777 and 1778. In the *awarzas* for 1774, 1776 and 1777 five villages of Pargana Champa appear, but these go out in the *awarza* for 1780 which relates to Dalla's time and the number of villages increases from 16 to 21, and the total income to Rs. 2,622.

The learned Subordinate Judge has declined to place any reliance upon these papers on the ground that they are *ex parte* and prepared in the *zemindar's sherista*, and, that the defendants cannot be bound by them. That is perfectly true. It is also true that many of the entries in these documents are not now intelligible. Nevertheless so far as they go, I think they are good corroborative evidence of the title set up by the plaintiff. They show that since 1774 the plaintiff has always asserted that the Chief of Jagodih was his *jagirdar*. Papers which are nearly 150 years old ought not to be regarded in a hypercritical spirit and it is our duty, unless there is clear evidence of forgery, to see whether they cannot be reconciled with the other old documents in the case. In my opinion they cannot support the case of the plaintiff.

The same observations apply generally to the other documents produced by the plaintiff except where there is clear evidence that they are not genuine. I do not think we are justified in rejecting them on the ground that copies were admitted in the suit of 1792 without sufficient proof of the loss of the originals or that the persons executing or writing them on behalf of the respective parties have not been shown to have possessed the authority to do so. The *kabuliyat* or bond of 1784 was executed by Somer Singh on behalf of the *jagirdars* of Jagodih, but if he signed in the *jagirdar's* presence and the signature was what is known in the vernacular as "*bakalam*" *i e*, by the hand of some one else, the question of authority arises.

The evidence of the plaintiff, therefore, leads to the following conclusions.

The country of the Chief of Jagodih lying within Pargana Chai was brought under the dominion of Hemant Singh, the Raja of Ramgarh in 1640. It is possible, as has been found by the Subordinate Judge, that the Jagodih family is older than the Ramgarh family and that the Chief of Jagodih was the most powerful of the minor local Chiefs in that part of the country, who all owned allegiance to Ramgarh. Hemnt Singh made an assessment of the annual produce of the villages lying within the Jagodih Chief's territory and prepared the *kamil jama* upon which the Permanent Settlement was eventually made. The authority of Ramgarh was frequently disputed; but in 1764 Madan Singh finally reduced it. From that time the Chief of Jagodih lost all his villages except 21 which were situated in the neighbourhood of his home and were granted to him by the Chief of Ramgarh on condition of service.

It is now urged on behalf of the appellants that these 21 villages were ancient *nankar* villages; *i. e.*, villages given in lieu of the allowance given by the Moghuls to *zemindars* for collecting the revenue. But in support of this there is no evidence beyond the assertions made by the Chiefs of Jagodih from time to time. There is evidence that in 1728, 1731, 1732 and 1733 the Chief of Jagodih executed *kabuliyats* in favour of some representative of the Moghul Emperor. I doubt the genuineness of these *kabuliyats* but even if it be admitted that at that time the Chief of Jagodih was paying revenue direct to the Moghuls, it seems clear that by 1764 his State had been completely conquered and absorbed by Ramgarh.

This evidence shows that for sometime the Jagodih Chiefs held the 21 *mouzas* as tenure-holders entitled to hold the lands free of rent for the services required of them. It is presumed that as their territory lay on both sides of the Grand Trunk

Road those services consisted of policing the road and of otherwise assisting the proprietor when necessary. In 1772 and 1773 rent appears to have been realised from them, because after the advent of the East India Company it was no longer necessary for the *zemindar* of Ramgarh, as was observed by Mr. Leslie, to keep a rabble army of retainers. In 1776 the rent was definitely commuted to Rs. 653-12-0 and 6 villages were assigned as security for the same. In my opinion this evidence is sufficient to rebut the entry that the villages in suit are held under a *shikmi taluki*. A judicial finding though not *res judicata* was entered to this effect in 1905 in a suit in which the proprietor of Ramgarh sued Hiram Khan, the Chief of Jagodih, for the rent of the years 1958 to 1961 *Sambat* describing him as *mashruti* (conditional) *jagirdar* and obtained a decree against him.

I propose next to consider the evidence upon which the respondent claims that the Settlement Officer's entry that Jagodih was a *shikmi taluk* is correct. Hiram Khan in his mortgage in favour of Rai D. C. Ghosh described the mortgaged property as revenue free *nankar dehat*. In his written statement in this suit the claim to a *lakheraj* right is withdrawn and it is pleaded that the mortgagor is a *talukdar* within the meaning of s. 6 of Regulation VIII of 1793. In argument before the learned Subordinate Judge that case was changed, and it was suggested that the mortgagor should have been held to be an actual proprietor under s. 5 of the Regulation. It is now urged that Tej Singh's letter of 1772 to Capt. Camac at Patna shows that the Chief of Jagodih was paying revenue to the East India Company through the Maharajah of Ramgarh. The letter certainly does contain a promise to take revenue from Jagodih but the promise was never carried out.

Next it is said that in 1777 Pareshnath acknowledged the existence of some *nankar* villages and, therefore, he had a proprietary right when he issued a *parwana* on Patlu peon not to realise rent from the *nankar* villages granted to Raja Lal Khan. I have shown that the letter does not contain any such admission. On the contrary it was Pareshnath who objected to Tej Singh's promise being carried out and insisted that Lal Khan was a *jagirdar*. The *Awarazas* of 1774, 1776, 1777, 1778, 1780 and 1782 refer to the 21 villages held by Lal Khan as *jagir* and are inconsistent with any admission that he was holding *nankar* land as a *shikmi* or independent *talukdar*.

It is said that in the *ekrarnama* delivered by Maninath in 1784 Maninath declares that the said Rajas have set apart one-fourth their villages on account of Government revenue. The word "*malguzari*" may mean both rent and revenue and before the Permanent Settlement rent in the English sense was unknown. It was not inaccurate to say that a tenure-holder was paying revenue to his landlord. That Lal Khan was a *jagirdar* in Maninath's opinion is clear from his written statement at page 50 of the paper-book which was filed in the suit of 1792. Mr. Camac in 1780 no doubt wished a separate engagement to be taken from Lal Khan and so did Mr. Chapman but that wish was never carried out. The payments made in 1782 to Daryao Singh do not show that they were made in his capacity as an independent *talukdar* or other actual proprietor.

It is next pointed out that in his appeal petition to the *Sadar Diwani Adalat* (page 87 of the paper-book) Bed Khan asserted that the suit of 1792 was for $406\frac{1}{2}$ villages besides *nankar* villages the *jama* of which in rupees was 6,501. In 1843 Shiv Raj Khan in the declaration of heirship (page 120 of the paper-book) asserted that he held 15 villages revenue free. In the *mulki* forms filed in 1842 assertions of the same kind were made. These assertions do not carry the case very far.

With regard to the Acts of Government, we find that Ramgarh was settled for one year in 1771, for three years, from 1772 to 1774 and for 5 years from 1775 to 1780. The first of these documents makes an allowance of Rs. 500 on account of *inam nankar*. The other two do not. These documents do not in any way show that there were any *nankar* villages in the possession of Lal Khan. It is possible that in the time of the Moghuls before the accession of the East India Company to the *Diwani* some *nankar* allowance used to be granted to the Chief of Jagodih, but there is no evidence that after 1765 they were allowed any *nankar* or to retain any lands in lieu thereof on the footing of any proprietary right. The evidence on the contrary shows that after 1764 Makund Singh deprived them of all their lands of the 21 *mouzas* which he assigned to them for their maintenance.

It is contended that though the Chai Chiefs lost their proprietary right to 406½ *mouzas* they retained it in that small fragment comprised in the 60½ *mouzas* which were the subject of the suit of 1792 and that, they were at the time of the Permanent Settlement actual proprietors in respect of that fragment. Apart from the effect of the Permanent Settlement on the status of actual proprietors who did not make a separate engagement with the Government, to which subject I will presently refer, it seems to me clear that at no time after 1764 was the Chief of Jagodih holding any land in proprietary right.

The entry, therefore, that he was a *shikmi talukdar* in the sense of a dependent *talukdar* paying revenue through another seems to me to be supported by no evidence at all.

It is clear that the Settlement Officer was using the term "*shikmi*" or "*shamilat*" *talukdar* as meaning a dependent proprietor who was entitled to separation as an actual proprietor and who was paying revenue through another. The term has been used to indicate any tenure-holder who dates back to the Permanent Settlement by Mr. Field in his Introduction to the Bengal Regulations and by the High Court in Calcutta and by their Lordships of the Privy Council in various decisions. "*shikam*" is the Persian for belly and *shikmi taluk* means literally a *taluk* within the belly of another or dependent upon another, and "*shamilat*" means joint or co-ordinate; and the ordinary meaning of the term "*shikmi talukdar*" is a *talukdar* who may or may not be an actual proprietor. At the time of the Permanent Settlement the East India Company found in this Province many classes of persons who all claimed to be the owners of the soil Some were ancient Chiefs and Rajas, others belonged to great land-holding families which had come into existence during the Muhammadan Government; others were officers in the employ of the Moghuls; others again were farmers who had in course of time begun to claim a prescriptive right to the office. Some were called *zemindars* and others were called *talukdars* or Chaudhurys. The *talukdars* were divided again into two classes, namely, independent or *Huzuri talukdars* who paid their revenue direct to Government, or *shikmi* or *mazkuri* or dependent *talukdars*. These again were divided into two classes, namely, those who were actual proprietors of the soil and paid their revenue through another proprietor and those who were not actual proprietors. Section 5 of Regulation VIII of 1793 empowered the East India Company to treat as actual proprietors the *shikmi* and dependent *talukdars* enumerated in the section. A *talukdar* in whose *taluk* the proprietor, through whom he was paying revenue had no proprietary interest, was entitled to separate himself unless he was under s. 6 debarred from so doing by his title deeds. The need of the East India Company for money was great and as there was no time to make a detailed inquiry, they decided to treat as the actual owner of the soil the person with engagement for the revenue The result was that all those *talukdars* who were actual proprietors but who failed to separate themselves ceased to be proprietors and became tenure-holders or tenants in the English sense. They fell into the category provided by s. 7 which runs as follows: "*talukdars* whose *taluks* are held under writings or *sanads* from *zemindars*, or other actual proprietors of lands, which do not expressly transfer the property in the soil, but only entitled the *talukdar* to possession so long as he continues to discharge the rent, or perform the conditions stipulated therein, are considered as lease-holders only" In s. 8 special provision is made for *jungleburi taluks* which, although to all intents and purposes proprietary estates, are classed as leaseholds. The Regulation makes a sharp distinction between revenue and rent although the contrary has been sometimes said. In the opinion of the framers of the Code revenue was that which was payable to Government by the *zemindar*, independent *talukdar* or other actual proprietor who took Settlement for the *zemindari*. All other persons holding *mal* lands in the estate were subordinate in status and were liable to pay rent unless exempted by the terms of the engagement or by special contract with the *zemindar*. It was the duty of the *zemindar* or independent *talukdar* engaging with Government to take in his turn the necessary engagements from the *talukdars* dependent upon him. The Muhammadan Government had recognised no rights of property in the soil in any one except Government and every person holding any interest therein had been liable to pay revenue to the Crown, and although there is some evidence that rent in the English sense of payment for the use and occupation of a land to a private proprietor other than the King had been known in Hindu times, the Muhammadan Government declined to subscribe to any such economic theory. The result was that the Collector of the revenue was at most entitled to a fee in addition to the revenue demandable from the *raiyat*. But the East India Company bringing with them a wholly different conception of the ownership of land decided to establish a middle class in whom would be vested a right in the soil, and they carried out this intention by enacting that the *zemindar* was entitled to contract for rent from his tenants without any reference to the revenue payable by him to Government. The rents, for some years were regulated by custom but though an attempt was made to protect the *raiyat* against competition rents by the Legislature the growth of population which followed upon a period of settled Government created such a sudden and urgent demand for land that the attempt met with signal failure.

Next in order to put a stop to the entertainment of applications for separation long after Regulation VIII was enacted and to protect the rights of purchasers of estates sold for default of revenue, Regulation I of 1801 directed that a dependent *talukdar* entitled to separation who failed to make his application within one year, was to be debarred from making any application to separate but that in other respects his rights would not be affected by the Regulation. This proviso, in my opinion, merely saves such rights as a dependent *talukdar* may claim as a tenant. It is a contradiction in terms to say that a dependent *talukdar* who had lost the right to separate himself could continue to remain an actual proprietor co-ordinate in status with the *zemindar* who had engaged for the revenue. The rights that were reserved to him were rights in regard to succession, transfer and the like. It may be conceded that if a dependent *talukdar* had been an actual proprietor he would become a tenant liable to be resumed for escheat but on no other ground; but if he was not formerly an actual proprietor his status would be governed by contract or custom.

A reference to the resumption Regulations in respect of *lakheraj* lands which were passed in the same year leads to the same conclusion also.

The effect of Regulation XIX of 1793 and Regulation II of 1819 was that resumed lands less than 100 *bighas* in area were annexed to the tenure of the dependent *talukdar* if any in whose *taluk* they were situated. In other words the relationship of landlord and tenant was established by law between the *talukdar* and the holder of the lands. There is, therefore, nothing startling in the view that all dependent *talukdars* became after 1801 the tenants of the proprietor of the estate.

In the lower Court a case seems to have been made that the *talukdar* of Jagodih was in effect a *lakherajdar* at the time of the Decennial Settlement; but that case has been abandoned before us and now upon the facts it is not arguable. The case now argued is that he was in possession of *nankar* lands as a part of his ancient *zemindari* and that at the time of the Permanent Settlement they were assessed to revenue in conformity with the Regulations and that by arrangement the revenue was computed at the income of 6 *mouzas* which were assigned as security to the proprietor who undertook the duty of paying it to Government. Such a case is intelligible; but, in my opinion the answer to it is that it is not supported by the facts. It is difficult to see why the proprietor of Ramgarh should have undertaken the position of a mere post office for the trasmission of the revenue and what remedy he had against the *talukdar* in case of default. Under the Regulations his estate was liable to be sold for the *talukdar's* default unless he chose to pay the arrear himself. In my opinion the consideration for the grant of the 21 villages was that the Chief of Jagodih accepted the status of a tenure-holder and he was confirmed in that position by the Permanent Settlement and he has continued to occupy it ever since.

The next question is whether the Settlement Officer's entry that the tenure is not resumable is correct.

On this part of the case the plaintiff puts his argument as follows: He says that although it was open to the proprietor of the Ramgarh Estate to create a tenure that would pass an absolute estate of inheritance he has in fact never done so at any time and that even an *istimrari mokarrari* tenure which for a long period was considered to be such an estate has now been held to be an estate resumable on failure of male heirs in the direct line of the grantee and that a *jagir* is the highest form of tenure known in the estate and that it has been held in repeated judicial decisions and though originally a tenure for life it has by custom become an estate in tail male: *Ram Narain Singh* v *Chota Nagpur Banking Association* (1), *Pratap Udainath Sahi Deo* v. *Ganesh Narain Sahi* (2), *Srinath Roy* v. *Pratap Udai Nath Sahai Deo* (3) and Sifton's Settlement Report page 89. A *jagir* which was originally a life-grant, has by custom acquired immunity form resumption except on failure of male heirs in the direct line of the grantee and as there is no tenure within the estate with privileges higher than this, the plaintiff is willing that the *taluk* in suit should be recorded as resumable like other *jagirs*. In about 1777 Mr. Heatley reported that the income of Ramgarh Estate was Rs. 1,53,000; but it was found that the proprietor was seldom able to pay a revenue of Rs. 30,000 because he had alienated large tracts of country as *jagirs*. In 1788 Mr. Leslie reported that these *jagirs* should be resumed by the proprietor on the death of the holder at the time but no orders were passed by the Board of Revenue and the evidence is that by custom the *jagirs* have in fact become hereditary and that sometimes a succession fee is exacted. It is true that since 1764 there is no evidence that any services have been actually performed by the *talukdars*; but, in my opinion, the evidence shows that the condition of the grant was service. The situation of the *taluk* in the neighbourhood of the Grand Trunk Road and the unsettled condition of the times which compelled the Ramgarh Chief to retain armed forces and the admission of the *talukdar* himself in 1784 show that the grant must have been conditional upon service and that it was a *jagir* in the true sense. As there is no question of the land being *lakheraj* and as the land is included within the ambit of the plaintiff's estate, the burden of proving the incidents of the tenure before the Settlement Officer rested upon the *talukdar*. The sole ground upon which the Settlement Officer appears to have arrived at his conclusion was that Jagodih was entitled to be separated from the Ramgarh Estate in 1793 as an independent *taluk* and that the Chief had continued to pay Government revenue since the Permanent Settlement through the proprietor of Ramgarh. In my opinion there was no reliable evidence for such a conclusion. There is no evidence that Jagodih ever paid any revenue through Ramgarh before 1793 or that he was entitled at that time to be classed as an actual proprietor. In my opinion, therefore, the entry that the *taluk* is not resumable is incorrect and the plaintiff is entitled to have it declared that the *taluk* is resumable upon failure of male heirs in the male line. The question may be asked "whose heirs?" The answer, I think, is that the *taluk* is resumable upon the failure of male heirs in the direct line of the original grantee Lal Khan.

It remains next to consider whether the contention of the respondents that s. 258 of the Chota Nagpur Tenancy Act is a bar to the suit.

Now s. 83 of the Chota Nagpur Tenancy Act, 1908 (Bengal Act VI of 1908) enacts as follows:

"(1) When a draft Record of Rights has been prepared under this Chapter, the Revenue Officer shall publish the draft in the prescribed manner and for the prescribed period, and shall receive and consider any objections which may be made to any entry therein, or to any omission therefrom, during the period of publication. (2) When such objections have been considered and disposed of in the prescribed manner, the Revenue Officer shall finally frame the record, and shall cause it to be finally published in the prescribed manner, and the publication shall be conclusive evidence that the record has been duly made under this Chapter."

When the draft record of *Mouzas* Paro and Jagodih was prepared and published, an objection was made by the Maharaja of Ramgarh on the 10th February 1913 that it might be recorded that the *shikmi taluk* was held in *jagirdari* right in lieu of service and that the word "resumable" might be entered in column 5 of *khewat* No. 2. On the 13th August 1913 Mr. N. N. Ghosh recorded an order declaring that the entry was correct and declining to make any alteration. The matter then appears to have been taken by the proprietor of Ramgarh to the Settlement Officer Mr. Sifton, who on the 1st February 1914 recorded the following order ;—

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(2) 70 Ind. Cas. 232; (1921) Pat. 369.

(3) 82 Ind. Cas. 879; 28 C. W. N. 145; (1923) M. W. N. 702; A. I. R. 1923 P. C. 217; 33 M. L. T. 408 (P. C.).

"Order in case under s. 89 of the Chota Nagpur Tenancy Act."

"I have heard Pleaders and Counsel upon the question of the nature of the terms of Rampur, Jagodih, Itkhori and Paroria and Barsote. I reserve my orders until I should have had an opportunity of studying the paper-books of two proceedings in the High Court on the relevancy and meaning of which the parties were at variance. It is not necessary for me at this stage to write a detailed judgment as the parties will have an opportunity after final publication of proceeding in a formal suit. After reading the evidence produced, I am satisfied that these tenures are not of the same origin as the *jagirs* founded by the Padma Raja and his predecessor. They have hitherto been regarded and treated as *shikmi* or *shamilat taluks* and they probably existed as independent properties before the Ramgarh Raj was established, and I can find nothing in their recent history to change the status of the holders of these *taluks* As they were not originated by the Ramgarh Raj I find them to be not resumable by the *zemindar*. They will be noted in the *khewat* as not liable to resumption." On the 24th March 1914 the Settlement Officer made the following supplementary order:—

"A petition has been filed by the Manager of the Court of Wards on behalf of the Ramgarh Raj enquiring under what section my order of 1st February 1914 was passed and whether it was a revisional order under s. 89, Chota Nagpur Tenancy Act in regard to the tenures Jagodih, Rampur, Itkhori, Paroria, and Barsote. The order was not an order of revision. There had been no objection under s. 83 in reference to any of the tenures except Jagodih and the order of the Assistant Settlement Officer who tried the case of the resumability of Jagodih held it to be non-resumable. The question of the nature of these tenures had been reserved by me for a full hearing when notice for orders were sent by the attestation officers. My proceedings were not and did not purport to be taken under s. 89 Chota Nagpur Tenancy Act and hence my order will not be any bar to a subsequent civil suit to determine the status of these tenures."

It is, however, contended by the respondents in that although the Settlement Officer did not think that his order was an order under s. 89 it was in fact such an order, and that under s. 258 no suit can lie so as to affect that order. Section 258 of the Chota Nagpur Tenancy Act runs as follows:—

"Save as expressly provided in this Act, no suit shall be entertained in any Court to vary, modify or set aside, either directly or indirectly, any decision, order or decree of any Deputy Commissioner or Revenue Officer in any suit, application or proceeding under s. 29, s. 32, s. 35, s. 42, s 46, sub-s. (4), s. 49, s. 50, s. 54, s. 61, s. 63, s. 65, s. 73, s. 74A, s. 75, s. 85, s. 86, s. 87, s. 89, s. 0 or s. 91 (proviso) or under Chs XIII, XIV, XV, XVI, or XVIII, except on the ground of fraud or want of jurisdiction (and every such decision, order or decree shall have the force and effect of a decree of a Civil Court, in a suit between the parties and, subject to the provisions of this Act relating to appeal, shall be final."

Now, was the Settlement Officer acting under s. 89 of the Act on the 1st February 1914? In my opinion he was not. In the first place, he did not revise any decision made under s. 83; but even if it were held that he did revise the entry in the draft record and that he passed an order within the meaning of s. 89, then the plaintiff's reply is that he is not seeking to vary, modify or set aside either directly or indirectly that decision. He is not concerned any longer with any entry in the draft record. The final record, having been published, he is bringing the present suit for a declaration that the final record is incorrect and this he is entitled to do under the general law. He might have proceeded under s. 87 of the Act for the correction of the entry, but he has chosen not to do so. He has an alternative remedy and s. 258 of the Act is no bar to the suit.

It was also argued that the learned Subordinate Judge was right in finding the issue of limitation against the plaintiff.

It is contended that as the *talukdar* first made his claim to proprietary rights in 1792 and repeated it in 1812 and 1813 the present suit is barred by the rule of 6 years' limitation under Art. 120 of the Limitation Act. The answer to this is that it was not necessary for the plaintiff to take notice of every challenge and that a new cause of action arose when an authoritative record of the title of the *talukdar* was made in the Survey and Settlement proceedings.

The learned Subordinate Judge also finds that on the death of the original grantee the possession of his successor became adverse if the tenure was a life *jagir*. In my opinion there is no evidence of any adverse possession. The tenancy was continued by the consent of both parties and as the evidence shows that the *jagirdar* was let into possession by the proprietor it is not open to him to plead adverse possession during the continuance of the tenancy. In my opinion the learned Subordinate Judge's findings on the issue on limitation cannot be sustained.

There is one other question which requires consideration and that is the effect of the decision of the *Sadar Diwani Adalat* in 1795 in the appeal, against Mr. Hunter's judgment of the 17th December 1793.

In my opinion that decision operates as *res judicata.* Although the case of the plaintiffs in that suit was that they were in possession of their *nankar* villages and although they did not pray for the recovery of those villages the point directly and substantially in issue was whether the plaintiffs had a *zemindari* or *milkiat* right in the 406½ villages in Pargana Chai. If they had succeeded in proving their *milkiat* right to those villages, their title to the alleged *nankar* villages which were in their possession would have also been established without a further suit. Indeed it was contended by the plaintiffs in their appeal that the fact that they were in possession of the *nankar* lands was proof of their ancient proprietary title. In my opinion the rule of constructive *resjudicata* applies here and it must be assumed that the question of the title of the plaintiffs to the *nankar* lands was also decided against them. If that view is correct, then the Jagodih Chiefs lost the right to claim in any subsequent proceeding proprietary rights to any of the 21 *mouzas* claimed by them as *nankar.* It follows then that they cannot how be heard to urge that proprietary right to the 41 villages now in suit.

The decision of this appeal does not depend on oral evidence. It depends upon the construction of and weight to be attached to documentary evidence and on matters of record in respect of which we are in as good a position to pronounce a decision as the learned Subordinate Judge.

In my opinion after giving due weight to the learned Judge's appreciation of the evidence in the case his decision cannot be supported and the appeal must be decreed with costs.

As First Appeals Nos. 163, 169 and 230 of 1922 were heard together, the judgment in each appeal will be governed by the material portions of the judgments in the other two.

R. L. *Appeal decreed.*
N. H.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 286 OF 1925.
April 13, 1926.
Present:—Mr. Justice Misra.
HULAS—DEFENDANT—APPELLANT
versus
Rani BARKATUNNISSA BEGAM—
PLAINTIFF—RESPONDENT.

Landlord and tenant—Parti *land—Presumption as to ownership of* taluqdar—*Possession of tenant—Adverse possession—Tenant, whether can put structures on land without permission of landlord—Tenant's right to retain possession over land held for more than 12 years.*

It is settled law in United Provinces that where a proprietor of a village is proved to be in rent collecting possession thereof, his possession over the lands situate in that village which bear the character of waste land, tank land and jungle land must be presumed. [p. 1035, col. 2.]

Thakur Sheo Narain Singh v. *Bodal Singh*, 8 O. C. 177 and *Sheikh Muhammad Alam* v. *Raghbir Singh*, 9 O. C. 33, referred to.

Where a person is admittedly a tenant, his possession of the land must be deemed to be in that very capacity unless it be shown by satisfactory evidence that it was of a contrary nature. [p. 1036, col. 1.]

Framji Cursetji v. *Goculdas Madhowji*, 16 B. 338; 8 Ind. Dec. (N. S.) 703, *Bechu* v. *Lachmi Kuar*, 8 Ind. Cas. 708, *Chokkalinga Naicken* v. *Muthusami Naicken*, 21 M. 53; 7 Ind. Dec. (N. S.) 394, *Ganpati Ambadas* v. *Raghunath Anant*, 4 Ind. Cas. 244; 33 B. 712; 11 Bom. L. R. 1087 and *Chandan* v. *Bahadur*, 68 Ind. Cas. 263; 4 L. L. J. 168; A. I. R. 19-2 Lah. 82; 62 P. L. R. 1922; 4 U. P. L. R. (L.) 106; 35 P. W. R. 1922, referred to.

The tenants residing in a village who are in the enjoyment of the land in front of their houses, the title of which is with the landlord, are not entitled, according to the custom prevailing in Oudh, to put up structures on the land without the consent of the landlord. [p. 1036, col. 2; p. 1037, col. 1.]

Jagannath v. *Gurdiyal Singh*, 10 Ind. Cas. 284 and *Ghatterpal* v. *Gajadhar Upadhya*, 25 Ind. Cas. 59, referred to.

If a tenant in a village has been in possession of a plot of land as *sahan darwaza* for more than 12 years, he obtains a right by such possession to remain in actual enjoyment of the land and the landlord cannot deprive him of such enjoyment. [p. 1037, col. 2.]

Gopal Krishna Jana v. *Lakhiram Sardar*, 14 Ind. Cas. 212; 16 C. W. N. 634, referred to.

Second appeal against the judgment and decree of the Subordinate Judge, Sitapur, dated the 20th March 1925, in Civil Appeal No. 45 of 1924, reversing that of the Additional Munsif, Sitapur, in Civil Case No. 163 of 1924, dated the 17th October 1924.

Mr. *K. S. Hajela*, for the Appellant.

Mr. *Rauf Ahmad*, for the Respondent.

JUDGMENT.—This is the defendant's appeal arising out of a suit for possession. The plaintiff, Rani Barkatunnissa Begam, is the proprietor of Taluka Ant in which is situate the village Mundyara which contains the land in suit. The plaintiff came to the Court on the allegation that the defendants are the two tenants residing in the village stated above and that they have recently made constructions of various character on the land in front of their houses without her permission. She, therefore, claimed possession of those plots of land and also asked for demolition of the newly constructed structures. The defence raised by the defendant No. 1, who alone contested the claim, was to the effect that the constructions complained of were more than 12 years old and that the plaintiff was not entitled to get them demolished, because the lands on which such constructions were made constituted the *sahan darwaza* (open spaces in front of house) of their houses. They pleaded limitation as a bar to the plaintiff's claim.

The learned Munsif of Sitapur who tried the case held that the constructions in dispute were not old constructions but had only been put up by the defendants two or three years before the institution of the suit, but the land in suit has been in the occupation of the defendants for more than 12 years and that the plaintiff had not established that she was in possession of this land within limitation. On these findings the learned Munsif dismissed the suit. The plaintiff *taluqdar* carried the matter further in appeal and the learned Subordinate Judge of Sitapur who heard the appeal came to a different conclusion. He held that the character of the land was *parti* (waste) and must be treated to be in possession of the *taluqdar*, who was the proprietor of the village and it was not, under the circumstances necessary for her to prove her possession of the land within limitation. He held also that the defendants were admittedly the tenants of the plaintiff and their possession of the plots in dispute which lay in front of their houses could not be treated as adverse. In that view of the case he decreed the plaintiff's suit for demolition of such of the structures as he held to be recent and also gave the plaintiff a decree for possession of the plots in dispute as held by her before. He, however, dismissed the plaintiff's suit for the demolition of such of the structures as he had found proved to have been built more than 12 years ago. The defendant No. 1 has now appealed to this Court and the learned Pleader for the appellant has contended in appeal that the appellant's possession over the plots in dispute should be held to have been adverse and that the plaintiff should not have been given a decree for demolition of the structures constructed by him on the plots in dispute. His argument was that the view taken by the Trial Court that the plaintiff ought to have proved her possession of the plots in dispute was a correct decision and should not have been reversed by the learned Subordinate Judge in appeal. His last contention was that in any case his client should not be deprived of the possession of the land in suit, inasmuch as it was proved from the plaintiff respondent's own evidence that the appellant had been in possession of the land for about 30 to 40 years.

As to the point that the plaintiff ought to have proved her possession of the land in suit within limitation and that the defendant-appellant had established his adverse possession, I am of opinion that the contention raised by the learned Pleader for the appellant must be overruled. It is a settled rule of law in this part of the country that where a proprietor of a village is proved to be in rent collecting possession thereof, his possession over the lands situate in that village which bear the character of waste land, tank land and jungle land must be presumed. If this were not the case it would be almost impossible for a landlord to prove his possession over the lands of this character. In *Thakur Sheo Narain Singh* v. *Bodal Singh* (1) it was held that where a *talukdar* sued for possession of waste land, tank land and jungle land situte in his *taluka* the *prima facie* evidence of his possession within 12 years anterior to the date of suit must be given, but in determining this question, evidence of the physical acts of enjoyment as user indicating possession was not necessary. The *talukdar's* title having been established, his possession should be presumed to exist unless possession is taken by another person in an exclusive manner. The *talukdar* was to be deemed in possession of such land without the actual user of it and the owner was not to be deemed to have been dispossessed of the land if trees were planted on the said land or if an act of otherwise trespassing on it had been committed. The same view was held in *Sheikh Muhammad Alam* v. *Raghbir Singh* (2), decided by Chamier, A. J. C. This rule of law has been consistently, so far as my knowledge goes, followed in the Province of Oudh and I am surprised to find that the learned Munsif took a contrary view of the matter. The land in suit admittedly lies in front of the house occupied by the defendants and they themselves call it as their *sahan darwaza* (open space lying in front of the house). The character of the land it is clear, was the same as described in the above cases. I am, therefore, of opinion that it was not necessary for the plaintiff *talukdar* to prove that she was in possession of the land in suit by proving actual acts of physical possession. She is admittedly the proprietor of the village and the lands are admittedly lands which can be described as *parti* and in the circumstances she must be deemed to be in possession of those lands.

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(1) 8 O. C. 177.

As to the contention of the learned Pleader for the appellant that his client's possession of the land was of adverse character, I regret I cannot agree with it. The only thing that has been proved in the case is that the defendants have been in possession of the land in suit in the sense that they have been enjoying it because it lies in front of their houses and an enjoyment of this character cannot be deemed to be adverse. In the case of *Thakur Sheo Narain Singh* v. *Bodal Singh* (1) already referred to by me, it was held that in order to dispossess an owner the plaintiff in possession must show that he asserted clearly that he claimed the right to hold possession as owner or his conduct must be such as would amount to the assertion of the intention to exclude the actual owner. No such evidence has been given in the case. The appellant, as remarked by the learned Subordinate Judge, is admittedly a tenant of the plaintiff and his possession of the land must be deemed to be in that very capacity, unless it be shown by satisfactory evidence that it was of a contrary nature. In *Framji Cursetji* v. *Goculdas Madhowji* (3) it was laid down that where a small piece of land which was of no present use to its owner and was convenient in many ways to a person having his house close to the land in suit to use it in various ways and he used it for such purposes for more than 12 years, such a user was insufficient to give a title to the land by adverse possession. This view of the law was also held in the late Court of the Judicial Commissioner of Oudh as will appear from the case reported as *Bechu* v. *Luchmi Kuar* (4), decided by Lindsay, A. J. C. It was held in that case that structures of purely temporary nature made by a tenant for the convenience of his house did not constitute such an assertion of rights on the part of the tenant as would justify the conclusion that he meant by erecting such structure to set up a claim to the ownership of the soil and, therefore, be an evidence of adverse possession. So far as I am aware this has been the rule of law consistently followed in these Provinces. A similar view was taken in *Chokkalinga Naicken* v. *Muthusami Naicken* (5) and in *Ganpati Ambadas* v. *Raghunath Anant* (6) and in *Chandan* v. *Bahadur* (7), decided by the Lahore High Court. I am, therefore, satisfied that the possession of the defendant-appellant over the plot in dispute cannot in any sense be regarded as adverse. His possession must be deemed to be that of a tenant and in the end of the argument the learned Pleader for the appellant almost conceded that position.

It was next contended that even if the possession of the appellant in respect of the land in dispute was proved to have been merely in the capacity of a tenant, he had still a right to put up the structures complained of. I do not agree with that contention. In my opinion the tenants residing in a village who are in the enjoyment of the land in front of their houses, the title of which was with the landlord, are not entitled, according to the custom prevailing in Oudh, to put up structures on the land without the consent of the landlord. It is one thing for a tenant to remain in enjoyment of the land as open space in front of his house and it is quite a different thing to put up structures on it or to enclose it by means of walls. The landlord may not object to his use of the open land situate in the *abadi* of a village, of which he happens to be the proprietor, but that would not give a right to the tenant to put up structures upon that piece of land and the landlord would be legitimately entitled to his remedy if he claimed it by coming to the Court for a relief to the effect that the sturctures complained of may be demolished. It would be perfectly within his rights to claim such a relief and in my opinion such a relief should be given to him. I am supported in this view by a case decided by the Allahabad High Court reported as *Jagannath* v. *Gurdiyal Singh* (8) and by another case decided by the same Court and reported as *Chatterpal* v. *Gajadhar Upadhya* (9) I, therefore, hold that the decree for the demolition of such structures in dispute as have been held by the learned Subordinate Judge to have been of recent date is a correct and proper decree and must be maintained.

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(2) 9 O. C. 33.

(3) 16 B. 338; 8 Ind. Dec. (N. S.) 703.

(4) 8 Ind. Cas. 768.

(5) 21 M. 53; 7 Ind. Dec. (N. S.) 394.

(6) 4 Ind. Cas. 244; 33 B 712; 11 Bom. L. R. 1087.

(7) 68 Ind. Cas. 263; 4 L. L. J. 168; A. I. R. 1922 Lah. 82; 62 P. L. R. 1922; 4 U. P. L. R. (L.) 106; 35 P. W. R. 1922.

There is, however, a further point which was urged by the learned Pleader for the appellant and it was to the effect that the defendant-appellant should not be deprived of the use of the land in suit as the land lying in front of his house and as his *sahan darwaza*. In my opinion this contention is quite correct. It has been proved by the three witnesses examined on behalf of the plaintiff, namely, Gouri P. W. No. 1, Bhaya Lal, P. W. No. 2, and Zalim P. W. No. 3, that the land in suit has been in possession of the defendant-appellant for a period of over 30 years. This long enjoyment has undoubtedly given the appellant a right to retain the land in his possession for being enjoyed as such and in this view of mine I am supported by a decision of the Calcutta High Court, which was cited before me by the learned Pleader for the appellant and which is reported as *Gopal Krishna Jana* v. *Lakhiram Sardar* (10). This was a case decided by Sir Lawrence Jenkins, C. J., and N. Chatterjee, J., and it was held that if a tenant had been in possession of a plot of land as a tenant for more than 12 years, he obtained a right by such possession to remain in actual enjoyment of the land and the landlord could not deprive him of such enjoyment I am in entire agreement with the principle laid down in this case and it appears to me to be clear from the evidence to which I have already referred that the defendant appellant has been in enjoyment of the land in suit as his *sahan darwaza*. The land in dispute lies in front of the appellant's house and also of other tenants who have their houses close by. The plaintiff is, therefore, not entitled to eject the defendant appellant from the possession of the land in suit by taking actual possession thereof.

I think that the learned Subordinate Judge when he said in his judgment that the plaintiff's claim should be decreed "for such possession of the plots in suit *as before*" he meant that the defendant was not to be dispossessed of the land in suit. I have, however, thought it proper that the matter should not be allowed to remain vague so that it may give rise to future disputes and I have, therefore, made it quite clear in my judgment that the plaintiff-respondent will not be entitled to take actual possession of the land in suit. She will, however, be deemed to be in proprietary possession of the land and the defendant will have no right to put up any structures thereon without the express permission of the plaintiff.

I have virtually maintained the decree passed by the learned Subordinate Judge and except a small modification which I have made as indicated in the above portion of my judgment, the decree passed by the Subordinate Judge shall stand. My order, therefore, is that this appeal, shall, subject to the modification indicated above, stand dismissed with costs.

G. H. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2666 OF 1920.

April 27, 1926.

Present:—Mr. Justice Broadway and
Mr Justice Fforde.

FATEH SHAH—PLAINTIFF—APPELLANT
versus
Musammat NURAN AND OTHERS—
DEFENDANTS—RESPONDENTS

Custom—Alienation—Gift—Sayyads of Basti Kesa

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(8) 10 Ind. Cas. 284.
(9) 25 Ind. Cas. 59.
(10) 14 Ind. Cas. 212; 16 C. W. N. 634.

in Okara Tehsil of Montgomery District—Gift of ancestral property to daughter's son.

Amongst Sayyads of Basti Kesa in the Montgomery District custom permits a gift to a daughter's son of ancestral property provided it is made in writing and is followed by possession. [p. 1038, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, Montgomery, dated the 30th August 1920.

Diwan *Mahesh Das*, for the Appellant.

Mr. *Muhammad Tufail*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by one Fateh Shah challenging a gift of ancestral land made by his father Bahab Shah in favour of *Musammat* Sahib Bibi, *Musammat* Saidan Bibi and *Musammat* Badshah Bibi, Bahab Shah's daughters by his wife *Musammat* Nuran. A declaration was asked for to the effect that the said gift would not effect the plaintiff's reversionary rights.

When the suit was instituted Badshah Bibi had died leaving a son named Madad Ali who was made a party under the guardianship of the Assistant Clerk of the Court. *Musammat* Sahib Bibi died without issue during the pendency of the suit which was dismissed, it being held that the parties who are Sayyads of Basti Kesa in the Okara Tahsil of the Montgomery District were governed by custom by which gifts of a portion of the ancestral property could be validly made to daughters in the presence of a son of the donor. Against this order of dismissal Fateh Shah preferred this appeal in November 1920 and while it has been pending in this Court Bahab Shah and *Musammat* Saidan Bibi have both died, the latter leaving no issue.

Fateh Shah himself has been brought on to the record as the legal representative of the father Bahab Shah and *Musammat* Nuran as that of *Musammat* Saidan Bibi and *Musammat* Sahib Bibi. She alone has contested the appeal through Mr. Muhammad Tufail. The case was remanded under O. XLI, r. 25, C. P. C. by an order of a Division Bench of this Court dated the 4th April 1925 and has now come up for disposal.

Although other matters were raised in the grounds of appeal the only point argued before us was whether the decision of the Trial Court on the question of custom was correct. Mr. Mahesh Das for the appellant urged that the evidence on the record did not justify the finding arrived at, while Mr. Muhammad Tufail contended that the finding was correct.

Fateh Shah is now in possession of the property which was the subject-matter of the gift and as pointed out by Mr. Mahesh Das, as Mr. Muhammad Tufail's clients have died without issue, the said property must revert to the heirs of the donor. A reference to the *Wajib-ul-arz* of Basti Kesa prepared at the Settlement of 1857 shows that the power to make a gift of ancestral property to a daughter's son was recognised provided the gift was made in writing and was followed by possession. Again the *Riwaj-i-am* of this Tahsil prepared in 1872 shows that gifts of lands to daughters were recognised and these entries are supported by two instances. A presumption of correctness attached to the entries in such Revenue Records.

In order to rebut the presumption the plaintiff produced cartain witnesses. P. W. No. 1 Chogatta, is a Churera of a neighbouring village and says that Sayyads "cannot gift ancestral land to daughters." P. W. No. 2 Nathu and P. W. No. 3 Bahadur are Bhattis and afford no assistance as they do not claim to know what the custom among Sayyads is. P. W. No. 4 Shamas Din is a Sayyad and the uncle of Bahab Shah. He says Sayyads cannot make gifts of this nature but had to admit that Taboo Shah, Bahab Shah's brother, had made such a gift. P. W. No. 5 Waryam, a Kharl, supports the plaintiff but gives his evidence in general terms. The evidence of P. W. No. 6 Imam Shah is similar to that of Waryam. P. W. No. 7 Taboo Shah while admitting that he made a gift to his daughter says that it was revoked later. At the same time he admits that the customs they follow are entered in the Settlement Records and have not altered since 1872. In this he is supported by P. W. No. 9 Mehr Shah. P. W. No. 8 Mulak Shah a Sayyad says generally that such gifts cannot be made but in cross-examination admitted that his uncle had made a gift to his daughters that had not been challenged. P. W. No. 11 Muhammad Amir a Lashari Biloch says that Sayyads follow the general agricultural custom which prohibits such gifts.

On the other hand for the defendants Sardar Ali and Hassan Shah both Sayyads, assert that gifts to daughters are recognised by custom and give instances. After a consideration of this evidence I am of opinion that the plaintiff's evidence does not rebut presumption of correctness that attaches to the entries in Revenue Records, which in the present case are further supported by the instances referred to by the defendants' witnesses. I would, therefore, dismiss the appeal but in the circumstances allow the parties to pay their own costs.

R. L. *Appeal dismissed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL NO. 22 OF 1924.
February 24, 1926.
Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.
Musammat SAKINA BEGAM—PLAINTIFF—APPELLANT
versus
Syed ALI HAIDER AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17 (1) (b), *49—Construction of document—Compromise recognising person as successor, effect of—Annuity created and charged upon estate—Registration, whether necessary.*

A petition of compromise recited that after the death of the applicant the respondent shall be her representative and successor and provided that so long as the estate in dispute was not transferred to the respondent on behalf of the applicant, a certain sum of annuity shall by monthly instalments ever remain payable from the said estate to the respondent, his heirs and representatives on behalf of the applicant, her heirs and representatives and that the said estate shall be liable for payment of the said annuity :

Held, (1) that upon a proper construction of the compromise the respondent was to succeed the applicant only in the event of a transfer being made by her in his favour either by way of gift *inter vivos* or by bequest and that so long as the estate did not vest in the respondent in either of these ways he was entitled to receive the annuity and in the event of his dying before the happening of that contingency his heirs and representatives would be entitled to the sum ; [p. 1041, col. 2.]

(2) that the compromise was an instrument of the nature described in s. 17 (1) *(b)* of the Registration Act and was compulsorily registrable and not being registered could not be received in evidence of any transaction affecting the estate. [p. 1042, col. 1.]

First appeal against a decree of the Subordinate Judge, Bahraich, dated the 5th January 1924.

Messrs. *Niamat Ullah* and *Naim Ullah*, for the Appellant.

Mr. *Bisheshwar Nath* for Mr. *Shahenshah Husain* and Messrs. *Mojiz Husain*, *Badri Prasad*, *Zahur Ahmed*, *Mohammad Hafees* and *Makund Behari Lal*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the First Subordinate Judge of Bahraich, dated the 5th of January 1924. The suit out of which this appeal arises relates to an estate called Vaira Qazi situate in the District of Bahraich. At the time of annexation of Oudh one Muzaffur Husain was the owner in possession of the estate and his name was entered in Lists I and III prepared under the provisions of the Oudh Estates Act, 1869. Under a gift *inter vivos* dated the 31st of May 1874, this estate devolved upon Kazim Husain, the only son of Muzaffar Husain, Kazim Husain died on the 12th of May 1894. *Musammat* Taiyaba Begam, the widow of Kazim Husain, succeeded to the estate of her husband under a Will, dated the 12th of May 1877 and held it till her death which occurred on the 17th of August 1918. *Musammat* Taiyaba Begam died intestate and the defendant No. 1, Ali Haider, who is the son of a brother of *Musammat* Taiyaba Begam, succeeded her by right of inheritance. Ali Haider has made several transfers of portions of the estate. The chief of such transferees are the defendants Nos. 2 and 3. Nawab Haji Sir Fateh Ali Khan and Badri Prasad respectively. Sir Fateh Ali Khan died during the pendency of the litigation and his son, Nawab Nisar Ali Khan has taken his place on the record of the case.

The plaintiff is the daughter of one Syed Ali, who was the son of a sister of *Musammat* Taiyaba Begam. Syed Ali died on the 1st September 1901. The plaintiff claims title to the entire estate of Vaira Qazi, the details of which are given in Appendix A attached to the plaint in the right of succession to the estate of her father, Syed Ali, who, according to her, had vested remainder in that estate falling into possession on the death of *Musammat* Taiyaba Begam. This is the second relief for which she prays. The first and the primary relief for which she asks is a decree for possession of a certain number of villages comprised within the estate, the details of which are given in Appendix B attached to the plaint. This relief she claims under a right of her own arising out of the events which we will state at length at the proper place in this judgment. Lastly, she claims an annuity at the rate of Rs. 3,000 per year and asks for decree for the recovery of the sum of Rs. 40,000 as the arrears of the annuity by the sale of the whole or a part of the entire estate. The details of the claim for annuity are given in Appendix C attached to the plaint. Her title to the annuity is again in the right of her deceased father. She does not ask for these reliefs collectively but for the one or the other of them according to the merits of the case.

We will now give a statement of facts which, according to the plaintiff, constitute her father's title to the estate and to the annuity. On this part of the case, there is very little controversy, if at all, as to facts. The matters in controversy are the inferences and legal effect of those facts. Almost immediately after the death of Kazim Husain dispute arose mainly as to possession and incidently as to title to succeed the Vaira Qazi estate. *Musammat* Taiyaba Begam on one side and Syed Ali on the other were the chief combatants. In consequence of this dispute the District authorities initiated proceedings under s. 145 of the Cr. P. C., and the estate went under attachment into the possession of the Magistrate with a direction that the parties were to seek their remedies in a Civil Court of competent jurisdiction. But before the proceedings ended under the order of the Magistrate, dated the 25th of July 1894 (Ex. 19), *Musammat* Taiyba Begam and Syed Ali both in opposition to each other, claimed title to the estate of Vaira Qazi. Syed Ali relied on an adoption made by Kazim Husain under a deed of the 9th of November 1893, (Ex. 2). He also relied on a document called *sipurdnama*, dated the 14th of November 1893 also executed by Kazim Husain under which it was said that Kazim Husain had placed Syed Ali in possession of the estate, (Ex. 3). Both the documents were registered in accordance with the law relating to registration of deeds in British India (See Syed Ali's written statement filed in the criminal proceedings under s. 145 of the Cr. P. C., dated the 18th of June 1894, Ex. 17). *Musammat* Taiyaba Begam, on the other hand, claimed title to the estate both by right of inheritance under the provisions of the Oudh Estates Act, 1869, and also under the Will of her deceased husband to which reference has already been made (See her written statement in the criminal proceedings, Ex. 18). Kazim Husain's Will of the 12th of May 1877 had some obvious defects. In the present case, however, we are not called upon to consider the effect of those defects. On this Will Kazim Husain merely signed his name on that date. There was no attestation of witnesses. He deposited the Will in the office of the Registrar of Lucknow under a sealed cover. Subsequently on the 1[illegible]th of January 1887, about ten years after, he withdraw it from the custody of the Registrar, opened the cover and got the Will registered. For the purposes of the registration he again signed the Will and was identified for the same purpose by two persons, who affixed their signatures in token of the identification. In a suit to which we will refer in greater details hereafter *Musammat* Taiyaba Begam claimed that the signatures of the two persons mentioned above made on the Will at the registration of it constituted sufficient attestation in law. This claim was upheld by a Bench of the late Court of the Judicial Commissioner of Oudh.

In the course of the criminal proceedings a compromise was effected between *Musammat* Taiyaba Begam and Syed Ali though it had no effect on the decision of the Magistrate. He maintained the attachment in respect of it which he had ordered at the beginning of the proceedings. This compromise is evidenced by two applications filed in those proceedings: one on behalf of Syed Ali, dated the 30th of June 1894, (Ex. 4) and another on behalf of *Musammat* Taiyaba Begam of the same date (Ex. 6). The plaintiff's claim for the possession of the estate and for the recovery of the annuity is founded on this compromise. This claim is denied by the defendants on various grounds which will be manifest as this judgment proceeds.

The learned First Subordinate Judge has rejected this claim mainly on two grounds, 1. That the compromise required registration and it is not registered and (2) that it was repudiated by the parties concerned. His decision is, of course, challenged in appeal but we are of opinion, that both the grounds are valid. We are further of opinion that the plaintiff's claim in so far as it rests on this compromise also fails on the ground that Syed Ali never acquired any title vested or contingent in the Vaira Qazi estate under that compromise. Before proceeding further with this matter we may mention the fact that Syed Ali's application is not of much consequence in this connection excepting so far that it contains an unequivocal admission of the validity of Kazim Husain's Will of the 12th of May 1877 and of *Musammat* Taiyaba Begam's title to the estate both as the 'heir' and 'successor' of Kazim Husain and refers to *Musammat* Taiyaba Begam's application in proof of the compromise. *Musammat* Taiyaba Begam's application must be quoted in full. It is as follows :—

"*Syed* KARAMAT HUSAIN—PLAINTIFF

versus

Syed ALI—DEFENDANT.

Charge under s. 145/146, Cr. P. C.

In the above noted case the applicant begs to submit as under :—

"1. That Syed Ali has admitted the deed of Will, dated 12th May 1877, executed by the applicant's husband Syed Kazim Husain, deceased, *taluqdar* of Vaira Qazi and has acknowledged that the applicant is the heir, representative and successor of the late *taluqdar*, that she is in proprietary possession of the Vaira Qazi estate and of other possessory (*sic*) and non-possessory (*sic*) property and that Syed Ali's own possession over the said estate is on behalf and with the permission of the applicant.

This application is, therefore, filed and it is prayed that the real and actual possession of the applicant (Taiyaba Begam) over the said estate be confirmed and maintained, and Syed Ali and this applicant have arrived at a compromise as per following conditions.

2. That the applicant admitted Syed Ali as the adopted son of her husband and of herself.

3. That Syed Ali, after the death of the applicant, shall be her representative and successor.

4. That Syed Ali shall have the power to attend the *Durbar* of the Lieutenant-Governor of the North-Western Provinces and the Chief Commissioner of Oudh in place of applicant.

5. That on condition of Syed Ali's obedience and allegiance to the applicant, the management and supervision of the said estate shall remain vested in him on behalf of the applicant in the same way as it was in the lifetime of Syed Kazim Husain deceased.

6. That as long as the said estate is not transferred to Syed Ali on behalf of the applicant Rs. 3,000 annually, shall by monthly system, ever remain payable from the said estate, to Syed Ali, his heirs and representatives on behalf of the applicant, her heirs and representatives, and the said estate shall be liable for the payment of the said annuity.

I do hereby declare that the contents of the application are correct and true.

(*Sd.*) Taiyaba Begam, with the pen of Shafi.

Haider, her brother and general agent.

Petition of *Musammat* Taiyaba Begam, widow of Syed Kazim Husain, deceased, *taluqdar* of Vaira Qazi, dated 30th June 1894."

(*Sd.*) Shafi Haidar."

It will be seen that Syed Ali's admission of Kazim Husain's Will and of *Musammat* Taiyaba Begam's title as his "heir, representative and successor" is again recited in para. 1 of the application. In para. 2, the deed of adoption put forward by Syed Ali is not mentioned at all but there is an admission on behalf of *Musammat* Taiyaba Begam of Syed Ali's status as the "adopted son" of her deceased husband and what is more significant 'of herself' a position which Syed Ali had never claimed. Paragraph 3 contains a declaration of Syed Ali's status as a "representative and successor" of the lady. There are no words of gift *inter vivos* or testamentary, contingent or vested, in respect of the title to the estate of Vaira Qazi in favour of Syed Ali. When para. 3 is read in the light of the provisions made for the annuity in para. 6 of the application and of the language of that paragraph the irresistible conclusion is that Syed Ali was to succeed *Musammat* Taiyaba Begam only in the event of a transfer being made by her in his favour either by way of a gift in present or testamentary. It is only in this manner that the two paras 3 and 6 can be re-conciled. The vernacular words used in the first portion of para. 6 are these *jab tak ilaqa mazkur minjanib saela ba haq Syed Ali muntaqil ho*. These words are not accurately translated in the printed record. One of us has translated them as follows :—

"So long as the said estate is not transferred from the side of the appellant in favour of Syed Ali." In other words so long as the estate does not vest in Syed Ali either under a gift *inter vivos* or under a bequest he shall be entitled to receive the annuity and in the event of his dying before the happening of that contigency his heirs and representatives shall be entitled to the same. *Musammat* Taiyaba Begam died without making either a gift or a bequest of the estate and Syed Ali predeceased her. Any of Syed Ali's heirs has, therefore, no title to the estate under the compromise of the 30th of June 1894. On this interpretation the plaintiff's claim in respect of relief B fails altogether.

As regards relief C relating to the recovery of the annuity the application of the 30th of June 1894 (Ex. 6) is inadmissible in evidence to prove any title to the annuity. There is no doubt whatsoever that the application for the first time created a charge on the estate in respect of that annuity in favour of Syed Ali the benefit of which was to descend on his heirs and representatives. It is, therefore, an instrument of the nature described in s. 17 (1) (*b*) of the Indian Registration Act, 1908, and not being registered cannot be received as evidence of any transaction affecting the estate (*vide* s. 49 of the Indian Registration Act).

The construction placed on Ex. 6 on behalf of the plaintiff is that it created a life-estate in favour of *Musammat* Taiyaba Begam and a vested remainder in favour of Syed Ali in the Vaira Qazi estate. Apparently the learned First Subordinate Judge has accepted this interpretation as a correct one. We are unable to adopt it. We have given our interpretation in the preceding paragraph. Assuming however that the plaintiff and the learned First Subordinate Judge are correct, we agree with the latter that the application was compulsorily registerable. It would then fall under either cl. 1 (*a*) or cl. 1 (*b*) of s. 17 sub-s. (1) of the Indian Registration Act and under s. 49 of the same Act is inoperative altogether. That the charge for the annuity of the life-estate and the vested remainder were created by means of a compromise will not make the application less compulsorily registrable. See the case of *Umrao Singh* v. *Lachhman Singh* (1). In our judgment it was not in recognition of any pre-existing right in favour of Syed Ali that the compromise was made by *Musammat* Taiyaba Begam. On the contrary her title as the full owner in terms of her husband's Will was most unequivocably recognised and Syed Ali according to our interpretation was held out a bare hope of succession in case the lady ever chose to exercise her powers of disposition in his favour. Syed Ali only secured on his side empty words of a declaration that he was the adopted son of the lady's husband and of the lady herself and a possible successor to the lady.

On the question as to whether the settlement of the 30th of June 1897 was acted upon or not we agree with the learned First Subordinate Judge that the balance of evidence is in favour of a negative answer to the question. Both sides repudiated it even before the ink was dry. After the proceedings under s. 145 of the Cr. P. C. had closed Syed Ali made an application to the Court of Revenue at Bahraich for the entry of his name in place of Kazim Husain deceased in respect of the Vaira Qazi estate (Ex. B-3 dated the 7th of September 1894). In this application Syed Ali imputed fraud to *Musammat* Taiyaba Begam's agent in the matter of the compromise and challenged the validity of the Will of the 12th of May 1877. He asserted that the terms of the compromise were not as were set forth in *Musammat* Taiyaba Begam's application (Ex. 6) but that they were to the effect that " the entire estate shall remain under the management of the petitioner (that is Syed Ali) as a proprietor and the widow shall receive only monthly allowance in cash." He wound up the petition with a prayer for mutation of names in respect of the Vaira Qazi estate on the ground of his title under cl. (5) of s. 22 of Act I of 1869. (Exhibit B-3). On the 27th of September 1894 *Musammat* Taiyaba Begam filed a counter-application asking for mutation of names in her favour (Ex. 20). In this application she asserted her title to the estate on the basis of the Will of the 12th of May 1877 and took advantage of Syed Ali's admissions contained in his application of the 30th of June 1894 as to the validity of the Will and as to her proprietary possession of the estate. She also claimed title as an heir under s 22, cl. (7) of Act I of 1869. The controversy as to the title to the estate was intended perhaps to be set at rest by the applications of the 30th of June 1894, was revived with full force by these applications for mutation of names. Syed Ali lost the case for mutation of names in the first Court but challenged the decision of that Court by way of an appeal to the Commissioner of the Fyzabad Division. A certified copy of the judgment of the Commissioner is on the record (Ex. 22). It completely brings into light the hostile attitude of Syed Ali and of *Musammat* Taiyaba Begam as against each other in respect of their claims of succession to the Vaira Qazi estate. The plaintiff says that the compromise was acted upon by the payment of the annuity for which provision was made in para. 6 of *Musammat* Taiyaba Begam's application. On the merits of the case we are not satisfied that the plaintiff has succeeded in establishing this part of her case. It is admitted by the plaintiff that the payment of the annuity ceased soon after 1907 and in agreement with the learned First Subordinate Judge we hold that it has not been proved that it was paid previously. In the circumstances of the case it is highly improbable that this annuity was ever paid either to Syed Ali or after his death to his heirs. The general effect of the evidence in the case is that soon after the termination of the controversy in the mutation case Syed Ali settled down to a life of submission to *Musammat* Taiyaba Begam. He lived with her and died while living with her. His widow and children also lived with *Musammat* Taiyaba Begam and were supported by her. The lady in spite of Syed Ali's hostility in the past seems to have taken him and his family back into her affections In these circumstances no occasion could have arisen for payment of any annuity on the part of *Musammat* Taiyaba Begam. The needs of Syed Ali and his family were all met with the income of the estate which came into the hands of the lady. Any benefit, therefore, pecuniary or otherwise, which Syed Ali and his family after his death derived from the profits of the estate or of any portion of it cannot safely be attributed to a recognition by *Musammat* Taiyaba Begam of any claim to the annuity. As we are in agreement with the Court below on this question of fact it is not necessary to pursue the matter further. But before we part with it we may mention that at the hearing of the appeal the plaintiff's learned Advocate laid great stress on certain admissions made on behalf of *Musammat* Taiyaba Begam in the proceedings of a case which was instituted against her by Syed Husain brother of Syed Ali in May 1906. In this case Syed Husain claimed title to the estate as against *Musammat* Taiyaba Begam in the right of his brother Syed Ali deceased. The title was based on the deed of adoption of the year 1893 to which reference has already been made and the Will in favour of *Musammat* Taiyaba Begam was challenged. A copy of the judgment of the Trial Court in that suit is on the record (Ex. B-15). The suit was dismissed. It appears that in defending that suit on behalf of *Musammat* Taiyaba Begam her agent and her Pleaders relied on the compromise of the 30th of June 1894 and the payment of the annuity thereunder (see Exs. 25, 26, 27 and 49). These statements made by her agent and her Pleaders were certainly binding on the lady in the suit in which they were made. But for the purpose of using them as the lady's admissions in the present case we should require evidence to bring them home to the lady herself. *Musammat* Taiyaba Begam was a *pardanashin* lady.

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(1) 10 Ind. Cas. 285; 38 I. A. 104; 15 C. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 107; 13 Bom. L. R. 404; 21 M. L. J. 637; 33 A. 344; 14 O. C. 9; (1911) 2 M. W. N. 242 (P. C.).

The first document which contains the admission relied upon is Ex. 49 dated the 2nd of July 1906. This is a petition filed in that suit by Lachman Singh, *Musammat* Taiyaba Begam's general agent. It is not the petition of defence or the written statement of *Musammat* Taiyaba Begam. It is only an application under s. 32 of the C. P. C., 1882, asking that the minor daughters of Syed Ali might be made a party to the suit. Before any other written statement or application was filed on her behalf *Musammat* Taiyaba Begam had left India and gone to Karbala in Mesopotamia. In the circumstances we agree with the Court below that these statements made on behalf of *Musammat* Taiyaba Begam cannot be safely relied upon in proof of the payment of the annuity in pursuance of the compromise of the 30th of June 1894. On these grounds and in agreement with the First Subordinate Judge we are of opinion that the plaintiff's case in respect of the reliefs B and C fails.

Now we come to that part of the plaintiff's case on which the relief A rests. This case is stated in para. 11 of the plaint. The learned First Subordinate Judge has refused to grant the relief A as well to the plaintiff. We have come to the conclusion what she is entitled to it. In proof of it the plaintiff relies upon two documents and upon the oral testimony of her witness in relation thereto. According to our judgment the evidence proves that while *Musammat* Taiyaba Begam was on her death-bed apprehensions were entertained as to the course of succession in respect of the Vaira Qazi estate after her death. Besides Muhammad Hasan and Shahamat Husain, with whom we are not concerned, the plaintiff honestly contemplated a rightful claim to the estate and the annuity in the right of her deceased father, Syed Ali, which according to her, arose by virtue of the settlement of the 30th of June 1894. The defendant, Ali Haider, on the other hand, claimed succession to the whole estate by right of inheritance to his own aunt, *Musammat* Taiyaba Begam. The plaintiff and the defendant agreed that there shall be no dispute between them when the succession opened on the death of *Musammat* Taiyaba Begam. The result was that five days before the death of *Musammat* Taiyaba Begam, that is on the 12th August 1918 Ali Haider and Zakir Mehdi, the husband and general agent of the plaintiff and on her behalf solemnly swore in writing that two-thirds of the estate shall go to Ali Haider and the remaining one-third to the plaintiff in satisfaction of her claim to the estate and to the annuity. Each party also agreed to bear proportionate liability for the debts then existing. Exhibit 31 is in the form of an affidavit and proves the contemplated settlement as stated above. This Exhibit is proved by the evidence of Zakir Mehdi and Muhammad Raza, who is its scribe. The learned First Subordinate Judge also holds its execution proved but he is of opinion that it being an unregistered document does not affect the immoveable property. Exhibit 31 was not produced as a deed of title to any immoveable property. It merely forms a link in the chain of proof of the plaintiff's case as stated in para. 11 of the plaint.

The next document in proof of this part of the plaintiff's case is Ex. 7. It purports to be a draft of a deed of gift which Ali Haider had promised to execute in favour of the plaintiff in performance of the settlement effected between them. The learned First Subordinate Judge holds that it bears the signature of Ali Haider. We agree with him. Then he says "Even if the Ex. 7 is not a forgery altogether it is certainly a document which has been "tampered with." In this opinion of the Court below we are unable to concur. Its finding that it has been tampered with is based on suspicions for which in our judgment there is no foundation. We have examined the original document carefully and have also carefully considered the evidence given by the plaintiff in proof of it. The scribe of the document, Zakir Husain (P. W. No. 3) is a witness in the case. As regards the word "*guzara*" on the first page of the draft, which the Court below thinks an interpolation, not a single question was put to the witness when he was in the box. It should be remembered that Zakir Husain was making a fair copy of the first and original draft which was made by Mehdi Haider. It may be that in making the copy he omitted the word "*guzara*" in the first instance and added it afterwards. But apart from that explanation we find nothing suspicion in the position of the word "*guzara*" on the paper of Ex. 7. The size of the letters forming the word "*guzara*" is in our opinion exactly the same as of the rest of the letters in the document. As to the addition of the sentence after the word *faqat* at the end of the document Zakir Husain tells us clearly how it came to be made. His story is that the addition was made at the desire of Zakir Mehdi, the plaintiff's husband, to which Ali Haider had agreed. According to him Ali Haider had added those words to the first draft. The learned First Subordinate Judge's criticism that the addition is "in much inferior language" and that it is "unidiomatic" has no force whatsoever. In the first place, it is not so. In the second place it did not form part of the original draft made by Mehdi Haider but as already explained it was the composition of Ali Haider made at the time when the writing of the fair copy had nearly finished. The difference in the gender of the two words "*dia*" and "*di*" is too subtle for a man of ordinary ability to grasp. Indeed the learned First Subordinate Judge seems at first to have thought that the sentence after the word *faqat* was put in the evidence as if it formed part of the first draft. He says "I have no doubt that the addition is not composed by the same man who has composed the rest of the draft". He is under a misapprehension. Zakir Husain's evidence is to the effect that the addition was made by Ali Haider as already stated. To the same effect is the statement of the plaintiff's husband, Zakir Mehdi. He says that "Ali Haider had amended the draft (that is the draft prepared by Mehdi Haider and for this reason Ex. 7 is not the exact copy of the draft prepared by Mehdi Haider. The amendment was made when the draft was faired out. The correction were made by Ali Haider personally." It appears that the learned First Subordinate Judge realized the true effect of the evidence at a late stage of his judgment; but he adheres to this opinion for the reason that the addition is not attested by Ali Haider. Again he suspects that the list of the villages at the end of the draft is an interpolation. This suspicion he bases on the position of the list in relation to Ali Haider's signature and the words "attested" on Ex. 7. He adds "If the intention of the parties was to make the draft of binding nature and if it was not a mere proposal there is no reason why it was not attested". We see nothing suspicious in the relative positions of the list and the signature of Ali Haider and of the words "attested" in two places. Besides the position is of no consequence when there is direct evidence both as to the signature of Ali Haider and to the list in the draft. In the body of the draft there is a specific reference to "the property detailed below". There is, therefore, no doubt that a list of villages was intended to be added at the foot of the draft. Zakir Husain, the scribe, says that Ali Haider at first made a list of the villages on a separate piece of paper. He had then dictated the list to the witness who wrote it on the draft. He adds that Ali Haider signed it in his presence and he identified Ali Haider's signature on the document. To the same effect is the evidence of Zakir Mehdi. The learned First Subordinate Judge seems to have omitted to consider the fact which in our opinion is of great importance that the draft not only bears the signature of Ali Haider in his own handwriting but that in the same handwriting is the endorsement "*yeh masaoda baham manzur hai*" (this draft is agreed upon by the parties). Finally he thinks that the so-called interpolations were made with the object of making the document a draft of a deed of an irrevocable gift; without them the gift would be revocable. Here again the learned First Subordinate Judge is in error. In the body of the draft we find the following "and also in return for the maintenance (*guzara*) and all sorts of present and future rights". The draft, therefore, without the suggested interpolations, evidences a mutual and amicable settlement of claims and there could be no question of revocation had Ali Haider perfected the settlement to which he had agreed.

According to the evidence one part of the settlement was the release by *Musammat* Sakina Begam of all her claims against the Vaira Qazi estate in favour of Ali Haider. A draft of a deed of release was accordingly also written and signed by Zakir Mehdi on behalf of the plaintiff as her agent (vide Zakir Mehdi's evidence at page 64 of the printed record) and this draft was handed over to Ali Haider. It is well-established by the evidence on the record that every act done by Zakir Mehdi was done by him with the consent and for the benefit of the plaintiff. The plaintiff has never repudiated the acts of Zakir Mehdi. On the contrary, she has constantly ratified them and stood by the settlement as would appear from applications of the 13th of September 1918 (Ex B 10) and of the 30th of September 1918 (Ex. 33 paras. 9 and 10). *Qui facit per alium facit per se.* We are, therefore, unable to attach any importance to the opinion of the learned First Subordinate Judge that the plaintiff is not entitled to any relief on this part of the case for the reason that the acts of her husband are not shown to have been done by him under the authority of his wife. There is some corroborative evidence also which is to be found in the statements of Khadim Husain (P. W. No. 4) and Zaigham Ali (P. W. No. 6). The strongest reason for accepting the evidence of the plaintiff's witnesses on this part of the case as substantially true is that it is wholly unrebutted. Ali Haider has not come into the witness-box to contradict it. The learned First Subordinate Judge has given no satisfactory reasons for discrediting the evidence of these witnesses. In a matter of the nature of this settlement no strangers could have any place in the negotiations. Zakir Mehdi is the husband of the plaintiff and Zakir Husain is a relation of Zakir Mehdi. This relationship, therefore, is no ground for disbelieving the testimony of these persons. Considering the entire circumstances of the case it appears to us that they are the most natural witnesses and they relate a story which is highly probable and consistent with other admitted and proved facts of the case.

The essence of the transaction which we hold as proved is a family settlement. The true nature of such a settlement is well-stated, if we may respectfully say so in the case of *Ram Nirunjun Singh* v. *Prayag Singh* (2) and we do not think that it is necessary for us to add anything to it. There is nothing in law to prevent us from giving effect to the contract for the settlement which we find proved in this case. If a primary relief as to the specific performance of the contract is necessary there is no reason why it may not be granted in the present case. There is no bar of limitation and the relief is specifically incorporated in relief A of the plaint. Clause (*c*) of s. 23 of the Specific Relief Act, 1877, clearly provides for such a case. But as such a relief is merely ancillary to the main relief for possession we are of opinion that the merits of the case will be satisfied if a decree for possession is granted in respect of property entered in Appendix B of the plaint.

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(2) 8 C. 138; 10 C. L. R. 66; 4 Ind. Dec. (N. S.) 88.

As regards the transferees, we agree with the finding of the learned First Subordinate Judge that they had notice that the plaintiff had a claim against their transferor Ali Haider. In the circumstances they cannot be treated as transferees in good faith without notice. Some of these transfers are also *pendente lite.*

The result is that we allow this appeal, set aside the decree of the lower Court and grant relief A. to the plaintiff with proportionate costs in both the Courts. Reliefs B and C are rejected.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL
No. 2175 OF 1924.
January 27, 1925.
Present:—Mr. Justice Martineau.
SHIV RAM AND OTHERS—PLAINTIFFS
—APPELLANTS
versus
Musammat ISHRI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 20—Civil Procedure Code (Act V of 1908), s. 16—Property situate in Burma and at Ludhiana—Probate taken out in Burma—Suit for administration of estate—Jurisdiction.

A suit for a declaration that the Probate proceedings shall not affect the plaintiffs and for the administration of the estate is not a claim for the determination of any right to or interest in immoveable property within the meaning of s. 16, C. P. C., and the mere fact that part of the property is situate at a particular place does not confer jurisdiction on the Court at that place. Such a suit would be entertained by the Court at the place where the Probate is taken out.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Ludhiana, dated the 18th August 1924.

Lala *Fakir Chand*, for the Appellants.

Mr. *M. C. Bakhsi*, Lala *Badri Dass*, R. B., and Lala *Nawal Kishore*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the Senior Subordinate Judge of Ludhiana returning a plaint for want of jurisdiction.

The plaintiffs allege that they and Indar Singh were members of a joint Hindu family owning property in the Ludhiana District and in Burma and that Indar Singh having died they are entitled to the property by survivorship. Indar Singh made a Will, of which Probate has been obtained by the defendant Parhlad Rai in Burma. The plaintiffs have brought a separate suit for a declaration of their title to the property. In the present case they ask for a declaration that the Probate proceedings shall not effect them and for the administration of the estate left by Indar Singh. The Senior Subordinate Judge has held that this suit is not triable in the Ludhiana District and I agree with him.

Section 16 of the C. P. C. does not apply, the claim for the estate to be administered not being a claim for the determination of any right to or interest in immoveabe property, so that the mere fact that part of the property to be administered is situate in the Ludhiana District will not give the Ludhiana Court jurisdiction. The question of jurisdiction has, therefore, to be determined by s. 20. Parhlad Rai is residing in Burma and the cause of action arose in Burma having been afforded by the Probate proceedings taken by Parhlad Rai in Burma. Consequently the suit cannot be tried in the Ludhiana District.

The appeal is accordingly dismissed with costs.

R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 331 OF 1924.
February 5, 1926.
Present :—Mr. Justice Devadoss.
THONDIYIL PUTHALATH UKKARAN
NAIR—DEFENDANT—PETITIONER
versus
THONDIYIL PONNIGARI UKKARAN
NAYAR—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 15 (2)—Vendee, default by, to pay kist—*Payment by vendor in whose name* patta *continues to stand—Suit by vendor for recovery of amount, whether cognisable by Small Cause Court—Plaintiff, right of, to personal decree—*Kist *for more than three years, whether recoverable*

Where a vendee undertook to pay the revenue payable on the land and committed default therein, and the vendor, in whose name the *patta* continued to stand, was compelled to pay, in a suit by the vendor to recover the money in a Small Cause Court:

Held, (1) that the plaintiff was entitled to a personal decree;

(2) that the suit was cognisable by the Small Cause Court;

(3) that plaintiff was entitled to recover only three years' *kist*.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Payoli, in S. C. S. No. 171 of 1925.

Mr. *T. S. Viswanatha Iyer*, for the Petitioner.

Mr. *S. Venkatachala Sastry*, for the Respondent.

JUDGMENT.—The first point raised in this petition is that the District Munsif had no jurisdiction to try the case as the relief which could be granted to the plaintiff is not a relief which a Small Cause Court is empowered to give, *viz.*, mortgage-decree. The argument is that the defendant who is in possession of property is liable to pay the tax on the property and when the *pattadar* pays the tax, he can only have a remedy against the land in the same way as the Government would be entitled to proceed against it, and the defendant not being a *pattadar* s. 5 of the Revenue Recovery Act (Madras) II of 1861, has no application to him. This point was not raised before the District Munsif. His contention there was that the suit was not maintainable not on the ground that the Small Cause Court could not give a mortgage decree against the defendant but on the ground that that *patta* had not been transferred to the defendant and, therefore, he was not liable to pay the revenue. The point not having been raised in the first Court, I do not think the defendant should be allowed to raise it in this Court. The suit as framed was a small cause suit and the relief prayed for also was one within the competency of the Small Cause Court to grant, and the relief granted was only for payment of money. That being so, the frame of the suit and the relief claimed were all within the cognizance of the Small Cause Court and the defendant could have pleaded that the suit as framed was improper and that a suit should have been differently framed and such suit would not be within the cognizance of the Small Cause Court. He not having taken the point before the District Munsif is not entitled to take the point now.

The next contention is that the plaintiff cannot obtain a personal decree against the defendant, and he relies on *Subramania Chetty* v. *Mahalingaswami Sivan* (1) and *Boja Sellappa Reddy* v. *Vridachala Reddy* (2). In *Boja Sellappa Reddy* v. *Vridachala Reddy* (2) it was found that the payment was a voluntary payment and in *Subramania Chetty* v. *Mahalingaswami Sivan* (1) it was found that the mortgagee paid the *kist* on the property not in his capacity of *pattadar* but in his capacity of a mortgagee. In a recent case C. R. P. No. 489 of 1923, Mr. Justice Krishnan held that the remedy which is open to a *pattadar* who pays *kist* against the owner of the land who is bound to pay it is not by a personal decree but by a decree against the property. These cases have no application to the present case as the District Munsif finds that there was a special agreement between the parties that the revenue payable on the plaint property was to be paid by the *tarwad* of the defendant; and from the previous conduct of the parties it is clear that the plaintiff paid the revenue on the land on behalf of the defendant. That being the course of conduct between the parties, it is not now open to the defendant to contend that the plaintiff is not entitled to obtain a personal decree against him. The District Munsif has given a decree for the revenue for four years on the ground that Ex. I which is a registered sale-deed provides for the payment of *cist* by the defendant. Under that document, the vendee, *i.e.*, the defendant, was asked to pay assessment. That would not enable the plaintiff, land-holder, to claim *kist* for more than three years prior to the date of the suit. The decree will, therefore, be modified by giving the plaintiff a decree only as regards the three years' *kist*. Each party to bear his own costs.

V. N. V. *Decree modified.*

(1) 3 Ind. Cas. 624; 33 M. 41; 19 M. L. J. 627; 6 M. L. T. 198.

(2) 30 M. 35; 16 M. L. J. 569; 1 M. L. T. 323.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2261 OF 1925.
March 25, 1926.
Present:—Mr. Justice Jai Lal.
BAHADUR—DEFENDANT—APPELLANT
versus
SAGHAR—PLAINTIFF—RESPONDENT.

Adverse possession—Possession follows title—Principle, application of.

The presumption that possession must be deemed to follow title arises only when there is no definite proof of possession by either party in the case of land incapable of actual possession owing to its nature.

Second appeal from a decree of the District Judge, Jhelum, dated the 12th June 1925, reversing that of the Subordinate Judge, Fourth Class, Jhelum, dated the 18th February 1925.

Mr. *Parkash Chandra* for Mr. *Muhammad Azam Khan*, for the Appellant.

Mr. *N. C. Mehra*, for the Respondent.

JUDGMENT.—Three *khasra* numbers were purchased by one Haidar. The sale in favour of Haidar was pre-empted by the respondent Saghar who in execution of his decree for pre-emption obtained possession of the three *khasra* numbers in 1923. Bahadur appellant thereupon instituted a suit under s. 9 of the Specific Relief Act and obtained possession. Saghar then instituted the suit out of which this second appeal has arisen for possession of three *khasra* numbers. The District Judge has held that in regard to two of the *khasras* numbers Bahadur has proved that he had been in adverse possession thereof for more than 12 years. He has, therefore, dismissed the suit with regard to them. The present appeal relates to *khasra* No. 581. This land was not cultivated but in the Revenue Records Bahadur had been shown to be in actual possession throughout. The fact that Bahadur obtained a decree under s. 9 of the Specific Relief Act also shows that he was in actual possession of this *khasra* numbers. The District Judge on the findings that Saghar is the owner of the land, that it is not cultivated, and that Bahadur could not be in adverse possession of uncultivated land, has decreed the suit as regards *khasra* No. 581. In my opinion this view of the learned District Judge is erroneous. The presumption that possession must be deemed to follow title arises only when there is no definite proof of possession by either of the contending parties, in the case of land which is incapable of actual possession owing to its nature. In this case Bahadur has been and is in possession of *khasra* No. 581. Saghar or his predecessors-in-interest have not been proved to have been in possession of the *khasra* number at any time within 12 years of the suit except on one occasion when he was ejected as a result of the suit under s. 9 of the Specific Relief Act. I hold, therefore, that Saghar's suit as regards *khasra* No. 581 should also have been dismissed and accepting this appeal dismiss it with costs throughout.

R. L. *Appeal accepted.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 317 OF 1922.
February 5, 1926.
Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.
CHARAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
GANESHI LAL—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 82—"Contract to contrary," meaning of—Contract between mortgagor and mortgagee not providing manner of liability of different properties—Effect—Subsequent purchasers, right of—Vendee's right to avail of contract between his vendor and another vendee.

The expression "a contract to the contrary" in s. 82, Transfer of Property Act, means a contract between the mortgagor and mortgagee. Therefore, in the absence of any contract between a mortgagor and his mortgagee that the several properties mortgaged are liable in any other manner than that contemplated by the section, neither of the purchasers of the properties subsequent to the mortgage can as against the mortgagee set up a case that the properties are not rateably liable to contribute to mortgagee's debt. [p. 1051, col. 1.]

Ramabhadrachar v. *Srinivasa Ayyangar*, 24 M. 85, relied on.

A vendee cannot avail himself of a personal covenant between his vendor and another vendee. [p. 1051, col. 2.]

Jamna Das v. *Ram Autar Pande*, 13 Ind. Cas. 304; 34 A. 63; 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) M. W. N. 32; 15 C. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J. 1158; 39 I. A. 7 (P. C.) and *Jamna Das* v. *Ramautar Pande*, 2 Ind. Cas. 460; 31 A. 352; 6 A. 427, referred to.

First appeal from a decree of the Subordinate Judge, Aligarh, dated the 1st May 1922.

Dr. *K. N. Katju*, for the Appellant.

Dr. *M. L. Agrawala*, Messrs. *P. L. Banerji* and *Panna Lal*, for the Respondents.

JUDGMENT.—One Bijai Indar Singh was the owner of a share in *Mauza* Kheria Gurdeo and a share in *Mauza* Mirpur in the Aligarh District. On the 8th of November 1906 he mortgaged these shares to one Mangal Sen as security for the sum of Rs. 8,000. From 1906 onwards he appears to have been in difficulties and on the 19th of March 1912 one Kishen Singh had obtained a decree against him on a mortgage which decree was under execution in 1914. On the 19th of May 1914 Bijai Indar Singh sold the property Kheria Gurdeo to Sher Singh, the father of the plaintiffs for the sum of Rs. 33,000. In the conveyance from Bijai Indar Singh to Sher Singh occurs the following passage:—

"The property sold is declared to be free from all kinds of claims, hypothecation liens and encumbrances, in that the entire amount due to Lala Mangal Sen and that due to *Shrimati* Ram Dei, wife of B. Sheo Prasad, Vakil, and *Shrimati* Ram Dei, wife of Bhola Nath, *i. e.*, entire amount due under both the documents have been left in deposit with the vendee for payment."

A sum of Rs. 17,300 was left with the vendee for payment of the mortgage of Mangal Sen of the 8th of November 1906. Rupees 6,500 were left to satisfy the decrees of Kishen Singh and of Hazari Lal and Gulzari Lal in respect of which an order had been made that the property of Bijai Indar Singh should be sold on the 20th of May 1914, that is, the day succeeding the date of the sale-deed.

It is said that there was another decree obtained by Hazari Lal alone for which no provision was made in this document. But be that as it may, the sale did in fact take place on the 21st of May 1914 and one Bhola Nath bought the share in Kheria Gurdeo for Rs. 1,450. On the 19th of June Sher Singh deposited a sufficient sum of money to have the sale set aside. That deposit was objected to and Sher Singh subsequently withdrew the money deposited by him for reasons which seemed good to him. On the 14th of November 1914 the sale to Bhola Nath was confirmed.

On the 16th of April 1915 Bhola Nath conveyed *Mauza* Kheria Gurdeo to Sher Singh for the sum of Rs. 2,500.

We now turn to *Mauza* Mirpur. It will be remembered that this also was subject to the mortgage of Mangal Sen, and the share in this *mauza* was also sold in execution of the decree of Kishen Singh. On the 18th of June 1913 Kishen Singh, the decree-holder had filed an affidavit in which he stated that the property was subject to certain encumbrances and the second encumbrance set out by him was the mortgage executed by Bijai Inder Singh in favour of Mangal Sen for Rs. 8,000 registered on the 10th of November 1906. It is, therefore, evident that any bidder at the auction sale would be well aware that he was bidding for property which was at all events possibly encumbered by that mortgage.

On the 20th of July 1914 *Mauza* Mirpur was sold to Ganeshi Lal. He gave for it the sum of Rs. 2,900. The alleged value of the property, free of encumbrances, has been stated to be Rs. 70,000 and there is evidence to show that the net annual profits were at least Rs. 1,800. And later when on the 20th of August 1921 this very property was put up to auction in execution of the decree of Jaideo and others, heirs of Mangal Sen, Roshen Singh purchased it for Rs. 45,000 subject to an encumbrance of Rs. 16,000 and deposited the whole of the purchase money. Subsequently an application was made by Ganeshi Lal the defendant in this case that the sale should be set aside, and it was in fact so set aside, but on the question of value it would appear that Roshan Singh was willing to pay a price in excess of Rs. 60,000 for this share in *Mauza* Mirpur.

Notwithstanding the engagement which Sher Singh had entered into by the document of the 19th of May 1914, he did not pay the Rs. 17,300 to Mangal Sen and Mangal Sen instituted a suit for sale which was decreed on the 14th for September 1918.

Ganeshi Lal was impleaded in this suit as defendant No. 4 and raised the defence that Sher Singh, who was joined as defendant No. 3 was liable to satisfy the plaintiff's debt as he had purchased Kheria Gurdeo from the mortgagor and had by the terms of his purchase undertaken to discharge the mortgage held by Mangal Sen. Ganeshi Lal claimed, therefore, that in the event of a decree being passed, the decretal debt should in the first instance be satisfied as far as possible by sale of Kheria Gurdeo and that Mirpur, purchased by him (Ganeshi), should not be brought to sale unless it transpired that the entire debt could not be discharged by sale of Kheria Gurdeo. The Subordinate Judge on the issue raised by this pleading held that there was no equity in favour of Ganeshi Lal and that as all the defendants were subsequent purchasers of the mortgaged property the mortgagee was entitled to sell as he chose.

Mangal Sen having obtained a decree took out execution and in the execution proceedings Ganeshi Lal again raised the plea which he had advanced by way of defence to the suit. That plea was rejected by the Execution Court and Ganeshi Lal then brought a suit (No. 111 of 1921) against the representatives of Sher Singh (Charan Singh and others) asking for a declaration that the share in *Mauza* Kheria Gurdeo was liable to be sold before any recourse could be had to *Mouza* Mirpur. That suit failed (see the judgment at pages 77-79 of our record) the Subordinate Judge holding (to quote his own words) as follows:—

"It is true that defendants first set (*i. e.*, the representatives of Sher Singh) undertook to pay the decree of Kishen Singh but they say that the existence of Hazari Lal's decree was concealed from them and so they had (refused) to satisfy the decree. Anyhow that is a matter between Bijai Indar Singh and the defendants first set and plaintiff has no right to make equity on that score. His clear remedy is to satisfy the decree of the defendants second set (*i. e.*, the representatives of Mangal Sen) and then to sue for contribution".

On the 20th August 1921 both these properties, Kheria Gurdeo and Mirpur were sold in execution of Mangal Sen's decree and on the 19th of September, 1921 Sher Singh, in order to save *Mauza* Kheria Gurdeo satisfied the decree by payment of Rs. 31,939. The effect of this payment was to set aside the sale which had taken place in execution and to free *Mauza* Mirpur from any claim under Mangal Sen's decree. It is in respect of that payment that the heirs of Sher Singh have brought this suit for contribution, the basis of their claim being that both properties stood proportionately liable to answer for the principal money and interest due under Mangal Sen's mortgage of the 8th of November 1906. This case was founded on the provisions of s. 82 of the Transfer of Property Act.

It was further pleaded that the question of the liability of *Mauza* Mirpur to contribute was *res judicata* between the parties in view of the decisions (1) in the suit brought by Mangal Sen (Suit No. 146 of 1918), (2) in the execution proceedings which followed on that suit, (3) in the declaratory suit (No. 111 of 1921) already referred to.

The defendant resisted the claim by pleading that the plaintiffs had no right to claim contribution by reason of the terms of the sale-deed executed in favour of Sher Singh on the 19th of May 1914 whereby the latter was bound to satisfy the claim of Mangal Sen on his mortgage—a sum of Rs. 17,300 having been left with him for that purpose. It was also denied that the question of the liability of *Mauza* Mirpur to contribute to the mortgage debt was *res judicata*.

And, lastly it was contended that when Bhola Nath purchased Kheria Gurdeo on the 21st May 1914 in execution of decree, he did so as *benamidar* for Sher Singh, and that, consequently, the subsequent transfer of this property by the sale-deed executed on the 16th of April 1915 by Bhola Nath in favour of Sher Singh conferred no fresh title upon the latter.

The suit was dismissed in the Court below. The Subordinate Judge held that the sale-deed of the 19th May 1914 was binding upon the plaintiffs and that they had no right to claim contribution because upon the terms of that deed Sher Singh was under an obligation to discharge the debt due on Mangal Sen's mortgage and that his subsequent payment of Rs. 31,939 in satisfaction of Mangal Sen's decree was nothing more than the discharge of that obligation. A sum of Rs. 17,300, sufficient to satisfy the claim of Mangal Sen at the date of the sale in May 1914 had been left with Sher Singh, and he having failed to pay off Mangal Sen then as he was bound to do, the plaintiffs, his representatives could not seek contribution in respect of the larger sum which by reason of Sher Singh's default, had become due to Mangal Sen when he sued, later, to enforce the mortgage.

The Subordinate Judge further held that Bhola Nath when he purchased Kheria Gurdeo on the 21st May 1914 was a *benamidar* for Sher Singh and that the subsequent sale by Bhola Nath to Sher Singh on the 16th April 1915 gave Sher Singh no new title. And he also decided that the question of the liability of *Mauza* Mirpur to contribute to the mortgage debt for which Mangal Sen obtained his decree was not *res judicata*.

These findings are attacked here in appeal and it is contended that on the facts, as established, the defendant had, in law, no answer to the plaintiff's claim.

The law which declares the liability of several properties mortgaged to secure one debt is contained in the first clause of s. 82 of the Transfer of Property Act. It is there laid down that in the absence of a contract to the contrary, the several properties mortgaged are liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

It follows, therefore, that unless there was a contract to the contrary, the two items of property with which we are concerned were liable to contribute rateably to the mortgage debt in favour of Mangal Sen.

It has been judicially held that the expression "a contract to the contrary" in s. 82 means a contract between the mortgagor and mortgagee [see the decision in *Ramabhadrachar* v. *Srinivasa Ayyangar* (1)] and if that is a correct statement of the law it follows that in the present case s. 82 is left to its full operation for it is not pretended that there ever was any contract between Bijai Indar the mortgagor and Mangal Sen his mortgagee that the two properties were to be liable in any other manner than that contemplated by the section; and neither Sher Singh nor Ganeshi Lal as purchasers subsequent to the mortgage could, as against Mangal Sen set up a case that the properties were not rateably liable to contribute to his debt. *Prima facie*, therefore, Ganeshi Lal is not entitled in this suit to maintain that the property purchased by Sher Singh was liable to the full extent of its value to be taken in satisfaction of Mangal Sen's decree.

But the plea put forward by Ganeshi Lal was that by virtue of the term of his purchase from Bijai Indar, Sher Singh was liable to satisfy the entire mortgage-debt of Mangal Sen out of that portion of the purchase money which was left with him for the purpose and that if he had done what he was legally obliged to do the result would have been that *Mauza* Mirpur would have stood free of the mortgage and could not afterwards have been sold in execution of Mangal Sen's decree. And so it has been argued before us that the plaintiffs have no right to enforce contribution. It is said that Sher Singh when he satisfied the mortgage-decree was paying not his own money but the money of Bijai Indar which had been left with him to discharge the mortgage. The defendant by raising these pleas is clearly claiming for himself the benefit of a contract to which he was no party. The obligation to pay off the mortgage arose out of the agreement for sale entered into between Bijai Indar and Sher Singh. That was a personal obligation which Bijai Indar as vendor, might enforce against his purchaser but it cannot be pleaded or enforced by Ganeshi Lal who was a stranger to the contract. Ganeshi Lal bought the share in Mirpur subject to the mortgage in favour of Mangal Sen and he cannot escape liability by pleading the terms of the sale-deed executed in favour of Sher Singh.

It has been argued before us that Ganeshi Lal has, as a representative of Bijai Indar, become entitled to the benefit of the contract but that is not so. He did, no doubt, by his purchase in execution acquire the right, title and interest of Bijai Indar in the share of *Mauza* Mirpur which was sold but he could not thereby acquire the benefit of any personal covenant in favour of Bijai Indar arising out of the sale in favour of Sher Singh.

The sale gave rise to no covenant attaching to the land of *Mauza* Mirpur which could pass upon a sale of that property.

The law on the subject is well-established; and we need only refer to the decision of their Lordsdips of the Privy Council in the case reported as *Jamna Das* v. *Ram Antar Pande* (2) which affirmed the judgment of this Court reported as *Jamna Das* v. *Ramautar Pande* (3). That was a case in which a mortgagee brought an action to enforce against a purchaser of the mortgaged property an undertaking which he had entered into with his vendor. It was held that the mortgagee had no right to avail himself of the undertaking. He was no party to the sale and the pruchaser entered into no contract with him.

The same is the case here. When Sher Singh in May 1914 entered into a contract with Bijai Indar for the sale of Kheria Gurdeo, he certainly did not make any contract with Ganeshi Lal who at that time was a complete stranger to the property. Nor, as has already been said, did he create any obligation the benefit of which could pass or has passed to Ganeshi Lal. Dr. Agarwala, in the course of his argument on behalf of the respondent, has put forward a contention based upon the language of s. 55, sub-s. (5), cl. (b) of the Transfer of Property Act. He claims that the sale of the 19th May 1914 was a sale of Kheria Gurdeo free from incumbrance and that consequently the sum of Rs. 17,300 left with Sher Singh for redemption of Mangal Sen's mortgage was a portion of the purchase-money which really belonged to the vendor Bijai Indar. And he argues that when, later on, Sher Singh was paying off the mortgage-decree he was doing so with Bijai Indar's money and cannot be heard to say that the money was his own so as to entitle him to claim contribution against Ganeshi Lal.

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(1) 24 M. 85.

(2) 13 Ind. Cas. 304; 34 A. 63; 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) M. W. N. 32; 15 C. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J. 1158; 39 I. A. 7 (P. C.).

(3) 1 Ind. Cas. 460; 31 A. 352; 6 A. 427.

In the first place, we cannot accept this view of the sale of the 19th May 1914. The property was not being sold free of encumbrance as a reference to the language of the sale-deed will clearly show. What was stated was that the property was subject to certain mortgages and that money sufficient to satisfy those mortgages was being left with the purchaser. It is true that there are words declaring that the property sold is "free from all kinds of claims, hypothecation liens and incumbrances" *in asmuch* as money was being left with the purchaser to discharge the incumbrances named but it is quite clear that at the time the property passed under this deed, it was incumberd. That fact was expressly mentioned, and so the sale was in reality a sale of property subject to incumbrances. The same view was taken of a similar transaction in the case reported as *Jamna Das* v. *Ram Autar Pande* (4).

Section 55, sub-s. (5), cl. (b) has, therefore, no application to this transaction.

In the next place even if we were to assume that it had, the case of the respondent is not advanced in any way. He cannot be heard to say that the money paid by Sher Singh to satisfy the mortgage-decree was purchase money belonging to Bijai Indar; to allow him to say so would be allowing him to take advantage of a term of a contract to which he was no party. Sher Singh paid the money into Court and it is no concern of Ganeshi Lal's whose the money was. If it was Bijai Indar's money, he can be left to make whatever claim he chooses. The learned Subordinate Judge in coming to his decision relied upon the case of *Shah Muhammad Abbas* v. *Muhammad Hamid* (5). That was a case in which two properties X and Y were subject to various mortgages. Of these X was sold to the plaintiffs with whom was left sufficient money to discharge all the incumbrances that existed on X and Y. Subsequently by arrangement between these plaintiffs and their vendors, the latter by taking some money from the plaintiffs agreed to pay off some of the incumbrances, the plaintiffs being liable to pay off the others.

After this the Y property was sold to the defendants "free of incumbrances" in spite of the fact that neither the vendors nor the plaintiffs had paid off the incumbrances under the arrangment just mentioned.

The mortgagee brought a suit for sale and having obtained a decree proclaimed portions of X and Y for sale. In order to prevent a sale the plaintiffs paid up the decree and sued the defendants (the owners of property Y) for contribution. It was held that the suit could not succeed and that the defendants were entitled to hold the property free from liability to contribute to the mortgage debts.

This decision appears to have proceeded upon the consideration that the vendors had sold property Y to the defendants free of incumbranees and that after the date of the sale to the plaintiffs it was not the intention "of any of the parties concerned" that the shares in the two villages should contribute rateably to the mortgage-debts.

The facts of the case were peculiar and are very different from those we have to consider here. The defendants' vendors had by the arrangement referred to above made themselves liable to dicharge some of the incumbrances, and without doing so had sold property Y to the defendants as being free from incumbrance.

In the case now before us Bijai Indar the vendor did not assume any liability for the mortgage debt due to Mangal Sen—that liability was left upon the purchaser Sher Singh. And again there was no sale to Ganeshi Lal free of incumbrance. On the contrary, it is clearly established that he bought Mirpur with knowledge of Mangal Sen's mortgage upon it: in fact he bought and knew that he was buying only the equity of redemption, for which he paid a sum of Rs. 2,900 only which was nothing like the value of the property free from incumbrance. The case is altogether different from the one just referred to and it is not possible for Ganeshi Lal to claim here the equity which was raised on behalf of the defendants in the other case.

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(4) 33 Ind. Cas. 351; 38 A. 209; 14 A. L. J. 151.

(5) 14 Ind. Cas. 179; 9 A. L. J. 499.

We are satisfied that the judgment of the Court below on this part of the case is erroneous and that the defendant Ganeshi Lal had no answer to the claim for contribution on any of the grounds just referred to.

The case was correctly put by the Subordinate Judge who decided the declaratory suit (No. 111 of 1921) between the present parties. Ganeshi Lal had no right to claim any equity based upon the contract entered into between Sher Singh and Bijai Indar on the 19th May 1914.

Next as regards the question of *res judicata*. Here again we must differ from the judgment of the lower Court. The decision in the declaratory suit we have just mentioned (No. 111 of 1921) is a bar to the defence raised in this suit by Ganeshi Lal.

In that suit, Ganeshi Lal as plaintiff asked for a declaration of his right to throw the entire mortgage debt upon *Mauza* Kheria Gurdeo and to hold *Mauza* Mirpur free of all claim under Mangal Sen's mortgage which could be satisfied by the sale of Kheria Gurdeo. The Subordinate Judge held that he had no such right and that all he was entitled to was a claim to contribution in case he satisfied the mortgage-decree.

That settled matters between Ganeshi Lal and the present plaintiffs and the question could not be agitated again in the present suit.

There remains only the finding of the Court below to the effect that when Bhola Nath purchased Kheria Gurdeo at auction on the 21st May 1914 he purchased *benami* for Sher Singh and that the sale purporting to have been made by Bhola Nath in favour of Sher Singh on the 16th April 1915 (Ex. I at page 55 of the record) gave no new title to Sher Singh.

In view of our decision on the other questions recorded above it is not necessary for us to give our opinion on this matter. We have dealt with the case as if Sher Singh's only title to the property arose out of the sale-deed obtained by him on the 19th May 1914 as alleged by the defendant.

We think it proper however to observe that were we called upon to decide this question, we should not be able to accept the finding of the Court below.

The solitary witness examined on the point was Bhola Nath himself. Sher Singh, the alleged real purchaser, is dead.

The learned Subordinate Judge believed the statement of Bhola Nath. In our opinion he ought not to have done so. We hold that Bhola Nath was not a witness of truth.

If we examine the sale-deed of the 16th April 1915 we find Bhola Nath reciting that he is the owner of the property which he had purchased at auction on the 21st May 1914 for Rs. 1,450. He professes to sell this property for Rs. 2,500 to Sher Singh the latter to be liable to pay all incumbrances whatever they may be. The deed further recites that Sher Singh had previously purchased the property from Bijai Indar and that the incumbrances mentioned in the sale-deed are to be maintained.

The deed further states that out of the Rs. 2,500 fixed as the purchase-money the vendor Bhola Nath had already received Rs. 1,900 from the vendee (Sher Singh) under a receipt dated the 23rd February 1915. The balance, Rs. 600, was to be paid at the time of registration and the registration endorsement shows that on the 17th April 1915 when the deed was registered the sum of Rs. 600 was paid to Bhola Nath in the presence of the registering officer. Bhola Nath's statements in the witness-box are in no way to be reconciled with the recitals in the deed. His story now is that he bought *benami* for Sher Singh and that he paid the 25 per cent. deposit of the purchase money out of funds provided by Sher Singh. He goes on to say that when he had to deposit the balance of the purchase money he paid Rs. 500 out of his own pocket. The rest was found by Sher Singh.

He does not in so many words explain how if that was the case he was selling the property for Rs. 2,500 to Sher Singh in April 1915 but his evidence leaves it to be inferred that the only consideration for this sale was Rs. 600 which he received at the time of registration and which compensated him for the Rs. 500 he had himself deposited in Court after the auction. According to this version, therefore, the recital in the sale-deed that he had received Rs. 1,900 from Sher Singh on the 23rd February 1915 was false. There is one other matter to be noted in this connection. It is admitted by Bhola Nath that after he had bought the property at auction Sher Singh applied to the Court to have the sale set aside. It is proved that he made a deposit of over Rs. 2,000 along with the application.

Bhola Nath admits that he opposed this application made by Sher Singh and that Sher Singh afterwards withdrew it with the result that the sale was confirmed to Bhola Nath on the 14th November 1914. Bhola Nath cannot explain why Sher Singh went through this farce if the fact was, as now alleged, that he himself was the real purchaser and Bhola Nath was merely his *benamidar*. It was for Bhola Nath to explain this matter and also to give some reasonable account of this discrepancies between his present statements and those contained in the sale deed of the 16th April, 1915 and as he failed to do so, we are of opinion that the Subordinate Judge was wrong in acting upon Bhola Nath's evidence so as to find that he was a *benamidar* for Sher Singh.

For these reasons we are of opinion that the right of the plaintiffs to claim contribution is established and that their appeal must prevail:

The only question left to be determined is the amount to which the plaintiffs are entitled by way of contribution. To enable us to decide this question it is necessary to remit an issue to the Court below as follows:—

"Having regard to the respective values of the properties in *Mauza* Kheria Gurdeo and *Mauza* Mirpur on the 8th of November, 1906, when the mortgage to Mangal Sen was made, to what sum are the plaintiffs entitled by way of contribution in respect of the payment of Rs. 31,939 made by Sher Singh on the 19th of September, 1921?"

The parties will produce any evidence they think proper before the Subordinate Judge, who will return his finding within two months from the receipt of this order, and on receipt of the finding 10 days will be allowed for filing objections.

R. L. *Appeal allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 346 OF 1925.
January 8, 1926.
Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.
MHALAPPA VENKATESH SHETTI
—DEFENDANT—APPELLANT
versus
JANARDAN GOVIND MAHALE—
PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 111, 117—Agricultural leases—Relief against forfeiture for breach of covenant.

Agricultural leases are exempt from the operation of s. 111, Transfer of Property Act. Therefore, a Court can in a proper case exercise its equitable power of relieving against forfeiture for breach of covenant. [p. 1055, col. 1.]

Appeal from a decision of the District Judge, Karwar, in Appeal No. 47 of 1924, confirming that of the First Class Subordinate Judge, Karwar, in Civil Suit No. 121 of 1923.

Mr. *G. S. Rao*, D. B., (with him Messrs. *V. N. Nadkarni* and *B. S. Mavinkurve*), for the Appellant.

Mr. *G. P. Murdeshvar*, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to recover possession of the land described in the plaint free from any rights or charges thereon, alleging that defendant No. 1 held the land in suit under a *mulgeni* lease, dated June 17, 1882; that under it the lessee was liable to pay the stipulated rent at a fixed time of the year; that the lease also stipulated that the lessee should enjoy the land without transferring it to anybody; that if he broke any of these conditions the lessee was under its terms liable to forfeit his lease-hold rights; that defendant No. 1 did not give the stipulated rent at the stipulated time; that defendant No. 1 mortgaged the land to defendant No. 2 on November 11, 1922; that he thus broke both the conditions and that, therefore, the plaintiff had got a right to recover possession of the land.

The 1st defendant contended that the stipulation against alienation was illegal. But that is obviously a point which cannot be relied upon by the 1st defendant.

We must take it, considering the terms of the lease, although it is not very clear whether the District Judge considered that the terms 'transfer' or 'alienation' include a simple mortgage, that the 1st defendant has transferred by mortgage his interest in the land to the 2nd defendant, which would involve a forfeiture if the owner wished to exercise his rights under the lease.

It has been argued that this Court has no power to relieve against forfeiture, except for non-payment of rent. But s. 111 of the Transfer of Property Act and the other sections of Ch. V do not by virtue of s. 117 apply to leases for agricultural purposes, and there is no other restriction that I know of against the Court exercising its equitable powers by relieving against forfeiture in a proper case. Considering that the lease does not expressly restrain the tenant from mortgaging his interest, and that apparently the owner had refrained from objecting to a prior mortgage executed by defendant No. 1 in favour of defendant No. 3, we think the proper order to make in this case is that defendant No. 1 should have three months from the time the record reaches the lower Court, to release the land held by him from the mortgage of the 2nd. defendant, and if he cannot release the land from the mortgage within that time, then the decree which has been passed by the Trial Court will come into effect. If the land is released from the mortgage, then the suit of the plaintiff will be dismissed. But in any event the 1st defendant will have to pay the plaintiff's costs throughout.

Coyajee, J.—I concur.

R. L. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2793 OF 1925.

April 27, 1926.

Present:—Mr. Justice Campbell.

KALIAN SINGH—DEFENDANT—APPELLANT

versus

FAZAL DIN—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Time requisite for obtaining copies—Sale-deed guaranteeing indemnity in case of loss—Pre-emption, loss in consequence of—Vendee's right to be recompensed.

A Jhelum appeal was heard by the District Judge, Rawalpindi, in his capacity as Additional Judge, Jhelum, and decided on 25th May 1925. On the 24th July 1925 the appellant applied in the Court of the District Judge, Jhelum, for copies of the judgment and the decree of the Appellate Court. His deposit of the fees was accepted and an order was made on the application for supply of the copies. On 28th September 1925 appellant's application was returned with a direction that it should be made at Rawalpindi. The application was presented in Rawalpindi Court on the 29th September 1925 and copies were obtained on the 5th October 1925 and the appeal was filed on 30th October 1925:

Held, that the appellant was entitled to count the whole period from the 24th July till the 5th October as time requisite for obtaining copies. [p. 1056, col. 1.]

A guarantee clause in a sale-deed to the effect that the vendor would be liable to recompense any loss that might accrue to the vendees in connection with the sale (*agar intikal haza men mushtarian ko koi nuksan paunche to main zimmenwar hunga*) covers the risk of the vendees' title being defeated by a pre-emptor. [p. 1056, col. 2.]

Khommon Bibi v. *Shah Mali*, 4 Ind. Cas. 690; 11 P. R. 1908; 13 P. L. R. 1909; 180 P. W. R. 1908, referred to.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 25th May 1925, modifying that of the Subordinate Judge, Fourth Class, Chakwal, at Gujar Khan, dated the 15th July 1924.

Mr. *Ram Chand Manchanda*, for the Appellant.

Messrs. *Mohammad Azam* and *Anant Ram*, for the Respondents.

JUDGMENT.—A preliminary objection is taken that this appeal and No. 2794 are barred by time. The facts are these.

The suits were Jhelum cases but the appeals were heard by the District Judge, Rawalpindi, in his capacity as Additional Judge, Jhelum. The date of the judgments is 25th May 1925. On the 24th July 1925 the appellant applied in the Court of the District Judge, Jhelum, for copies of the judgments and decrees of the Appellate Court.

His deposit of the fees was accepted and an order was passed on the applications that copies should be supplied. We know nothing of what happened thereafter until the 28th September 1925, on which date the appellant's applications were returned to him with endorsement that the cases had been sent to record in the Rawalpindi Court and that applications for copies should be made there. The applications were presented in the Rawalpandi Court on the 29th September 1925 and copies were obtained on the 5th October 1925 and the two appeals were filed here on the 30th October 1925.

If the time during which the appellant's applications lay in the Jhelum Court be included in the time requisite for obtaining copies the appeals were filed within time. If that period is to be excluded the last date for filing the appeals was the 12th

October 1925, the date of the High Court opening.

It has been argued on behalf of the respondents, who have raised the preliminary objection, that the appellant must have been negligent, since otherwise there would not be so wide a gap between the 24th July and 28th September. In view of the facts, however, that his money was taken at Jhelum and was not returned and that an order for supplying the copies was passed and further that he presented his applications at Rawalpindi without any delay after receiving them back at Jhelum entitled him, in my opinion, to count the whole period from the 24th July till the 5th October as time requisite for obtaining copies. The preliminary objection is overruled.

On the merits the facts are as follows:— Uttam Chand and Hoshnak Rai decree-holders purchased a certain house in execution of a decree. They then sold it to Kalyan Singh for Rs. 600. Kalyan Singh, through his agent Ram Singh, sold the house again to Fazal Din and *Musammat* Rakhi for Rs. 1,500. Jawala Sahai cousin of Uttam Chand and Hoshank Rai then brought a suit to pre-empt the sale by his relatives to Kalyan Singh, and obtained a decree for possession by pre-emption of Rs. 600 against Fazal Din and *Musammat* Rakhi who were impleaded among the defendants. Fazal Din and *Musammat* Rakhi then brought separate suits against Kalyan Singh to recover the balance of purchase-money paid by them to him and damages for the expenditure to which they had been put to in the litigation. Each suit was of Rs. 450 (*i. e.*, half of Rs. 900) plus Rs. 250 damages. The Trial Court dismissed the suits but on appeal the District Judge gave each plaintiff a decree for Rs. 554-10. Kalyan Singh has preferred second appeals.

The question for decision is the interpretation of the following sentence in the sale deed executed by Ram Singh as agent of Kalyan Singh in favour of Fazal Din and *Musammat* Rakhi: "*agar intikal haza men mushtarian ko koi nuksan paunche to main zimmenwar hunga.*"

It was argued before the lower Appellate Court on behalf of Kalyan Singh that the word "*main*" indicated a personal responsibility undertaken by Ram Singh in his individual capacity and that the sentence did not bind Kalyan Singh in any way. It should be observed that the original defendants were Kalyan Singh and Ram Singh both, but in the lower Appellate Court the claims against Ram Singh were given up. The learned District Judge held that it was clear from the document that Ram Singh was not taking upon himself any individual responsibility and that the guarantee given was that of Kalyan Singh.

The second point urged by Kalyan Singh in the lower Appellate Court was that the word "*nuksan*" could not be interpreted to mean "loss" as the result of a pre-emption suit such as that which was brought by Jawala Sahai. The learned District Judge repelled this contention also and held that the word "*nuksan*" was wide enough to cover such "loss." He referred to *Khommon Bibi* v. *Shah Mali* (1), a case which has some features in common with the present case, and appears to have concluded that, as in that case, so in the case before him the sentence quoted was inserted as much for the purpose of indemnifying the purchaser against loss due to the intervention of a pre-emptor as for any other reason.

Exactly the same argument has been put before me in second appeal by the learned Vakil for Kalyan Singh and after hearing him and examining the sale-deed I find that the learned District Judge was correct. When the whole deed is read it is clear to my mind that the guarantee was one by Kalyan Singh the vendor given on his behalf by Ram Singh as agent, and I see no reason for disagreeing with the learned District Judge's view that the word "*intikal haza men nuksan paunche*" can properly be held to include the risk of the vendees' title being defeated by a pre-emptor. It has not been argued that Ram Singh was not empowered to give the guarantee.

I, therefore, dismiss both the appeals with costs.

R. L. *Appeals dismissed.*

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(1) 4 Ind. Cas. 690; 111 P. R. 1908; 13 P. L. R. 1909; 180 P. W. R. 1908.

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Adverse possession.

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———— *Co-owners—Exclusive possession.*

Jhanda Singh, Hira Singh and Jagat Singh were brothers and co-owners of a piece of land. The possession of the entire holding was with Jhanda Singh the others being absentees. In 1896 sons of Hira Singh sold off their share to a stranger which was successfully pre-empted by Gattu son of Jhanda Singh. In 1907 Jagat Singh died and his share was mutated in favour of Gattu no mention being made of Hira Singh's sons. On Hira Singh's sons bringing a suit for possession for half share of Jaggat Singh's share in 1923:

Held, that the plaintiffs' suit was barred by time for Gattu's possession since 1907 was exclusively on his own account and not that of co-owner and was, therefore, adverse to the plaintiffs. **L** BISHNA *v.* NARAIN SINGH **486**

———— *Co-owner, ouster of—Knowledge of adverse possession—Mode of proof—Second appeal—Mixed question of law and fact—Finding of fact, consideration of.*

The question of adverse possession is a mixed question of law and fact. In dealing with the question in second appeal the findings of fact should be considered to see whether the inference drawn by the Appellate Court was proper or not.

The ouster of a co-sharer in order to render the possession adverse need not be violent nor need notice of adverse holding be actually brought home to the other co-sharers by personal or formal communication but it is sufficient if contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. **C** SABITRI DASI *v.* NADIAR CHAND BARIK **38**

———— *Death of owner of property—Possession of one of several heirs beyond his share—Adverse possession in respect of excess.*

Where one of the heirs of a deceased person comes to occupy more than his share to the exclusion of the rightful heir of the excess share and alienates it and such alienation is accepted by the conduct of the latter, the possession of the former is adverse to the latter and ripens into ownership if it extends beyond twelve years. **L** KARAM DIN *v.* MEHR DIN, 8 L. L. J. 129 **550**

————, *how established.*

No particular form of an expression is necessary to constitute adverse possession, it is always a question of *animus* which has to be gathered from all the circumstances. **C** GANGA PROSAD CHOWDHURY *v.* KULADANANDA ROY, 30 C. W. N. 415; A. I. R. 1926 Cal. 568 **235**

———— *Plaintiff vendee from person without title—Open user for more than 12 years—Prescription.*

Adverse possession—concld.

The plaintiff had purchased the site in suit by a deed from a person who had no title to it. The deed was not registered but was attested by a *lambardar* of the *patti*. On another land purchased by the plaintiff he had constructed a house and he had been using the land in suit as an appurtenance to his house. He had enclosed it with a hedge and had been using as a carpenter's yard for more than 12 years:

Held, that the plaintiff's possession had ripened into ownership. **L** ISHER SINGH *v.* WIR SINGH **1000**

———— *Possession follows title—Principle, application of.*

The presumption that possession must be deemed to follow title arises only when there is no definite proof of possession by either party in the case of land incapable of actual possession owing to its nature. **L** BAHADUR *v.* SAGHAR **1048**

Advocate, whether must file appointment in writing. *See* O. P. C., 1908, O. III, R. 4 **841**

———— **or Vakil**—Written authority, necessity of. *See* CR. P. C., 1898, s. 340 **714**

Agra Pre-emption Act (XI of 1922), ss. 14, 15—*Sale by co-sharer—Notice—Estoppel.*

Sections 14 and 15 of the Agra Pre-emption Act do not imply that unless a notice of a contemplated sale is given by the intending vendor to his co-sharers, they can in no case be estopped from claiming the right of pre-emption. If by taking an active part in the completion of the sale, and by his conduct in other ways, a co-sharer leads the vendee to believe that he (co-sharer) has waived his right of pre-emption, and no notice is, therefore, thought necessary to be issued to him, he would be estopped from claiming his right of pre-emption. **A** RANJIT SINGH *v.* BHAGWATI SINGH, 24 A. L. J. 581 **397**

Appeal (Civil). *See* ARBITRATION **7**

———— *New plea.*

A plea will not be allowed to be set up in appeal which was neither taken up in the plaint nor was embodied in an issue and is contradicted by the party's own witness. **O** PIRTHA SINGH *v.* RAJA MOHAMMAD ALI KHAN, 13 O. L. J. 126 **188**

———— Plea of limitation, abandoned in trial Court, whether can be taken **611**

———— **(Privy Council).** *See* C. P. C., 1908, O. XLI, R. 33 **767**

———— *High Court, judgment of—Misstatement of fact—Review—Appeal.*

If a High Court in its judgment makes an absolute mis-statement of fact in a perfectly plain question, it is the duty of the person aggrieved to go to that Court and say "your judgment is vitiated by an obvious error on a pure question of fact" and to ask it to correct the mistake. If this remedy is not availed, the Privy Council will not go behind it. **P C** MAUNG KYI OH *v.* MA THET PON, A. I. R. 1926 P. C. 29; (1926) M. W. N. 489 **916**

———— **(Second).**

See ALSO C. P. C., 1908, ss. 100 TO 103, O. XLI.

See ADVERSE POSSESSION **38**

See CIVIL PROCEDURE **686**

See JURISDICTION OF COURT **1**

———— *Finding of fact.*

The High Court ought not to interfere in second appeal with a finding of fact so long as there is some evidence to support it, but a finding arrived at without evidence is bad and is not binding upon the High Court. **Pat** JUGAL SARKAR *v.* RAJ MANGAL PRASAD, A. I. R. 1926 Pat. 187 **929**

Appeal (Second)—concld.

——— *Pre-emption suit—Location of property—Question of fact or law.*
The question whether a certain immoveable property is situated in a town or village is a question of fact. L KARAM CHAND *v.* KARM SINGH, 8 L. L. J. 66 127

Arbitration—*Parties agreeing to be bound by decision of Court—Appeal.*
If the parties to a suit relating to a landed property agree not to produce any evidence and to be bound by the decision of the Court arrived at after an inspection of the locality, such decision is binding on the parties and is not appealable. A CHAIN SUKH *v.* RAM SARUP 7

——— *Terms of reference—Private enquiry—Award, validity of.*
An arbitrator must not take evidence behind the back of the parties unless the terms of the reference, construed in the light of the circumstances of the case, give him authority to do so.
Where a reference to arbitration permits the arbitrator to come to a decision by any method that he might think fit, an award made by him after private enquiry is not invalid. O CHANDRIKA DATT RAM PANDEY *v.* SHYAM LAL, 3 O. W. N. 397; A. I. R. 1926 Oudh 383 162

Arbitration Act (IX of 1899), s. 8. *See* C. P. C., 1908, SCH. II 177

——— **s. 19**—*Stay of suit or proceeding—Arbitration, taking place of.*
The power of the Court under s. 19 of the Arbitration Act is to stay the suit or proceedings, if the conditions referred to in the section are fulfilled. If a stay is granted the arbitration then takes place by reason of the submission contained in the contract and in accordance with the provisions of the Arbitration Act.
Per *Buckland, J.*—In connection with arbitration proceedings under the Arbitration Act, all that need be considered is whether there were (1) a submission by the parties to the dispute, (2) a reference before arbitrators duly appointed by them under the submission and (3) an award properly made by such arbitrators. C MITSUI BUSSAN KAISHA, LTD. *v.* HOGARTH SHIPPING CO., LTD., 43 C. L. J. 297; A. I. R. 1926 Cal. 722 182

Arms Act (XI of 1878), ss. 19 (f), 20—*Concealment, meaning of—Carrying arms in gunny bag—Intention.*
Each case of concealment of arms must be decided on its own merits.
For a conviction to fall under s. 20, Arms Act, there must be some special indication of an intention that the possession of arms was being concealed from a public servant or from a Railway Official. Where the arms are carried through a place where it is not anticipated that a public servant would be met, the intention to conceal is not easy to infer. Consequently when a person carried arms wrapped up in a gunny bag on a horse back to an appointed place for sale where he did not expect any public servant to meet, he could not be said to have had an intention to conceal. L CHET SINGH *v.* EMPEROR, 7 L. 65; A. I. R. 1926 Lah. 262; 27 Cr. L. J. 625 401

Benami transaction—*Onus of proof.*
The onus of proving that the ostensible owner is not the real owner is on the plaintiff.
If a simple *benami* is alleged in the plaint without any suggestion indicating that a fraud or an illegal act was contemplated, the defendant would have to aver and prove that the fraud or the unlawful act that was intended was carried out. C RAJANI KANTA DAS GUPTA *v.* ABANI KANTA DAS GUPTA 33

Bengal Land (Conditional Sales) Regulation (I of 1798), s. 2. *See* BENGAL LAND (REDEMPTION AND FORECLOSURE) REGULATION, 1806, s. 7 991

Bengal Land (Redemption and Foreclosure) Regulation (XVII of 1806), s. 7—*Object of Regulation—Mortgage with conditional sale—Notice to foreclose—Formalities—Bengal Land (Conditional Sales) Regulation I of 1798, s. 2—Omission to mention section—Notice demanding larger sum than due—Effect.*
The object of the Bengal Land (Redemption and Foreclosure) Regulation XVII of 1806 is to give a warning to the mortgagor so as to enable him by taking action under the Regulation to preserve his right to redeem.
The omission to mention s. 7 of the Bengal Land (Redemption and Foreclosure) Regulation of 1806 in the notice is not fatal to its validity if the purport of the section is given in the notice. Similarly so long as the purport of s. 2 of the Bengal Land (Conditional Sales) Regulation I of 1798 is given in the notice specific reference to it is not imperatively necessary.
The demand for a larger sum than is actually due at the time of the notice is not a defect fatal to the validity of the notice. L JAGGI MAL *v.* ARYA RAM 991

Bengal Municipal Act (III B. C. of 1884), ss. 102, 103—*Re-valuation of holdings without fresh determination of percentage rate—Legality.*
Section 102 of the Bengal Municipal Act provides that once a percentage has been fixed it shall remain in force until rescinded or until the Commissioners at a meeting determine some other percentage at which the rate will be levied from the next year. There is no provision in the Act which provides that every time there is a fresh valuation there must be a formal meeting to fix the percentage even though the Commissioners intend the same percentage to continue. C BHUBAN MOHAN BASAK *v.* CHAIRMAN, MUNICIPAL COMMISSIONERS, DACCA, 30 C. W. N. 405; A. I. R. 1926 Cal. 607; 53 C. 453 231

——— **ss. 112, 113**—*Privy and water taxes—Liability—Remedy of person aggrieved.*
In some cases it is the owners and in others it is the occupier that is liable for privy and water taxes. A person who disputes his liability to be assessed has his remedy by way of an application to the Commissioners under s. 113 of the Act and until he has exhausted the remedies provided by the Act he cannot invoke the assistance of the Civil Courts. C BHUBAN MOHAN BASAK *v.* CHAIRMAN, MUNICIPAL COMMISSIONERS, DACCA, 30 C. W. N. 405; A. I. R. 1926 Cal. 607; 53 C. 453 231

Bengal Tenancy Act (VIII of 1885), s. 13—*Landlord's fee, failure to pay—Notice, service of, absence of—Auction-purchase, effect on.*
Neither failure to pay landlord's fee, nor mere failure to serve notice under s. 13 of the Bengal Tenancy Act invalidates the purchase of a tenure at an auction-sale. C BARADA PROSAD ROY *v.* TARAK NATH MANDAL 147

——— **s. 22 (2).** *See* BENGAL TENANCY ACT, 1885, s. 50 (2) 749

Bengal Tenancy Act—contd.

——— s. 49. *See* Bengal Tenancy Act, 1885, s. 182 920

——— s. 50—*Presumption of fixity of tenure—*Kabuliyat *for term, effect of—Record of Rights, if rebutted.*

The existence of a temporary *kabuilyat* for a term of years sufficiently rebuts the presumption raised by an entry in the Record of Rights as to the permanence of the tenure. C Birendra Kishore Manikya *v.* Jahiruddin 26

——— s. 50 (2)—*Presumption of fixity of rent—Occupancy* raiyat, *if can be* raiyat *at fixed rate.*

In cases to which the presumption under s. 50 (2), Bengal Tenancy Act, is not applicable the Court is entitled to consider the facts in view of all the circumstances and determine whether the holding is held at a fixed rental.

The same person can combine in himself the status of an occupancy *raiyat* and a *raiyat* at fixed rate. C Rajmohini Dasi *v.* Nagendra Kumar Talpatra 310

——— ss. 50 (2), 22 (2)—*Ejectment suit—Fixity of rent—Uniform payment for 20 years—Presumption, applicability of.*

Sub-section (2) of s. 50 of the Bengal Tenancy Act has no application to suits which are not suits under that Act but are suits under the general law for ejectment of an alleged trespasser.

The mere fact that the operation and effect of s. 22 (2) of the Bengal Tenancy Act has to be considered in a suit does not make a suit in ejectment a proceeding under the Act.

Though the special presumption laid down in cl. (2) of s. 50 of the Bengal Tenancy Act may not be applicable to a case not under the Act, a presumption may arise, apart from the Act, that where there has been a uniform payment of rent for more than 20 years the original contract was a contract to hold at fixed rate. C Santosh Kumar Roy *v.* Rakhal Chandra Hazra, 43 C. L. J. 104 740

——— s. 174 (3)—*Civil Procedure Code (Act V of 1908), O. XXI, r. 91, applicability of—Auction-purchaser, if can apply to set aside sale and claim refund.*

The *prima facie* meaning of s. 174 (3), Bengal Tenancy Act, is that the principle laid down in O. XXI, r. 91, C. P. C., does not apply to cases of sales held under Ch. XIV of the Bengal Tenancy Act. C Sasdhar Choudhury *v.* Bishnu Narain Kunda, 43 C. L. J. 279; A. I. R. 1926 Cal. 738 292

——— s. 178—*Holding—Undivided parcel of land, if holding—Sale of undivided portion—Abandonment—Re-entry, clause as to—Legality.*

Undivided portions of land included within a leasehold do not constitute a holding as defined in the Bengal Tenancy Act.

Sale of undivided portions of lands not comprising a holding does not amount to abandonment and the landlord is not entitled to re-enter on that ground.

A clause in a lease covenanting that the landlord shall be entitled to re-enter on transfer by the tenant does not offend against the provisions of s. 178, Bengal Tenancy Act. C Bahadur Ahmed Moulvi *v.* Hemanta Kumar Roy, 30 C. W. N. 613 338

——— ss. 182, 49—*Under-*raiyati *of homestead and* nal *land—Lease, expiry of—Ejectment suit, maintainability of.*

Defendant was holding an under-*raiyati* of homestead and also of *nal* land and a tank under a registered lease the term of which had expired. The plaintiff brought a suit for recovery of possession after service of notice under s. 49 of the Bengal Tenancy Act:

Held, that s. 182 of the Bengal Tenancy Act was not applicable to the case and that the suit was maintainable. C Rahimuddi Meaji *v.* Amina Bibi, 43 C. L. J. 132; A. I. R. 1926 Cal. 662 920

Bengal Troops Transport and Traveller's Assistance Regulation (XI of 1806), s. 3 (1) paras. 3, 4—*Impressing cart against owner's will—Native officer, power of.*

In case of carts let on hire, the native and Police Officer referred to in paras. 3 and 4 of s. 3, cl. (1) of the Bengal Troops Transport and Traveller's Assistance Regulation can legally impress them against the consent of their owner. Pat Rup Lal Singh *v.* Secretary of State for India, 5 Pat. 205; (1926) Pat. 105; A. I. R. 1926 Pat. 258; 7 P. L. T. 463 10

Bombay District Municipal Act (III of 1901), s. 22. *See* C. P. C., 1908, s. 115 660

Bombay Hereditary Offices Act (III of 1874), ss. 4, 5—*Mortgagee or lessee from* watandar, *whether* watandar—*Alienation of* watan *land—Period of operation.*

Legal possession within the lifetime of the mortgagor or lessor *watandar* is clearly not equivalent to the legal acquisition of title to the land which is contemplated in the definition of *watandar.* Therefore, a mortgagee or lessee from a *watandar* is not himself a *watandar.*

An alienation of a *watan* land remains in force only during the natural life of the alienor. B Ganpatrao Bhavanrao *v.* Ganesh Vishnu Hasabnis, 28 Bom. L. R. 395; A. I. R. 1926 Bom. 261 651

——— s. 10. *See* C. P. C., 1908, s. 115 760

Bombay High Court, Original Side, Rule 494—*Bombay Pleaders Act (XVII of 1920)—Attorney—Taxation of bill for work done as Pleader in* mofussil—*Work done on appellate side of High Court—Taxation of bill.*

Before the operation of Bombay Pleaders Act, 1920, a Solicitor would be entitled to have his bill for professional work done in the *mofussil* taxed by the Taxing Master on the original side of the High Court. But a bill for the work done on the appellate side of the High Court could not be so taxed. B Nowroji Pudumji Sirdar *v.* Kanga & Sayani, 28 Bom. L. R. 384; A. I. R. 1926 Bom. 272 149

——— r. 736—*Appeal—Security for costs, additional, when may be demanded.*

Additional security for the costs of the respondent may be required from an appellant in an exceptional case where it appears that the appellant has failed to pay the costs incurred by the respondent at the trial, that he is not possessed of sufficient funds out of which the costs can be recovered and that he has not been able to make the necessary deposit with his attorneys for advances for costs. B Sevadasji Chandradasji *v.* Municipal Corporation, 27 Bom. L. R. 1216; A. I. R. 1926 Bom. 42 654

Bombay Land Revenue Code (Act V of 1879), ss. 3 (16), 68, 83, 217—*Alienated village, introduction of Survey Settlement in—Tenant's rights, variation in—Liability to enhanced rent.*

Introduction of Survey Settlement into an alienated village does not confer on an ordinary tenant the rights which belong to an "occupant" in an unalienated village. Such a tenant, therefore, is not immune

Bombay Land Revenue Code—concld.

from enhancement of rent. B Kondi Ramji Bhosle *v.* Vithalrao Laxmanrao, 28 Bom. L. R. 424; 50 B. 155; A. I. R. 1926 Bom. 257 662

——— **s. 111.** *See* Gujarat Talukdars' Act, 1888, s. 33 752

——— **s. 150**—*Land revenue, meaning of.*

The term 'land revenue' as used in s. 150, Bombay Land Revenue Code, is not confined to one particular kind of land revenue, namely, assessment but covers every other kind of revenue from land payable to Government by any person on account of land held by or vested in him. B Jinabhai Nathabhai Rashia *v.* Collector & T. S. Officer, 28 Bom. L. R. 416; A. I. R. 1926 Bom. 325 752

Bombay Pleaders Act (XVII of 1920). *See* Bombay High Court, Original Side, Rule 491 149

Bombay Regulation XVI of 1827, s. 20, *construction of—Grantee from Deshpande, alienation by—Restriction.*

Section 20 of the Bombay Regulation XVI of 1827 must be strictly construed. The section covers the case of an alienation of *watan* lands by an incumbent of the hereditary office of Deshpande and not an alienation by any grantee of that incumbent.

Therefore, sale of a land forming part of a Deshpande *watan* granted by the Deshpande thereof to a *mutalik* as remuneration for services as a *mutalik*, in execution of a decree against the *mutalik*, is permissible. B Bodhrao Gopalrao Mutalik *v.* Shrinivas Atmaram Jog, 28 Bom. L. R. 390; 50 B. 128; A. I. R. 1926 Bom. 259 649

Bombay Rent (War Restrictions) Act (II of 1918), s. 9—*Landlord and tenant—Tenancy terminating during continuance of Act—Ejectment after Act ceases to be applicable—Notice to quit, whether necessary.*

There is nothing in the provisions of the Bombay Rent (War Restrictions) Act to justify the contention that the contractual tenancy which, apart from the provisions of the Act, exists between a landlord and tenant cannot be terminated during the continuance of the Act. Where such tenancy has been terminated by a proper notice to quit during the continuance of the Act, the mere fact that the tenant is entitled to retain possession of the premises while the Act remains in force is not sufficient to create any such relationship of landlord and tenant between the parties as would require a fresh notice to terminate it after the provisions of the Act have ceased to be applicable to the premises. The right of the tenant to continue in possession of the premises occupied by him under the provisions of the Act is a statutory right the limits of which are to be found in the terms of the Statute; and the moment the Statute ceases to extend that protection to him he ceases to have the protection as against the landlord which the Statute gave him up to a certain period. Thereafter his possession with reference to the premises is that of a tenant holding over whose tenancy had been terminated, and he is not entitled to any fresh notice to quit. B Kishoredas P. Mangaldas *v.* Ahmed Suleman, 27 Bom. L. R. 1086; 49 B. 567; A. I. R. 1925 Bom. 516 564

Buddhist Law, Burmese—*Inheritance—Orasa son—Minor, whether can claim rights of orasa son—Death of husband—Widow, rights of—Alienation by widow.*

The whole doctrine of the *orasa* son under the Burmese Buddhist Law is based on the eldest son being in a position to take his father's place as head of the household in the event of his father's death. The eldest son, therefore, can on the death of his father claim one-fourth share in his property from his mother only if he has attained the full status of an *orasa* son at the time of his father's death. A minor son cannot be regarded as having attained the full status of *orasa* and cannot, therefore, claim one-fourth share of the estate on his father's death. In such a case the widow who owned half of the joint property in her husband's lifetime, inherits his half when he dies and thus becomes possessed of the whole and is competent to alienate the whole of it. R U Tun Gywe *v.* Ko Ko Gyi, 4 Bur. L. J. 67; A. I. R. 1925 Rang. 245 531

Buddhist Law—concld.

——— *Inheritance—Property inherited by husband after marriage, nature of—Share of wife—Property, whether liable for debts of husband.*

Where a Burman Buddhist *eindounggyi* having two wives inherits immoveable property from his father after his second marriage, the property is *lettetpwa* of the marriages and is joint property of the husband and wives and not the separate property of the husband. The share of his two wives in such property jointly is one-third and both being of equal status the share of each is one-sixth. Each wife acquires a vested interest in one-sixth of such property from the date on which it is inherited, and that interest is not liable for any part of the debts incurred by the deceased husband alone.

Per *Maung Gyi, J.*—Under Burmese Buddhist Law as soon as a person dies his heirs immediately become entitled to his estate, and when a husband or a wife inherits property after marriage, the other spouse also becomes entitled at the same time to an undivided one-third share of such inherited portion. R C. T. P. V. Chetty Firm *v.* Maung Tha Hlaing, 3 R. 322; A. I. R. 1925 Rang 329 797

Burden of proof—Doubt, benefit of. *See* Evidence Act, 1872, s. 102 158

Calcutta Improvement (Appeals) Act (XVIII of 1911), s. 5—*Execution of order—Jurisdiction of Chief Judge, Small Cause Court—Munsif, jurisdiction of—Civil Procedure Code (Act V of 1908), s. 6, application of.*

Under s. 5 of the Calcutta Improvement (Appeals) Act the jurisdiction to execute the order of the President of the Tribunal by the Chief Judge of the Small Cause Court of Calcutta is not limited to an order which may come within his pecuniary jurisdiction.

Proceedings before the President of the Calcutta Improvement Tribunal not being a suit, s. 6 of the C. P. C. does not apply to any order passed by the President which may, therefore, be executed by a Munsif irrespective of the consideration of his pecuniary jurisdiction. C Nandalal Ganguli *v.* Nrityakali Devi 170

Calcutta Police Act (V of 1866), s. 78-A—*Procedure in Police investigation—Inherent powers of Police.*

Attendance and questionings of any person during Police investigation under s. 78-A, Police Act, are intended to take place within the Presidency Town itself. But if information is to be obtained from a person outside the Presidency whose attendance cannot be procured for some reason in the Presidency Town the procedure laid down in cl. (3) of the section is to be followed.

Calcutta Police Act—concld.

There are no inherent powers possessed by the Police. All investigations by the Police in the *Mofussil* must be controlled by the Cr. P. C. and in Calcutta by the Police Act itself or by any Circular Orders issued. **C** SATYA CHARAN MITTER *v.* EMPEROR, 30 C. W. N. 427; A. I. R. 1926 Cal. 586; 27 Cr. L. J 602 **266**

Calcutta Rent Act (III of 1920), s. 11—*Landlord and tenant—Covenant not to sub-let without written consent—Breach of covenant—Waiver of breach—Ejectment.*

Where a lease provides that the lessee shall not assign, sub-let or part with possession of the demised premises or any part thereof without the previous consent in writing of the lessor but that such consent shall not be unreasonably withheld in the case of a responsible and respectable person, and the lessee subsequently sub-lets the premises, without the written consent of the lessor, the lessor continuing to receive the rent with knowledge of the sub-lease and without objection thereto, the breach of covenant is merely technical and the subsequent receipt of rent by the landlord amounts to a waiver of the breach. In such a case it cannot be held that the tenant has failed to perform the conditions of the tenancy within the meaning of s. 11 (1) of the Calcutta Rent Act.

Per *Rankin, J.*—The last words of sub-s. (1) of s. 11 of the Calcutta Rent Act cannot possibly mean that because a breach of covenant was committed by a tenant in 1921, which was perfectly harmless, was never made a grievance of, and as to which no request for compensation or damages was ever made, therefore, it is impossible for the Court to give the tenant, in 1924 the benefit of the Rent Act. **C** OFFICIAL TRUSTEE *v.* W. G. BOWDEN, 30 C. W. N. 199; A. I. R. 1926 Cal. 624 **857**

Carriage of goods—*Railway Company—Goods accepted under Risk Note B—Waggon sealed with paper only—Liability for loss of goods.*

The fact that a waggon is sealed with paper and bolted but not locked, does not amount to wilful neglect on the part of the Railway Company accepting goods on the terms of Risk Note B. **O** DWARKA DAS *v.* AGENT OF EAST INDIAN RY. CO., 2 O. W. N. 794; A. I. R. 1926 Oudh 16 **672**

—— *Railway Company—Risk Note—Delay in delivery—Railway, liability of.*

Where a consignee of goods in consequence of obtaining the carriage of his goods at low rates signs a Risk Note thereby absolving the Railway from liability for loss under certain circumstances, he is bound by the terms of the note.

Where a suit as framed is not one brought in tort for damages due to loss occasioned to the plaintiff on account of retardation in delivery but simply for compensation for the loss of the articles which were found missing, it cannot succeed on the ground of delay in delivery of goods, where the goods were consigned to the Railway under Risk Note Form H. **Pat** MADRAS & SOUTH MARHATTA RY. CO. *v.* GOPAL RAI-RAM CHUNDER, (1926) Pat. 123; A. I. R. 1926 Pat. 273 **510**

C. P. Tenancy Act (I of 1920), s. 12—*Occupancy holding—Transfer to distant heirs—Legality.*

Under s. 12 of the C. P. Tenancy Act an occupancy tenant is entitled to transfer his holding to any distant heir even during the lifetime of other nearer heirs, provided the transferee is a person to whom the right is likely to go by inheritance to the transferring tenant in the absence of any nearer heirs entitled to succeed under the Tenancy Act. **N** MOHAN *v.* BODHAN, 21 N. L. R. 144; A. I. R. 1925 Nag. 421 **655**

—— **ss. 12, 13**—*Occupancy holding—Surrender to co-sharer—Joint possession by* lambardar, *suit for—Contribution, whether can be claimed by co-sharer.*

A transfer of an occupancy holding is not *ab initio* void but only voidable, as it can be avoided by certain specified persons mentioned in s. 13 of the C. P. Tenancy Act.

A *lambardar* can, therefore, obtain joint possession of land acquired under a surrender by a co-sharer from an occupancy tenant only on making contribution towards the cost of acquisition incurred by the latter. **N** WAMANRAO *v.* SHRAWAN **941**

—— **ss. 49, 50, 109**—Sir *land—Cultivating rights—Transfer—Permission in general words, scope of—Sanction for sale, whether sufficient for mortgage of portion—Sanction of Sub-Divisional Officer—Confirmation by Deputy Commissioner, whether necessary—Endorsement on transfer deed, whether sufficient proof of sanction—Civil Courts, whether have power to question propriety of sanction.*

A permission by the proper Revenue Officer to transfer cultivating rights in *sir* lands must be taken to be a permission to transfer them in any way, for any consideration, to any person, at any time the owner pleases unless the permission is limited in any of these ways. A permission for the sale of such rights would, therefore, suffice for validating a transfer by mortgage of those rights.

If a sanction is granted for the sale of the cultivating rights in the entire *sir* land in the village, it will be available for the transfer of such rights in a part of the land.

The sanction required under ss. 49 and 50 of the C. P. Tenancy Act or by any of the rules made on the subject under s. 109 of the Act is the sanction of the Revenue Officer, *i.e.*, Sub-Divisional Officer, and though under the rules under s. 109 the Revenue Officer dealing with an application of this kind must in certain cases forward it to the Deputy Commissioner if he does not reject it, the sanction of the Deputy Commissioner is not necessary under the Act for the validity of the transfer. The sanction of the Revenue Officer, *i.e.*, Sub-Divisional Officer, being all that is required for the purpose of validating the transfer.

The endorsement by the Revenue Officer relating to the grant of the sanction by him for the transfer is complete proof of such sanction and the Civil Courts cannot enquire whether the Revenue Officer ought to have granted the sanction or not. **N** PREM NARAYAN *v.* MAN SINGH **829**

—— **s. 109.** *See* C. P. TENANCY ACT, 1920, s. 50 **829**

Chinese Customary Law. *See* Cr. P. C., 1898, s. 488 **608**

Chota Nagpur and Ramgarh Jagirs—*Jagirs and maintenance grants, nature of—Jagodih Lat, whether resumable—Bengal Decennial Settlement Regulation VIII of 1793, s. 7.*

Jagirs and maintenance grant in Ramgarh and Chota Nagpur are resumable on the failure of the lineal male descendants of the grantee.

The holders of Jagodih tenure have the status of dependent *taluqdars* holding under the Ramgarh Raj and are to be considered as lease-holders only within

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the meaning of s. 7, Bengal Decennial Settlement Regulation VIII of 1793.

Jagodih Lat is a *jagir* tenure held under the Ramgarh Estate and is resumable on failure of the lineal male descendants of Raja Lal Khan the grantee and is not a *shamilat* or *shikmi* tenure in the sense in which the terms are used by the Revenue Officers in the Record of Rights published in 1914. **Pat** Kamakhya Narain Singh *v.* Jawahir Khan 1007

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 3 (1), 12—*Estate coming under Act—"Bar" of pending proceedings, meaning of—Revival of proceedings—Limitation Act (IX of 1908), s. 15.*

The real meaning of the word "bar" used with regard to pending proceedings in cl. (1) of s. 3 of the Chota Nagpur Encumbered Estates Act is that they should be stayed so long as the management continues and not that, except in the circumstances laid down in s. 12, the bar shall be absolute. Even if, in cases which do not fall under the purview of s. 12, no revivor of proceedings is allowed, the provisions of s. 15 of the Limitation Act must apply thereto.

Similarly any process, execution or attachment, which became null and void on the publication of an order under s. 2 of the Chota Nagpur Encumbered Estates Act, can be revived, after its cancellation, under s. 15 of the Limitation Act, although s. 12 of the Estates Act does not apply thereto.

The provisions of s. 12 of the Chota Nagpur Encumbered Estates Act relating to the revival of barred proceedings and debts should not be strictly construed. **Pat** Mathura Prasad Singh *v.* Jageshwar Prasad Singh, (1926) Pat. 65; A. I. R. 1926 Pat. 260; 5 Pat. 404 624

Chota Nagpur Tenancy Act (VI of 1908), s. 258 —*Settlement entries—Suit for declaration that entries are wrong, whether maintainable—Burden of proof.*

A suit for declaration in a Civil Court that a certain tenure which has been entered in the Settlement records as non-resumable is in fact resumable is not barred by the provisions of s. 258, Chota Nagpur Tenancy Act.

Per *Mullick, J.*—Where it is admitted before the Settlement Officer that the defendants are holding land within the ambit of the *zemindari* of the plaintiff who is paying revenue for the same, the onus of showing the nature of their title is upon the defendants and upon a failure to show that they have a tenancy therein, the plaintiff is entitled to resume. But where the Settlement Officer holds that the defendants are owners of a non-resumable tenure, the onus is shifted upon the plaintiff to rebut the presumption created by the Record of Rights. **Pat** Kamakhya Narain Singh *v.* Jawahir Khan 1007

Civil procedure—*Minor, decree against, in second appeal—Decree set aside—Second appeal, re-hearing of.*

Where a decree in second appeal passed by the High Court is set aside on the ground that a minor respondent was not duly represented by a guardian *ad litem*, the second appeal would be re-heard. **L** Muin-ud-din *v.* Abul Khair 686

——— Suit against Railway—Defendant misdescribed. *See* Limitation Act, 1908, s. 22 762

——— *Trial Court, duty of, to try all issues.*

A trial Court should not dispose of a case on a law point only but should try all the issues that arise in the case. **Pat** Kesho Prasad Singh *v.* Shamnandan Rai, (1926) Pat. 81; 5 Pat. 233 28

Civil Procedure Code (Act V of 1908), s. 2 (2) (b), scope of. *See* Jurisdiction of Court 1

——— **s. 6**, application of. *See* Calcutta Improvement (Appeals) Act, 1911, s. 5 170

——— **s. 11**—*Award not operative—Decree, whether executable—Executability of decree, decision as to, in previous application*—Res judicata.

Where in an award a sum is noted as due by one party to another but without any direction that the party so liable should pay it to the other, the decree based upon such award cannot be said to be executable.

But where once in execution proceedings of such a decree it is decided that the decree is executable, the decision operates as *res judicata* in a subsequent application. **A** Nand Lal Saran *v.* Dharam Kirti Saran, 24 A. L. J. 465 961

——— **s. 11**—*Consent decree—Unnecessary finding*—Res judicata—*Rent suit, findings in, where binding.*

Res judicata by its very words means a matter upon which the Court has exercised its judicial mind, and a judgment passed on consent cannot be considered as a *judicium.* A consent decree, therefore, does not come within the rule of *res judicata* as contained in s. 11 of the C. P. C. It, however, raises an estoppel as much as a decree passed in *invitum* and the decree must be held binding as against the parties thereto unless there was want of jurisdiction or there were present circumstances which would go to vitiate the agreement on which the consent was founded.

Where a Court in a rent suit definitely determines the area of the land in the possession of the tenant and the annual rent payable for the same, it might be said that the determination is general and not limited to the particular years for which rent is claimed, and in a subsequent suit the tenant can only dispute the findings by proving that the area or the rent has since altered.

Where a decree is not based on a finding but is granted in spite of it and the party against whom the finding is arrived at is not able to challenge it on appeal, the finding cannot be regarded as necessary for the decision of the suit and does not operate as *res judicata.* **C** Sivadas Dutta *v.* Birendra Krista Dutta, 43 C. L. J. 116; A. I. R. 1926 Cal. 612 844

——— **s. 11**—*Legal representative, question of*—Res judicata.

Where the question of a legal representative is decided by a Court under O. XXII, r. 5, C. P. C., its re-adjudication in a subsequent regular suit is barred by the rule of *res judicata.* **A** Raj Bahadur *v.* Narayan Prasad, 24 A. L. J. 546 157

——— **s. 11**—Res judicata—*Custom of pre-emption, finding as to,* inter partes *in previous suit, effect of—One of parties minor in previous litigation—Variation in custom, right to prove.*

A finding in a previous suit *inter partes* as to the existence or non-existence of a custom of pre-emption is binding on the parties in a subsequent suit subject only to the condition that it is open to the either party to show in the subsequent suit that the custom has ceased to exist or has in any other way been abandoned.

The mere fact that one of the parties to the subsequent suit was a minor in the previous litigation does not take away from the binding force of the finding in the previous suit. **A** Deonath Singh *v.* Tilakdhari Singh 463

Civil Procedure Code—1908—contd.

———— **s. 11**—Res judicata, *plea of—Court of concurrent jurisdiction—Judgment, whether operates as bar—Subsequent suit—S. 11, whether exhaustive.*

The plea of *res judicata* is not limited to the provisions of s. 11 of the C. P. C., nor is it limited to a judgment of a Court of concurrent jurisdiction being pleaded as bar to the subsequent suit which is dealt with in the said section but it extends also to a judgment of a Court of exclusive jurisdiction. **S** VELJI DAYALJI *v.* FIRM OF NAND LAL **423**

———— **s. 11**—Res judicata—*Decision in previous case wrong—Cause of action recurring*—Res judicata.

It is settled law that even if the cause of action for a suit be a recurring one every matter decided in the suit may be *res judicata* which was directly and substantially in issue in the previous suit even though the decision in the former suit be erroneous. **Pat** DEBI PRASAD *v.* JALDHAR MAHTON, (1926) Pat. 113; A. I. R. 1926 Pat. 288 **553**

———— **s. 11**—Res judicata—*Mortgage—Suit for redemption—Mortgagee not resisting suit on ground of purchase of equity of redemption—Subsequent suit, whether barred—Defendant in possession, duty of, to resist suit.*

Where in a redemption suit the mortgagee does not resist the suit on the ground that he is a purchaser of the equity of redemption of part of the property but simply claims mortgage-money, a subsequent suit by him for possession on the ground of purchase is barred by the rule of *res judicata.*

A defendant being in possession is bound to resist claim on all grounds that it is possible for him on his knowledge at the time to bring forward. **L** ROSHAN *v.* NIGAHIA, 7 L. 40; A. I. R. 1926 Lah. 162 **27**

———— **s. 11**—Res judicata *between co-defendants—Necessary conditions*—Res judicata, *constructive.*

In order to constitute a decision *res judicata* between co-defendants three essential conditions must be fulfilled: (1) that there should be a conflict of interests between co-defendants, (2) that it should be necessary to decide on that conflict in order to give the plaintiff the relief appropriate to his suit, and (3) that the judgment should contain a decision on the question as between co-defendants.

The tendency of Courts is to apply the doctrine of constructive *res judicata* as founded on *Explanation IV* to s. 11, C. P. C., within very narrow limits as between plaintiffs and defendants and there is scarcely any room for its application as between co-defendants. **C** GANGA PRASAD CHOWDHURY *v.* KULADANANDA ROY, 30 C. W. N. 415; A. I. R. 1926 Cal. 568 **235**

———— **s. 11**—Res judicata—*Order entering satisfaction of decree—Fresh application.*

An order in execution entering satisfaction of decree unless set aside operates as *res judicata* and bars a fresh application for execution. **L** MUL RAJ *v.* KISHORI LAL **172**

———— **s. 11**—Res judicata—*Rent suit—Rate of rent.*

The essence of the doctrine of *res judicata* is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other, the same question cannot be agitated by them again in another suit. In the case of suits for rent or other recurring liability, the causes of action for suits for successive periods are different. In the case of such suits, for the doctrine to apply, it will have to be shown that the question of right or liability not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided the decision would be *res judicata* in respect of any suit for a subsequent period. If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding the right or liability for the period involved in the suit, then the issue was raised not directly and substantially but collaterally or incidentally. In a suit for rent, no issues need be framed, but where issues are framed, the non-existence of a direct issue of this character has to be seriously taken into account in determining whether the question of right or liability for all times was really directly and substantially in issue. **C** GNANADA GOBINDO *v.* NALINI BALA DEBI, 43 C. L. J. 146; 30 C. W. N. 593; A. I. R. 1926 Cal. 650 **837**

———— **s. 11, Exp. IV**—*Point not necessary in previous suit, omission to raise*—Res judicata.

A point which could have been raised in a previous suit but was not necessary for the decision of the case and as such was not raised cannot operate as *res judicata* in a subsequent suit. **C** RAJMOHINI DASI *v.* NAGENDRA KUMAR TALPATRA **310**

———— **s. 11, 151**—*Dismissal of application under s. 151 challenging compromise decree—Suit to set aside same decree*—Res judicata.

A summary dismissal of an application under s. 151, C. P. C., challenging the validity of a compromise decree does not bar a regular suit for avoiding that decree on the basis of fraud. **Pat** PARSHAN SAHI *v.* RICHARDSON, 5 Pat. 276; A. I. R. 1926 Pat. 289 **765**

———— **s. 13.** *See* C. P. C., 1908, s. 94 **512**

———— **s. 13**—*Foreign state, subjects of, sued in British Courts—Duty of Courts.*

When the jurisdiction of a British Court is invoked against a subject of a foreign state on the ground that by coming within the physical boundaries of the jurisdiction of that Court he is liable to be sued as if he were a subject of His Majesty, a duty is cast upon the Court to be as jealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty. **M** CHAND MULL DUDHA *v.* PURUSHOTHAMADOSS, 50 M. L. J. 348; (1926) M. W. N. 328; A. I. R. 1926 Mad. 584 **512**

———— **s. 16.** *See* PROBATE AND ADMINISTRATION ACT, 1881, s. 20 **1046**

———— **s. 20**—*Jurisdiction—Principal and agent—Suit for account—Negligence and misconduct alleged—Contract of agency, where made—Cause of action, where arises.*

The cause of action in a suit for account between a principal and agent arises where the contract of agency is made or where it was to be performed and where the refusal to account takes place.

In the absence of proof as to where any express contract of agency was made, it must be deemed to have been made where the agent receives orders from his principal and accepts the orders thus indicating his consent to act.

In the absence of a contract to the contrary the accounting and payment by an agent must necessarily be done where all the business is transacted.

Where a principal charges his agent with various acts of negligence and misconduct on the latter's part in the course of agency, the cause of action arises

Civil Procedure Code—1908—contd.

where the agent commits the alleged acts of negligence and misconduct, even though the suit may ostensibly be for rendition of accounts. **S** Gordhandas Kalidas *v.* Dowlatram Khhayalal **287**

——— **s. 20 (c)**—*Suit for declaration that decree is obtained by fraud and for injunction restraining decree-holders from executing it—Cause of action—Jurisdiction.*

Cause of action for a suit for a declaration that a particular decree was obtained by fraud and for an injunction restraining the decree-holders from executing it partly arises at the place where the decree is obtained and partly where it is sought to be executed and consequently Courts at both the places have jurisdiction to try the suit. **L** Jawahar Singh *v.* Sassoon & Co., 7 L. 61; A. I. R. 1926 Lah. 277 **377**

——— **s. 24**—*Expression of opinion by Court in another case—Transfer.*

Expression of opinion by Court on certain points involved in the case in hand in a previous case is no ground for transferring the case from that Court. **L** Narain Devi *v.* Shankar Dass **394**

——— **s. 34.** *See* Contract Act, 1872, s. 73 **575**

——— **s. 35.** *See* Contract Act, 1872, s. 73 **971**

——— **s. 35 (1)**—*False defence—Compensation.*

No compensation for a false defence can be awarded unless objection has been taken by the party against whom the defence was set up. **L** Hira Lal *v.* Darbari Lal **78**

——— **s. 35 (1)**—*Provincial Small Cause Courts Act (IX of 1887), s. 24—Small Cause Court—Costs, extraordinary, award of, power of—Appeal, whether lies.*

An officer who has been permitted to exercise the powers of a Small Cause Court Judge, under the Provincial Small Cause Courts Act, is not entitled to exercise the powers of granting costs under s. 35 (A) of the C. P. C., unless he is vested with a jurisdiction up to Rs 250 or has been empowered by the High Court to award such costs.

Where an order awarding extraordinary costs under s. 35 (A) of the C. P. C. is made by a Small Cause Court an appeal lies from the order under s. 24 of the Provincial Small Cause Courts Act to the District Judge. **A** Banwari Lal *v.* Shalimar Paints Colour and Varnish Co. **790**

——— **ss. 38, 41**—*Decree transferred for execution—Re-call by Court transferring.*

A Court can make an order withdrawing its own decree which it has transferred to another Court for execution. **B** B. N. Lang *v.* Jasvantlal Hathichand, 28 Bom. L. R. 381; A. I. R. 1926 Bom. 271 **146**

——— **s. 39.** *See* Limitation Act, 1908, Sch. I, Art. 181 **482**

——— **ss. 39, 41**—*Decree transferred for execution—Failure to execute—Circumstances attending failure to execute certified to Court passing decree—Jurisdiction, cessation of, of Executing Court.*

The Court to which a decree is sent for execution ceases to have any jurisdiction to deal with the case after it has certified to the Court which passed the decree the circumstances attending the failure to execute it. **Pat** Muhammad Ibrahim *v.* Chhatoo Lal, (1926) Pat. 86, 5 Pat. 398; 7 P. L. T. 461; A. I. R. 1926 Pat. 274 **36**

——— **s. 46**—*Precept, issue of—Security, acceptance of, by Court to which precept is issued—Jurisdiction—Estoppel.*

Civil Procedure Code—1908—contd.

It is not beyond the jurisdiction of the Court to which a precept has been issued to accept security offered by the judgment-debtor for payment of the decretal amount by a particular date and stay execution till then.

Where a security has been so offered to and accepted by the Court, judgment-debtor and surety are both estopped from challenging the jurisdiction of the Court to do so. **L** Puran Mal *v.* Dina Nath-Bari Ram, 8 L. L. J. 164 **119**

——— **s. 47**—*Legal representative—Right to contest liability under decree in execution.*

The question whether or not an alleged legal representative does or does not occupy that capacity so as to be bound by the decree, is one which is to be decided in the Execution Court. Such a determination does not offend against the principle that an Execution Court cannot go behind the decree. **A** Babu Lal *v.* Janak Dulari, 24 A. L. J. 462 **454**

——— **s. 47**—*Party exonerated as misjoined—Name not removed from record—Party, whether ceases to be party to suit.*

A party to a suit who has been exonerated on the ground of misjoinder but whose name appears in the decree without being struck off from the record is a defendant against whom the suit has been dismissed within the meaning of Explanation to s. 47, C. P. C.

The ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. **M** Sethu Konar *v.* Ramasami Konar, 50 M. L. J. 205; (1926) M. W. N. 251; A. I. R. 1926 Mad. 484; 49 M. 494 **526**

——— **s. 47**—*Stay of execution, refusal of—Appeal, if lies.*

No appeal lies against an order refusing to stay execution of decree. **C** Khetra Mohan Saha *v.* Sarat Chandra Saha **352**

——— **s. 47, O. I, r. 10**—*Suit, dismissal of, against necessary party by consent—Order "striking off" name of party—Order, construction of—Subsequent suit against party, maintainability of.*

Where a party is properly impleaded as one of the defendants in a case and the case as against would proceed to judgment but for the fact that the plaintiff elects to abandon part of his case and the suit is in consequence dismissed as against that defendant, the party is a defendant against whom a suit has been dismissed within the meaning of the Explanation to s. 47, C. P. C.

But where a defendant has been improperly joined as a party, the proper procedure is to strike out the name of the defendant under O. I, r. 10, C. P. C., and not to dismiss the suit as against him.

Where in a suit against several defendants, the Court in its judgment stated as to one of the necessary defendants, "By consent I strike off the 2nd defendant's name. Plaintiff will pay by consent half the costs":

Held, (1) that the substance and not the form of the order must be regarded;

(2) that since the defendant was not an unnecessary party to the suit, the order was really one of dismissal as against him, although the words "strike off" were inappropriately used;

(3) that the order amounted to a decree which not having been appealed against became final and a subsequent suit against the same defendant was not

maintainable. **M** Linga Iyer *v.* Lakshman Chettiar, 50 M. L. J. 387; 23 L. W. 533; (1926) M. W. N. 409; A. I. R. 1926 Mad. 487 **123**

———— **s. 47, O. XXI, r. 90** *—Letters Patent (Lah.), cl. 10—Execution of decree—Sale, application to set aside, dismissal of—Appeal, second, whether lies—Revision—Appeal under Letters Patent, whether competent.*

An application to set aside an auction-sale was dismissed as barred by time. In appeal the District Judge held that as the necessary deposit under O. XXI, r. 84 (1) of the C. P. C., had not yet been made the sale was not complete and the application was within time. He remanded the case to the first Court for a fresh decision. In revision a Single Judge of the High Court set aside the order of the District Judge and restored that of the first Court dismissing the application. The judgment-debtor filed an appeal against the order of the Single Judge under cl. 10 of the Letters Patent and contended that the order of the first Court was passed under s. 47, C. P. C., and was, therefore, a decree and consequently open to second appeal, and that the order of the Single Judge must be treated as having been passed in a second appeal and was appealable under the Letters Patent:

Held, (1) that the order of the first Court was passed under O. XXI, r. 90, C. P. C., and was not open to second appeal,

(2) that the order of the Single Judge was passed in revision and was not open to appeal under the Letters Patent. **L** Parja Mal-Chandi Mal *v.* Mul Chand-Murari Lal, 6 L. 250; A. I. R. 1925 Lah. 624 **521**

———— **s. 48**—*Decree of Original Court appealed from—Limitation, starting point of.*

Where an appellate decree either affirms, modifies or reverses the decree of the trial Court, the period of limitation will begin to run under s. 48, C. P. C., from the date of the decree of the Appellate Court.

But where an appeal is dismissed as not being competent, there is no decree by the Appellate Court and the limitation would run from the date of the decree of the trial Court. **A** Nand Lal Saran *v.* Dharam Kirti Saran, 24 A. L. J. 465 **961**

———— **ss. 48, 151, O. XLVII, r. 1**—*Execution application—Dismissal for no fault of decree-holder—Restoration—Inherent powers—Review—Notice.*

Where an execution application is dismissed, by reason of objections on the part of the judgment-debtor or action taken by Court or other cause, for which the decree-holder is not responsible, the right of the decree-holder to the final completion of the proceedings is not necessarily defeated, and further applications of the decree-holder to the Court executing the decree to go on from the point where the execution proceedings are arrested, are regarded as applications merely ancillary to the substantive application and no question of limitation under s. 48, C. P. C., can arise under such circumstances.

Where an Execution Court strikes out execution proceedings in the absence of the decree-holder, on the ground that there is no bidder for the property at the Court-sale, and the decree-holder is not present at the time to ask for further action, it is a case in which the decree-holder is not responsible for dismissal of the proceedings, and the Court has power to revive them under s. 151, C. P. C. But where it purports to act under O. XLVII, r. 1, C. P. C., it is incumbent on it to give notice of the application filed by the decree-holder to the opposite party, and an omission to do so makes the order of restoration of proceedings defective. However, any such defect is cured, if the propriety of the order is not challenged for several months together. **A** Girdhari Lal *v.* Ram Charan Lal, 24 A. L. J. 437; A. I. R. 1926 All. 331 **613**

———— **s. 79**—*Government of India Act, s. 32—Sovereign act—Right of suit.*

There is a great and clear distinction between acts done in the exercise of what are usually termed Sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them.

If the Secretary of State takes the property by an act of Sovereignty then no suit lies, but if on the other hand he takes it under the colour of a legal title then his act will be within the jurisdiction of the Courts. When the Secretary of State takes property under a decree of Court, the acquisition is one under the colour of a legal title and not by an act of Sovereignty. **Pat** Khursaidi Begum *v.* Secretary of State for India, (1926) Pat. 145 **433**

———— **s. 92**—*Scheme—Provision for redress by application to Court, legality of—Application by* archakas *for salary payable by trustee, whether sustainable.*

A general clause in a scheme framed under s. 92, C. P. C., providing for application to the Court with regard to the scheme is *ultra vires* as being opposed to the principle of s. 92, C. P. C., since for such matters as are covered by the section, the sanction of the Advocate-General must be obtained.

An application by *archakas* of a temple to a Court for recovery of the arrears of their salaries is not competent even if the scheme provides for making an application to the Court by the trustee or any other person interested in regard to any matter arising out of the scheme. The proper remedy in such a case is by way of a regular suit. **M** Ryali Brahmayya *v.* Venkatasurya Narayanamurthy, 50 M. L. J. 409; A. I. R. 1926 Mad. 557 **554**

———— **s. 92**—*Scheme, tentative—Removal of trustee—Procedure—Appeal.*

A trustee appointed under a tentative scheme, which provided for its modification after a certain time but made no provision for the removal of the trustee, can be removed only by a regular suit under s. 92, C. P. C. Any removal of such a trustee otherwise than in a regular suit is without jurisdiction and liable to be set aside in revision.

Orders of the latter kind removing the trustees are not orders in execution and are, therefore, not appealable. **M** Bangarammal *v.* Ramanuja Iyengar **610**

———— **s. 92**, *scope of.*

Section 92, C. P. C., regulates suits where there is a breach of an express or constructive trust created for public purpose of a charitable and religious nature but a suit to establish the existence of the trust itself is beyond its ambit. **Pat** Khursaidi Begum *v.* Secretary of State for India, (1926) Pat. 145 **433**

———— **s. 92**—*Sikh and Singh distinguished—Udasis, whether Sikhs—Singhs, interest of, in Udasi shrine—Religious community, identity of—Suit for change of management of shrine, who may bring.*

Sikh and Singh are not interchangeable terms. *Udasis* constitute a sect of their own quite distinct

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from the orthodox Sikhs of the previous generations as well as from the modern Singhs.

The followers of Guru Gobind Singh have no such interest in an *Udasi* shrine as is contemplated by s. 92, C. P. C., and are, therefore, not competent to maintain a suit under that section in respect of an *Udasi* shrine.

The mere fact that their ancestors or some members of their community made gifts to the shrine does not confer on them the said right.

Per *Harrison, J.*—Identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies and texts.

Any man having a right of worship can bring a suit under s. 92, C. P. C., but the right to worship connotes the profession by the would-be worshipper of the religion practised in the place of worship, and even though the views of the majority of the worshippers may change and develop to such an extent that they wish to alter and even to make a radical change in the form of worship, they have no right to do so, and the minority, however small, which adheres to the original practice retains the control and possession of the place of worship and its endowments. No question of the majority of persons can affect the question but the original purposes of the trust must be the guide. **L** Basant Das *v.* Hem Singh, A. I. R. 1926 Lah. 100; 7 L. 275 **695**

——— **s. 94, O. XXXVIII, r. 1**—*Arrest before judgment, principles of—Suit founded on proceedings of special Tribunal created by* firman *of Nizam—Plaint disclosing highly contentious questions—Arrest before judgment, whether can be ordered.*

Before ordering arrest before judgment a Court should be satisfied (1) that the plaintiff's cause of action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint and (2) that there is reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court.

A suit was filed on the Original Side of the High Court of Madras for recovery of a sum of $5\frac{1}{2}$ lakhs of rupees and the plaint was founded on the proceedings of a special tribunal created under a *firman* of the Nizam of Hyderabad and described as a decree of that commission. On an application by the plaintiff for arrest before judgment of the defendant and for an order that he should be made to show cause why he should not give security for his appearance:

Held, that it was at least highly arguable that the proceedings before the Commissioners terminated not in anything that could be called a decree or a foreign judgment within the meaning of s. 13 of the C. P. C. but a report submitted to the Nizam to guide him as to what action he should take;

(2) that it was equally arguable that the order to pay passed by the Nizam though binding on the defendant as a subject, was not a foreign judgment but an executive act;

(3) that the plaint, therefore, disclosed highly contentious matters, obviously doubtful and arguable and the application for arrest before judgment and for security must be rejected. **M** Chand Mull Dudha *v.* Purushothamadoss, 50 M. L. J. 348; (1926) M. W. N. 328; A. I. R. 1926 Mad. 584 **512**

——— **s. 94, O. XXXIX, r. 1**—*Suit for declaration—Temporary injunction, whether can be granted.*

In a suit for declaration of title which contains no prayer for any injunction which may last after the disposal of the suit, the plaintiff is not entitled to ask for a temporary injunction restraining the defendant from interfering with the exercise of his rights by the plaintiff during the pendency of the suit. **C** Sachindra Lal Mitter *v.* Panchanon Mitter, 30 C. W. N. 214; A. I. R. 1926 Cal. 604 **871**

——— **s. 95.** *See* Limitation Act, 1908, Sch. I, Art. 36 **444**

——— **s. 96**—*Second appeal—Meaning of word—Finding of fact.*

The finding as to the meaning of a word is a finding of fact and cannot be disturbed in second appeal. **C** Bi[illegible]ban Mohan Basak *v.* Chairman, Municipal Commissioners, Dacca, 30 C. W. N. 405; A. I. R. 1926 Cal. 607; 53 C. 453 **231**

——— **s. 97**—*Finding as to status of agriculturist under Dekkhan Agriculturists' Relief Act—Preliminary decree—Appeal.*

A finding on the question whether a party to the suit is or is not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act is not appealable as a preliminary decree. **B** Rupchand Ganesh Shet *v.* Bhogilal Ratanchand, 28 Bom. L. R. 307; A. I. R. 1926 Bom. 237 **72**

——— **s. 100**—*Second appeal—Custom, whether question of fact or law—High Court's power to interfere—Custom regarding* zar chaharum—*Finding as to evidence being insufficient to prove custom, whether open to attack in second appeal.*

The High Court in second appeal is not justified in determining whether the evidence produced in a case as to the existence of the alleged custom is or is not credible, though the High Court is competent to examine the evidence and to determine whether the evidence produced establishes a valid and binding custom.

The question whether the facts found in any given instance prove the existence of essential attributes of a custom or usage is a question of law which may be discussed in second appeal but the question whether such a state of facts has been proved by the evidence is merely a question of fact.

Where, therefore, the lower Appellate Court comes to the conclusion that the documentary and oral evidence produced is sufficient to prove a custom regarding "*zar chaharum*," the finding of fact as to custom arrived at by the lower Appellate Court in appeal is binding on the High Court and cannot be attacked in second appeal. **O** Horilal *v.* Bachchu Lal **987**

——— **s. 100**—*Second appeal—Finding of fact, when not binding.*

A finding of fact arrived at on a mistaken view of the pleadings is not binding in second appeal. **O** Ahmad Sharif *v.* Umrao Beg, 3 O. W. N. 460; A. I. R. 1926 Oudh 353 **779**

——— **s. 100**—*Second appeal—Jointness of cultivation, finding as to—Finding of fact—Finding based on misappreciation of expression 'sharing in cultivation'—Sharing in cultivation, meaning of.*

A finding whether a person is sharing in cultivation with another person is one of fact. But where such a finding is based on the misappreciation of the true meaning of the expression "sharing in cultivation" it is liable to be disturbed in second appeal.

Sharing in cultivation is not confined to ploughing, sowing, attending the crops or reaping them but covers any kind of help in agricultural pursuits. **A** Ramdeo *v.* Sheo Naik **190**

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—— **s. 100**—*Second appeal—Matters of procedure, if can be questioned.*

Matters of procedure dependent upon certain facts cannot be raised for the first time in second appeal. **C** SHIB NARAIN KAIBARTA DAS *v.* ABDUL GANI 417

—— **s. 102.** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 23 77

—— **s. 102**—*Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 41—Suit for contribution by co-judgment-debtor—Second appeal.*

A suit by a co-judgment-debtor to recover by way of contribution a share of the decretal amount paid by him is a suit of the nature of a Small Cause and not one falling under cl. 41, Sch. II, of the Provincial Small Cause Courts Act and, therefore, no second appeal is competent in such case where the value of the suit is less than Rs. 500. **A** MOHAMED SHER KHAN *v.* CHAMMAN KHAN 949

—— **s. 107**—*Additional evidence in appeal.*

Power to take additional evidence in appeal should be exercised by a Court of Appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised and that such additional evidence when admitted will be evidence which if produced at the trial would have been admissible. **P. C.** MAHOMED KHALEEL SHIRAZI *v.* LES TANNERIES LYONNAISES, A. I. R. 1926 P. C. 34; 3 O. W. N. 568; 49 M. 435; (1926) M. W. N. 495 767

—— **ss. 109, 110**—*Appeal in High Court dismissed in default—Appeal to Privy Council—Substantial question of law—Inferior wife, rights of, under Buddhist Law.*

Leave to appeal to Privy Council cannot be granted where the appeal in the High Court has been dismissed for want of prosecution.

Buddhist Law regarding the rights of a lesser or inferior wife when living apart from her husband having been established by a series of decisions is not a substantial question of law within the meaning of s. 110, C. P. C. **R** MA THAN *v.* MA KYIN, 3 R. 658; A. I. R. 1926 Rang. 111 464

—— **s. 109 (c), 110, O. XLV, rr. 2, 3, 8**—*Order of remand setting aside abatement of suit, whether final—Leave under s. 109 (c), grant of.*

Where in a suit under s. 92, C. P. C., for removal of a trustee and for framing of a scheme, the trustee died and the Court of first instance held that the suit had thereby abated but the High Court on appeal set aside the abatement in so far as the prayer for scheme was concerned, and remanded the case to the lower Court for disposal according to law:

Held, that the order in appeal was not a final one within the meaning of s. 110, C. P. C., nor was the case a fit one for granting special leave under s. 109, C. P. C.

An order is only final if it finally disposes of the rights of the parties. **M** SRILASRI VYTHILINGA DESIKA *v.* AURUMUGHA THAMBIRAN, 50 M. L. J. 552; 23 L. W. 695 966

—— **s. 110**—*Appeal to Privy Council—Mesne profits subsequent to High Court decree—Valuation.*

Mesne profits subsequent to the date of the High Court decree which have been awarded to the decree-holder, cannot be taken into consideration in making an estimate of the value under para. 2 of s. 110, C. P. C. **B** SHESHAGIRI SHAMBULINGA UPADHYA *v.* MANJAYA SANNAYA SHANBHOG, 28 Bom. L. R. 454; 50 B. 160; A. I. R. 1926 Bom. 265 755

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—— **s. 110**—*Appeal to Privy Council—Value of property involved—Affidavit, value of.*

Where on an application for leave to appeal to the Privy Council, the petitioner files an affidavit that the value of the property in dispute exceeds Rs. 10,000 and there is no counter-affidavit by the respondent, the Court may assume the correctness of the affidavit filed by the petitioner. **L** WAZIR CHAND TRIKHA *v.* NATHU RAM, 26 P. L. R. 123 554

—— **s. 114.** *See* PRIVY COUNCIL APPEAL 916

—— **s. 115.**

See ALSO GOVERNMENT OF INDIA ACT, 1915, s. 107.

See C. P. C., 1908, SCH. II, para. 5 483

See C. P. C., 1908, SCH. II, para. 10 115

—— **s. 115**—*Assumption of jurisdiction—Revision.*

Where upon an erroneous construction of a Statute, a Subordinate Court assumes a jurisdiction which does not belong to it, the High Court has the power to revise its decision. **B** BHIMJI N. DALAL *v.* B. B. & C. I. RY. CO., 28 Bom. L. R. 443; 50 B. 215; A. I. R. 1926 Bom. 266 742

—— **s. 115**—*Bombay District Municipal Act (III of 1901), s. 22—Election petition—District Judge acting under Municipal Act, whether Court—Revision.*

A District Judge acting under s. 22, Bombay District Municipal Act, is not a Court within the meaning of the word in s. 115, C. P. C. Therefore, an order by the District Judge refusing to entertain an objection petition in election on the ground of improper presentation is not open to revision by the High Court. **B** GANGADHAR BAPURAO GADER *v.* HUBLI MUNICIPALITY, 28 Bom. L. R. 519; 50 B. 357 660

—— **s. 115**—*Bombay Hereditary Offices Act (III of 1874), s. 10—Collector's refusal to grant certificate—Revision.*

Assuming that it has power to do so, the High Court will not interfere in revision with the order of Collector refusing to grant a certificate under s. 10, Bombay Hereditary Offices Act, where there is no violent misuse of authority, obvious bad faith, or reckless disregard or wanton perversion of the law on his part. **B** GOVIND MAHIPAT DESHPANDE *v.* BALKRISHNA NARAYAN, 28 Bom. L. R. 456; A. I. R. 1926 Bom. 308 760

—— **s. 115**—*Court Fees Act (VII of 1870), s. 7 (iv) (c)—Valuation of injunction accepted by District Judge—Interference in revision.*

The High Court will not interfere in revision with a valuation given by the plaintiff to a suit for injunction which the District Judge found to be a reasonable one. **Pat** JANKI SAHAY *v.* LALBEHARI LAL, (1926) Pat. 102 103

—— **s. 115**—*Refusal of leave to sue as pauper—Revision.*

No revision lies from an order refusing leave to sue in *forma pauperis*. **A** SHANKER BAN *v.* RAM DEI, 24 A. L. J. 557 484

—— **s. 115**—*Wrong decision—Material irregularity or illegality—Another remedy open—Interference in revision.*

A Court that has decided a suit over which it had jurisdiction cannot only on the ground that it has arrived at a wrong decision be said to have exercised its jurisdiction illegally or with material irregularity.

It is not the practice of the Judicial Commissioner's Court to interfere in revision where another remedy is open to the aggrieved party and where no great injustice or inconvenience would follow from their

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refusal to act. **N** SAMSHERKHAN *v.* ABDUL SATTAR KHAN, 22 N. L. R. 30; A. I. R. 1926 Nag. 290 **70**

——— **s. 115, O. IX,** *application of—Execution proceedings—Mistaken application—Relief, grant of, in revision.*

The provisions of O. IX, C. P. C., are not applicable to execution proceedings.

The High Court will not interfere in revision to direct the lower Court to treat a mistaken application under O. IX, C. P. C., as one for review under O. XLVII of the Code, where there was another remedy open to the applicant which he could have availed of. **C** SAFITANNESSA KHATUN *v.* MEGH LAL GOPE, 43 C. L. J. 285; A. I. R. 1926 Cal. 735 **172**

——— **s. 115, O. IX, r. 13**—Ex parte *decree, proceedings for setting aside, whether case—Application barred by time—Jurisdiction.*

Proceedings for setting aside an *ex parte* decree, since they involve the reversal of a final order and decree are themselves a case within the meaning of s. 115, C. P. C.

When a Court in effect decides that an application is time-barred and in spite of its decision refers to that application, which is one for which the law does not permit it to extend time, as within time and proceeds to decide it in favour of the applicant, the Court illegally assumes jurisdiction which it does not possess. **L** WIRU RAM *v.* AMAR CHAND, 8 L. L. J. 170 **117**

——— **s. 141, O. IX**—*Dismissal of suit in default—Application for restoration also dismissed in default—Application to restore application, whether maintainable.*

An application under O. IX, C. P. C., to set aside an order of dismissal of a suit in default, is not an application in suit but is an independent one coming under s. 141, C. P. C. Such an application, therefore, is covered by O. IX and can be restored under that Order if dismissed in default. **M** SALAR BAG SAHEB *v.* KARUMANCHI KOTTAYA, 23 L. W. 538; A. I. R. 1926 Mad. 654 **151**

——— **s. 145, O. XXI, r. 2**—*Surety for payment of decree—Uncertified payment, whether can be pleaded by surety—Surety, application of, under O. XXI, r. 2, maintainability of.*

So long as there is an executable decree against the judgment-debtor, a surety who executes a bond undertaking to discharge the decree is not relieved from his liability to pay the decree amount under the security bond executed by him.

Where, therefore, payments to the decree-holder are not certified to the Court executing the decree, an application for execution is maintainable against the surety.

A surety though he is not a party to the decree has an interest in showing that the decree has been satisfied and may, therefore, ask the Court to hold an enquiry as to the same. **M** TAMBI REDDI VIRAREDDY *v.* DEVI REDDY, 49 M. 325; 50 M. L. J. 584; A. I. R. 1926 Mad. 674 **522**

——— **s. 151.** *See* C. P. C., 1908, s. 48 **613**

——— **s. 152**—*Amendment of decree after satisfaction*

Section 152 of the C. P. C. permits clerical or arithmetical mistakes in judgments and decrees to be corrected at any time, but an amendment of a decree after satisfaction has been entered up is a mere nullity unless steps are also taken at the same time to set aside the order recording satisfaction. **M** MUNUSAMI PILLAI *v.* MAHDI HUSSAIN KHAN, (1926) M. W. N. 180; A. I. R. 1926 Mad. 516; 50 M. L. J. 655 **453**

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——— **O. I, r. 8,** *scope of.*

Order I, r. 8, C. P. C., is merely an enabling provision of law and does not prevent a representative suit being brought in any other manner that the law permits. **B** SHANKARLAL PURSHOTTAM GOR *v.* DAKORE TEMPLE COMMITTEE, 28 Bom. L. R. 309; A. I. R. 1926 Bom. 179 **47**

——— **O. I, r. 10.** *See* C. P. C., 1908, s. 47 **123**

——— **O. I, r. 10**—*Suit by widow for declaration of invalidity of adoption, dismissal of—Suit for possession by adopted son—Reversioner of adoptive father, whether can be impleaded as party.*

The widows of a deceased Hindu instituted a suit against the plaintiff for a declaration that his adoption by their deceased husband was invalid. This suit was dismissed and the plaintiff then instituted a suit against the widows for recovery of possession of the property of his adoptive father. During the pendency of the suit, a reversioner of the deceased made an application to be impleaded as a party to the suit:

Held, that the suit being merely one for possession consequential upon the dismissal of the declaratory suit brought by the widows, it was not proper to implead the reversioner as a party to the suit, inasmuch as such a course would totally change the frame and scope of the suit and would render it necessary again to re-open the question of the validity or invalidity of the plaintiff's adoption which had already been settled as between him and the widows. **N** SUNDARBAI *v.* GOPAL SINGH **918**

——— **O. II, r. 2**—*Promissory note given in satisfaction of antecedent liability—Suit on pro-note, dismissal of—Suit to enforce antecedent liability, whether barred.*

The provisions of r. 2 of O. II of the C. P. C. are directed to securing the exhaustion of the relief in respect of a cause of action and not the inclusion in one and the same action of different causes of action, even though they arise out of the same transaction.

Where a promissory note is given in satisfaction of an already existing liability, a claim founded on the promissory note and a claim founded on the original liability are based on different causes of action, though they may arise in respect of the same transaction. Where, therefore, in such a case, a suit to recover on the promissory note is dismissed, a subsequent suit to enforce the original liability is not barred by the provisions of r. 2 of O. II of the C. P. C. **R** M. K. M. V. CHETTY FIRM *v.* MA MYA, A. I. R. 1925 Rang. 304; 4 Bur. L. J. 130 **628**

——— **O. II, r. 2**—*Suit for possession—Claim for mesne profits not adjudicated upon—Subsequent suit to recover mesne profits, whether barred.*

In a suit for declaration and recovery of possession there was a prayer that the defendants be ordered to render true and full accounts of all receipts in their hands and expenditure since the estate in dispute had passed into their possession. The Court granted the plaintiffs a decree for declaration and possession and made a note at the end of the judgment to the effect that the relief with regard to the accounts could not be claimed in the suit. In a subsequent suit by the plaintiffs to recover mesne profits arising out of the property which was the subject-matter of the previous suit:

Held, (1) that the prayer for accounts in the previous suit was in substance a prayer for the recovery of mesne profits ;

(2) that if the right to recover mesne profits was regarded as a relief arising out of the same cause of action as the right to obtain possession, then the effect of the note made in the judgment in the previous suit was to give leave to the plaintiffs to omit the relief with regard to mesne profits in that suit and to refer them to a separate suit for that purpose ;

(3) that if the right to recover mesne profits was regarded as a claim arising out of the same cause of action out of which the right to obtain possession had arisen, the plaintiffs having asserted their claim in that suit and having prayed for a relief in respect of it, it could not be said that the plaintiffs had omitted to sue in respect of the claim or that they had intentionally relinquished it ;

(4) that, therefore, the subsequent suit was not barred by the provisions of O. II, r. 2 of the C. P. C. **R** MAUNG MYA *v.* MA THIN TIN, A. I. R. 1925 Rang. 313; 4 Bur. L. J. 113 **611**

——— **O. III, r. 4**—*Advocate, whether must file appointment in writing.*

The effect of the Notification No. 57, dated the 16th September 1925, published in the Bihar and Orissa Gazette of the 7th October 1925, is to dispense with cl. (3) of r. 4 of O. III of the C. P. C., and an Advocate has now to file appointment in writing as any other legal practitioner in the High Court. **Pat** ABDUL GHAFFAR *v.* MRS. F. B. DOWNING, (1925) Pat. 4; 7 P. L. T. 213; 5 Pat. 255; A. I. R. 1926 Pat. 246; 5 Pat. 415 **841**

——— **O. V, r. 15**—*Notice, service of*—Pardanashin *lady—Service on son, validity of.*

Service of notice on the son of a *pardanashin* lady living in the same house with her is valid and proper service. **C** KHORSHEDENNESSA KHATOON *v.* HAKIKANNESSA BANOO **228**

——— **O. V, r. 20**—*Substituted service.*

Under O. V, r. 20, C. P. C., the Court has power to order substituted service not only where it has reason to believe that the defendant is keeping out of the way to avoid service but where it is satisfied that for any other reason the summons cannot be served in the ordinary way. **N** ANAND *v.* RAMCHANDRA **395**

——— **O. VI, r. 17**—*Amendment of plaint—Court-fee not tendered—Procedure—Amendment at late stage.*

An application for amendment of a plaint should not be rejected on the ground that the necessary Court-fee had not been paid with the application. The application should be granted and the plaintiff required to pay the requisite Court-fee within a time fixed by the Court.

Under O. VI, r. 17, C. P. C., all amendments ought to be allowed at any stage of the proceedings which satisfy the two conditions :

(*a*) of not working injustice to the other side, and

(*b*) of being necessrry for the purpose of determining the real question in controversy between the parties. **O** MOHAMMAD ZAFAR *v.* KANIZ SAIYADA **875**

——— **O. VI, r. 17**—*Pleadings, amendment of, in second appeal—Co-owners—Suit for rent by one.*

In the absence of a contract to the contrary, one of the joint owners cannot singly bring a suit for his share of rent. He may sue for the enforcement of the entire claim by making other co-owners as party defendants.

The High Court in second appeal will not allow an amendment of plaint where the objection as to incompetency of one of the joint owners to bring a suit for his share of rent was raised in both the Courts below and no amendment was applied for. **C** RADHABINODE MANDAL *v.* NABA KISHORE MONDAL, 30 C. W. N. 413; A. I. R. 1926 Cal. 578 **244**

——— **O. VII, r. 10**—*Wrong Court, presentation of plaint to—Duty of Court—Finding as to merits, legality of.*

Where a Court holds that it has no jurisdiction to entertain a suit, it should not go into the merits of the case but should return it for presentation to the proper Court. **M** ABDUL AMEETH SAHIB *v.* PONNAMBALA MUTHURIAN, (1926) M. W. N. 286; A. I. R. 1926 Mad. 679; 23 L. W. 757 **550**

——— **O. VII, r. 16**—*Plaint covering several causes of action—Some within jurisdiction of Court, others beyond it—Return of plaint—Procedure.*

Where on presentation of plaint covering more than one cause of action, the Court is of opinion that it can deal only with some of the causes of action, the proper procedure to follow is to retain the plaint and strike out from the plaint that part of it which it thinks is beyond its jurisdiction leaving it to the plaintiff to file another suit with regard to the causes of action struck out from the plaint in the proper Court. It is not a proper procedure to return the plaint to be presented to proper Court for trial of causes of action beyond its jurisdiction and itself to proceed on a certified copy of the plaint for causes of action within its jurisdiction. **B** SHANKAR GOVIND PATHAK *v.* BALKRISHNA SHANKAR JOSHI, 28 Bom. L. R. 521; A. I. R. 1926 Bom. 253 **783**

——— **O. IX.**

See C. P. C., 1908, s. 115 **172**

See C. P. C., 1908, s. 141. **151**

——— **O. IX, r. 13.** *See* C. P. C., 1908, s. 115 **117**

——— **O. IX, r. 13**—Ex parte *decree—Application to set aside—Conditional acceptance—Condition not fulfilled—Death of applicant—Order maintaining decree, effect of—Fresh order.*

Where, on an application to set aside an *ex parte* decree, the Court passes a conditional order to the effect that if the defendant pays in Court a certain sum before a certain date, the decree would be set aside, otherwise the application would stand dismissed, and no payment being made till the prescribed date, dismisses on that date the application, maintaining the decree, it is not any fresh order adverse to the defendant that is passed by the Court, but only effect is given to the previous order, and if on that date the defendant is dead, it cannot be said that any fresh injurious order has been passed against a dead man. **O** SURAJPAL SINGH *v.* DEOKALI **973**

——— **O. IX, r. 13**—Ex parte *decree in reference under Land Acquisition Act—Refusal to set aside—Appeal.*

No appeal lies against an order refusing to set aside an *ex parte* decree made in a reference under the Land Acquisition Act. **C** ROSHAN BEPARI *v.* COLLECTOR OF DACCA, A. I. R. 1926 Cal. 816 **330**

——— **O. IX, r. 13**—*Limitation Act (IX of 1908), Sch. I, Art. 164*—Ex parte *decree, setting aside of—Service of summons, finding as to.*

For setting aside an *ex parte* decree it is not enough to find that the judgment-debtor was ignorant of the decree, the Court must also decide whether

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the summons was not duly served. **M** R. Duraiswamy Iyer *v.* Balasundaram Iyer, 23 L. W. 319; A. I. R. 1926 Mad. 558 **420**

——— **O. X, r. 2**—*Examination of person appearing on behalf of party—Statement, whether binding on party.*

Any statement made by a party to a suit while being examined under O. X, r. 2, C. P. C., is binding only on the person who made the statement to the same extent as the statement made by a Pleader engaged by him may be binding on him; but a statement made by a person who merely appears to prosecute a case or to look after it on behalf of a party, not personally present or who is unable to be present, does not stand on the same footing. If the statement made by him in Court in regard to any material fact is admitted or accepted by the party concerned or his Pleader to be correct, it may help to narrow down the issues; but it is open to the party to say that the statement was not made under his instructions. **A** Suraj Mal *v.* Chhote **1003**

——— **O. XX, r. 1**—*Judgment, pronouncement of—C. P. Courts, practice of—Decree, appeal or application against.*

In the Central Provinces a judgment cannot be said to have not been "pronounced" within O. XX, r. 1, C. P. C., simply because it is not read out entirely by the Court. **N** Kutuab-ud-din *v.* Gulam Rabbani **121**

——— **O. XX, r. 4.** *See* Provincial Small Cause Courts Act, 1887, s. 25 **397**

——— **O. XX, rr. 7, 3**—*Limitation, operation of.*

The period of limitation for an appeal or application against a decree runs from the date of the decree and not from the date when the decree is signed. **N** Kutuab-ud-din *v.* Gulam Rabbani **121**

——— **O. XX, r. 11.** *See* C. P. C., 1908, O. XXXVII, r. 2 **9**

——— **O. XX, r. 18**—*Partition suit—Interest, whether can be allowed.*

In a suit for partition the Court has power, after a preliminary decree has been passed, to award interest, although the preliminary decree does not make any mention of interest. **B** Kesarlal Girdharilal Desai *v.* Jagubhai Hiralal, 27 Bom. L. R. 226; A. I. R. 1925 Bom. 406 **686**

——— **O. XXI, r. 2.** *See* C. P. C., 1908, s. 145 **522**

——— **O. XXI, r. 2**—*Decree, adjustment of, by another decree.*

An agreement which puts an end to a liability under a decree by substituting a new liability under the agreement may be held to be an adjustment of the decree and may itself be embodied into a decree which decree would be one under O. XXI, r. 2, C. P. C. **O** Ahmed Mirza Beg *v.* Allahabad Bank, Ltd., 29 O. C. 26 **317**

——— **O. XXI, r. 10.** *See* Limitation Act, 1908, Sch. I, Art. 181 **482**

——— **O. XXI, r. 40**—*Arrest of judgment-debtor, when can be refused—Judgment-debtor's right to apply for insolvency—Duty of Court.*

Unless a Court finds that the judgment-debtor is unable to pay his debts because of poverty or any other sufficient cause, the decree-holder is entitled to have the warrant of arrest issued against the judgment-debtor, even though the latter be prepared to farm out his land to the decree-holder or have his salary attached.

When judgment-debtor is brought before the Court, it is the duty of the Court to inform him that he can avoid arrest by presenting a petition in insolvency. **L** Dukh Bhanjan Ram *v.* Sarfraz Khan **279**

——— **O. XXI, r. 63**—*Execution of decree—Objection proceedings—Order passed on objection, finality of.*

By virtue of the provision contained in r. 63 of O. XXI of the C. P. C., it is incumbent on a person, against whom an order is made in objection proceedings, to file a suit to set aside the order if he feels himself aggrieved thereby, otherwise the order passed in the objection proceedings will become final, and will not be open to question in any other proceeding between the parties. **N** Lobo *v.* Babulal, 8 N. L. J. 170; A. I. R. 1925 Nag. 390 **573**

——— **O. XXI, r. 63**—*Objection to attachment dismissed—Execution case dismissed—Suit under O. XXI, r. 63, necessity for—Attachment effected second time—Dismissal of second application—Regular suit—Limitation, starting point of.*

Where an execution case is dismissed it is not incumbent upon the claimant to bring a suit under O. XXI, r. 63, C. P. C., in order to set aside the order rejecting his claim. In case an attachment is made second time, it is competent to the objector to file another application and in the event of rejection of such application to bring a regular suit under O. XXI, r. 63, C. P. C., within one year from the date of dismissal of second objection application. **C** Satish Chandra Ray *v.* Joy Chandra Roy **120**

——— **O. XXI, r. 66**, Issue of notice under. *See* Limitation Act, 1908, Sch. I, Art. 182 (5) **44**

——— **O. XXI, r. 66**—*Proclamation of sale—Duty of Court—Settlement of proclamation, whether can be delegated—Sale, validity of.*

Under O. XXI, r. 66, C. P. C., it is the duty of the Court to settle the proclamation of sale and it cannot delegate that power to Commissioner appointed by it.

A sale held without the proclamation therefor having been settled by the Court is invalid. **M** Kuzhakkumbat Madhathil Appu *v.* Achutha Menon, 23 L. W. 652; 48 M. 333 **8**

——— **O. XXI, r. 90.** *See* C. P. C., 1908, s. 47 **521**

——— **O. XXI, rr. 90, 92**—*Proceedings under r. 90—Parties—Object of r. 92.*

Period of limitation for an application to set aside a sale in execution of a decree is 30 days under Art. 166 of the Limitation Act but there is no time limit under that Act for serving notices upon persons affected by the order. **Pat** Iswardas Marwari *v.* Bhikeswar Lal Marwari, (1926) Pat. 83; A. I. R. 1926 Pat. 266 **31**

——— **O. XXI, r. 91.** *See* Bengal Tenancy Act, 1885, s. 174 (3) **292**

——— **O. XXII, rr. 2, 4**—*Rent-decree—Death of one of tenants respondents—Non-substitution—Abatement.*

If in an appeal from a rent-decree by the landlord against the heirs of a deceased tenant, one of the respondents dies and his legal representative is not brought on the record, the appeal abates only partially and can be proceeded with against the surviving respondents. **C** Official Trustee *v.* Adhar Bera **30**

——— **O. XXII, rr. 3, 4**—*Appeal from injunction decree—Death of one of several plaintiffs-respondents—Legal representatives not brought on record in time—Abatement* in toto.

Where in an appeal from a decree issuing mandatory injunction to the defendant restraining him from opening windows in a particular wall of his house one of the several plaintiffs-resopndents dies

and his legal representatives are not brought on the record the appeal abates *in toto.* **L** Maula Bux *v.* Chanan Mal, 8 L. L. J. 134 **563**

——— **O. XXII, r. 4**—*Decree against dead man—Rent-decree against some dead defendants, whether wholly null—Decree as against surviving defendants, nature of—Execution sale, what passes at.*

A decree against a dead person is a nullity. But the question whether the whole decree is a nullity depends on the question whether the failure on the part of the plaintiff to bring the representatives-in-interest of the deceased on the record affects his right to proceed with the suit.

A decree for rent is a nullity only against the dead defendants or their representatives as a suit for rent against some of the several joint tenants is maintainable. But such a decree cannot be executed as a decree for rent but as a simple money-decree only. Consequently at execution sale of such a decree the entire holding does not pass and the interests of the defendants dead at the institution of the suit remain unaffected. **Pat** Kesho Prasad Singh *v.* Shamnandan Rai, (1926) Pat. 81; 5 Pat. 233 **28**

——— **O. XXII, r. 4**—*Mesne profits, indivisible, claim for—Death of some of respondents—Legal representatives not brought on record—Abatement* in toto.

Where plaintiffs-appellants' claim for mesne profits is based on the allegation that the defendants-respondents jointly dispossessed them from the land in collusion with one another, the claim is one that is not divisible and where in appeal the legal representatives of the deceased respondents are not brought on the record the appeal abates in its entirety. **C** Srikanta Mandal *v.* Jotirmoyi Devi **253**

——— **O. XXII, r. 4**—*Only one legal representative brought on record—Abatement—Knowledge of death—Diligence required.*

Even if one of the legal representatives of a deceased party is brought on the record in time there is no abatement of the suit or appeal as the case may be.

No doubt an appellant is required to be diligent in prosecuting his appeal, but after he gets the notice served on the respondent he is not required to watch the movements of the respondent and as to whether he is dead or alive. The law, therefore, is that he must make the application for substitution within 90 days of his knowledge of the death. **Pat** Sadhu Saran Pandey *v.* Nand Kumar Singh, (1926) Pat. 97; A. I. R. 1926 Pat. 276 **209**

——— **O. XXII, rr. 4, 8**—*Abatement—Legal representatives brought on record subject to just exceptions—Nature of order.*

Where a Judge of the Lahore High Court passes an order subject to just exceptions setting aside abatement and bringing legal representatives of a deceased party on the record, the order in accordance with the usual practice of the Court must be considered as conditional and not an absolute one. **L** Sham Sundar-Madan Gopal *v.* Fatteh Chand **243**

——— **O. XXII, rr. 4, 9**—*Application for bringing legal representative on record, when may be treated as one for setting aside abatement—Joint decree—Death of party in appeal—Abatement* in toto.

Where there has been no reasonable cause for delay in making the application, an application for bringing legal representatives of a deceased party on record cannot be treated as an application for setting aside abatement.

Where a decree may be executed by any one of the plaintiffs, it is a joint decree.

A decree for a declaration that a certain lease has expired and that the plaintiffs are entitled to retain proprietary possession of certain shops and for an injunction to the defendants not to take steps to obtain possession or to interfere with the plaintiffs' ownership and possession is a joint decree as the injunction against the defendants might be enforced by any one of the plaintiffs.

If in an appeal from a joint decree a necessary party dies without his legal representatives being brought on the record the appeal abates *in toto.* **L** Ata-ur-Rahman *v.* Mashkur-un-nisa **300**

——— **O. XXII, rr. 4, 9**—*Limitation Act (IX of 1908), s. 5, Sch. I, Art. 177—Appeal—Death of respondent—Abatement of appeal—Application to set aside abatement—Ignorance of law, whether sufficient excuse for delay.*

During the pendency of an appeal one of the respondents died and no application was made within time to bring his legal representatives on the record. In an application to set aside the abatement the appellant urged that he was an ignorant milkman and was not aware that he was required to make an application for substitution of the legal representatives of the deceased respondent:

Held, that there was sufficient cause to set aside the abatement. **C** Krishna Mohan Ghosh *v.* Surapati Banerji, 29 C. W. N. 472; A. I. R. 1925 Cal. 684 **929**

——— **O. XXII, rr. 4, 9 (2)**—*Abatement—Automatic proceeding.*

Abatement takes place automatically after the expiration of 90 days from the death of a deceased party and unless the abatement is set aside on an application presented within 60 days or a period further extended in virtue of s. 5 of the Limitation Act, the suit or appeal is dead. **L** Qaim *v.* Nura, 7 L. 73; A. I. R. 1926 Lah. 234 **422**

——— **O. XXII, r. 10**—*Assignment* pendente lite—*Application for substitution by assignee—Delay in making application—Discretion of Court.*

Rule 10 of O. XXII of the C. P. C. leaves a discretion to the Court to recognize or refuse to recognize an assignment made *pendente lite.*

Where the *factum* of an assignment is disputed and an application by the alleged assignee to be brought on the record is made several months after the date of the alleged assignment, the Court may properly refuse to recognize the assignment. **L** Allah Jawaya *v.* Lajpat Rai, A. I. R. 1925 Lah. 574; 7 L. L. J. 392 **926**

——— **O. XXII, r. 10**—*Company going into liquidation—Devolution of interest—Legal representative, necessity of bringing on record.*

When a plaintiff Company registered under the Companies Act goes into liquidation, there is no assignment, creation or devolution of an interest within the meaning of O. XXII, r. 10, C. P. C., the Company continues to be the plaintiff and there is no need of bringing any legal representatives on the record. **N** National Stores *v.* Ramsaran, 9 N. L. J. 40; A. I. R. 1926 Nag. 303 **380**

——— **O. XXIII, r. 1 (2), (b)**—*Withdrawal of suit—'Other sufficient ground,' construction of.*

The expression "other sufficient ground" in cl. (*b*) of r. 1 (2), O. XXIII, C. P. C., must be construed to be ground analogous to the ground mentioned in

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cl. (*a*) of the same rule, that is to say, it must be of the same nature as formal defect. **B** Punjushet *v.* Motiram Budhu, 28 Bom. L. R. 440; 50 B. 192; A. I. R. 1926 Bom. 315 **777**

——— **O. XXIII, rr. 1, 2**—*Leave to withdraw suit with liberty to bring fresh suit—Formal defect, what is—Defect in substance, whether ground for granting leave.*

Where a defendant has succeeded in showing that certain facts were lacking which were essential to the plaintiff's cause of action, the Court has no jurisdiction to allow the plaintiff under O. XXIII, r. 1, C. P. C., to withdraw his suit with liberty to bring a fresh suit.

On an application to withdraw a suit the Trial Court has only a limited jurisdiction. It is not unconditionally empowered to permit a plaintiff to withdraw his plaint under O. XXIII, r. 1, C. P. C. If the plaint is defective the only sort of defect which attracts the rule is a formal defect, and not a defect in substance.

In permitting a plaintiff to withdraw his plaint by reason of a defect not in form but in substance the Court exercises a jurisdiction not vested in it by law. **M** Palikanji Chettiar *v.* Krishna Iyer, 23 L. W. 525 **983**

——— **O. XXIII, r. 3, O. XXXIV, r. 4**—*Compromise decree passed in mortgage suit, nature of—Preliminary decree, necessity of, in mortgage suit.*

Order XXIII, r. 3, C. P. C., does not contemplate the necessity of two decrees, a preliminary and a final but only one decree. Therefore, a compromise decree in a suit on an hypothecation must be regarded a final and an executable decree and not one under O. XXXIV, r. 4.

The necessity to pass a preliminary decree in a suit on the basis of a mortgage arises only when the plaintiff succeeds and not where the matter is compromised. **O** Ahmed Mirza Beg *v.* Allahabad Bank, Ltd., 29 O. C. 26 **317**

——— **O. XXVI, r. 4 (1) (a)**—*Examination of plaintiff on commission—Applicant for removal of guardianship, examination on commission of.*

Ordinarily a plaintiff, having had a choice of *forum*, is not entitled to claim to be examined on commission outside the jurisdiction of the Court in which the suit is pending. But where the plaintiff has had in effect no choice of *forum*, he can, in a fit case, be permitted to examine himself on commission. **Pat** Fariduddin Ahmed *v.* Abdul Wahab, (1926) Pat. 103; A. I. R. 1926 Pat. 277 **229**

——— **O. XXX, r. 1**—*Partnership, suit against—Title of suit—Written statements, separate, whether can be filed.*

Under O. XXX, r. 1, C. P. C., any two or more persons being liable as partners and carrying on business in British India may be sued in the name of the firm. In such a suit an individual partner may also be sued personally along with the firm. It is not, however, correct to sue persons as partners in the name of the firm by a partner or manager. **B** Ajitsing Manibhai *v.* Grunning & Co., 27 Bom. L. R. 998; A. I. R. 1925 Bom. 491 **969**

——— **O. XXX, r. 6**—*Partnership, suit against—Written statement separate, whether can be filed.*

Under O. XXX, r. 6, C. P. C., where persons are sued as partners in the name of their firm they must appear individually in their own names but all subsequent proceedings will nevertheless continue in the name of the firm. In such a case, each partner can put in a separate written statement, but each written statement is the written statement of the firm. It is only when a partner is sued personally along with the firm that he may put in a personal defence. **B** Ajitsingh Manibhai *v.* Grunning & Co., 27 Bom. L. R. 998; A. I. R. 1925 Bom. 491 **969**

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——— **O. XXXII, r. 7**—*Compromise of suit on behalf of minor—Benefit of minor—Matters to be considered by Court in sanctioning compromise.*

How far a Judge should go into the facts and the law of each case before he makes up his mind to sanction a compromise on behalf of minors must depend on the circumstances of each case and where the Judge exercises his discretion in a judicial manner it is not one which can be afterwards called in question in subsequent proceedings.

It is not practicable to lay down a definite or hard and fast rule as to what particular materials a Judge may call for before he is satisfied that the compromise is one for the benefit of the minors. It must be left to his discretion and that discretion may vary in different cases.

A Judge is entitled to rely upon the opinion of the Counsel at least in part, that the compromise is for the benefit of minors.

There is no authority for the proposition that a Judge is bound to gauge the chances of success of the minors and weigh against them the chances of the opposite party and sanction only if the chances of the minors appear to him slender. **B** Dhairyasingh Gordhandas *v.* Kissandas Tribhovandas, 28 Bom. L. R. 363 **104**

——— **O. XXXII, r. 11**—*Retirement of guardian* ad litem—*Courts, discretion of.*

It is not open to a guardian *ad litem* to retire at his own sweet will without the permission of the Court. It is a matter of discretion for the Court which having regard to all the circumstances of the case may permit the guardian to retire and may pass such orders as to costs as it thinks fit. **A** Narender Singh *v.* Chatrapal Singh **340**

——— **O. XXXIII, r. 1**—*Petition to appeal* in forma pauperis—*Subsequent deposit of money to petitioner's credit under decree of lower Court, whether amounts to, "sufficient means"—Subject-matter of suit, exclusion of, in considering means of person.*

The expression "The subject-matter of the suit" in O. XXXIII, r. 1, C. P. C., does not qualify "sufficient means" and in considering the means of a person to sue *in forma pauperis*, the subject-matter of the suit ought to be excluded as being out of the pauper's reach.

But where a plaintiff who has obtained a decree for maintenance applies for leave to appeal *in forma pauperis* claiming a larger amount and the petition is sent to the Court of first instance for inquiry into pauperism and the judgment-debtor meanwhile deposits into Court the amount of the decree, which amount is in excess of the Court fees payable on the appeal, the petitioner must be said to be possessed of sufficient means to enable him to pay the stamp fee in appeal and is not entitled for leave to appeal *in forma pauperis*. **M** *In re* Pokala Mahalakshmi Ammal, 50 M. L. J. 114; 23 L. W. 427; A. I. R. 1926 Mad 567 **337**

——— **O. XXXIII, r. 10**—*Court-fee decreed to Government in pauper suit—Right to future*

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maintenance, liability of, to be proceeded against—Method of recovery.

The right of the Government to recover the Court-fee decreed as payable to Government from a pauper plaintiff is not unenforceable, merely because plaintiff's property is confined to a right to future maintenance. The proper method of recovering such Court-fee is by the Court appointing a Receiver to collect the maintenance amount and pay to Government (by instalments if necessary in order that plaintiff may have something to live upon) the fee due by the plaintiff **M** SECRETARY OF STATE FOR INDIA *v.* SARVEPALLI VENKATA LAKSHMANAYYA, 50 M. L. J. 279; 23 L. W. 602; (1926) M. W. N. 362; A. I. R. 1926 Mad. 484; 49 M. 567 **254**

——— **O. XXXIII, r. 10**—Forma pauperis—*Suit for maintenance decreed—Government's costs, charge for—Sale of property liable for maintenance for costs—Effect.*

Where a plaintiff's suit for maintenance *in forma pauperis* is decreed and maintenance is made a charge on certain properties of the defendant, the first charge of the Government for costs must be on the subject-matter of the suit so far as the plaintiff succeeds under O. XXXIII, r. 10, C. P. C. But where, however, the Government proceed to sell the properties the effect would be as that of a sale of equity of redemption subject to the charge of maintenance decreed in plaintiff's favour. **C** GADADHAR MANDAL *v.* MANAKA DASSI **391**

——— **O. XXXIV, r. 4.** *See* C. P. C., 1908, O. XXIII, R. 3 **317**

——— **O. XXXIV, rr. 4, 5**—*Mortgage suit—Preliminary decree—Decree made final without separate sheet—Irregularity.*

Where in a mortgage suit, a preliminary decree is made final by an endorsement on the preliminary decree-sheet and no formal decree is drawn up, the absence of a separate decree-sheet should be considered only an irregularity and the Court should be considered to have made the decree final. **L** DHANPAT RAI *v.* NATHE KHAN **58**

——— **O. XXXVII, rr. 2 (2), 4, O. XX, r. 11**—*Summary suit—Defendant not obtaining leave to defend—Right to ask for instalments—Instalments, procedure for grant of.*

In a summary suit under the provisions of O. XXXVII, C. P. C., unless a defendant has obtained leave to defend, he cannot be allowed to appear on the hearing and make an application for stay of execution or for payment of the decree by instalments. Such a defendant may either apply for instalments under O. XX, r. 11 (2) which relief can be granted only with the consent of the decree-holder or under O. XXXVII, r. 4 ask the Court to grant him any of the reliefs mentioned therein. **B** PESTONJI SHAPURJI NARELWALLA *v.* JAMSHEDJI NOWROJI GAMADIA, 28 Bom. L. R. 138; A. I. R. 1926 Bom. 250; 50 B. 262 **9**

——— **O. XXXVIII, r. 1.** *See* C. P. C., 1908, s. 94 **512**

——— **O. XXXVIII, r. 5**—*High Court—Attachment before judgment—Property outside jurisdiction—Procedure—Practice.*

Where the property of the defendant sought to be attached is outside the local limits of the jurisdiction of the High Court, the proper course to follow is to transmit the order for attachment before judgment to the Court in whose jurisdiction the property is situated with a request that that Court should levy the attachment.

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The practice of appointing plaintiff's Solicitor's clerk as a special bailiff to levy such attachment is not a proper one and must be stopped. **B** GAJANAN RAMKRISHNA MULE *v.* BHASKAR BALVANT KULKARNI, 28 Bom. L. R. 380; A. I. R. 1926 Bom. 278 **116**

——— **O. XXXVIII, r. 6**—*Attachment before judgment—Past conduct of defendant.*

Under O. XXXVIII, r. 6, C. P. C., the Court must be satisfied that the defendant is now about to dispose of his property with the intention of delaying and obstructing any decree that the Court might pass against him.

The mere fact that the defendant in the past mortgaged or otherwise disposed of his property is not sufficient ground for an order under O. XXXVIII, r. 6, C. P. C. **C** MANMATHA NATH SEIT *v.* NAGENDRA NATH BHATTACHARJYA **880**

——— **O. XXXIX, r. 1.** *See* C. P. C., 1908, s. 94 **871**

——— **O. XXXIX, rr. 1, 2**—Interim *mandatory injunction, whether can be granted—Discretion, when to be exercised.*

A Court has power to grant an *interim* mandatory injunction, but the power should be exercised only in very exceptional circumstances, and for this purpose each case must be considered on its own merits. **S** HAROON BROTHERS *v.* COWASJI BEZONJI AGHA **840**

——— **O. XL, r. 1**—*Plaintiff's possession recently disturbed—Suit for declaration—Receiver, appointment of.*

Appointment of a Receiver under O. XL, r. 1, C. P. C., is competent even if the suit is one for declaration.

Where plaintiff's possession has been only very recently disturbed, the Appellate Court will not interfere with the discretion exercised by the Court below in the appointment of a Receiver. **L** MAKHAN SHAH *v.* HALIMA **39**

——— **O. XLI, r. 1**—*Appeal—Copy of decree essential—Land Acquisition Act (1 of 1894), s. 26—District Judge's award, whether decree—Two appeals against same decree—Decree filed only in one appeal, whether sufficient for other appeal.*

As under s. 26 of the Land Acquisition Act the award of a District Judge contains both a decree and a judgment and as it is essential that a copy of the decree appealed against should accompany memorandum of appeal, an appeal against the award is not properly filed without this memorandum. Therefore, where two appeals are filed by the same Vakil on the same day and from the same award of a District Judge, it is not a sufficient compliance with the provisions of O. XLI, r. 1, C. P. C., if instead of filing a copy of the award with the memorandum of each appeal it is filed only with one of them and a note is made on the other to the effect that the award has been filed with the other appeal. **L** MUBARAK ALI SHAH *v.* SECRETARY OF STATE FOR INDIA, 6 L. 218; A. I. R. 1925 Lah. 438 **145**

——— **O. XLI, r. 1**—*Second appeal—Copy of first Court's judgment uncertified—Proper presentation.*

Presentation of a second appeal accompanied by an unattested copy of first Court's judgment, when an attested copy was applied for but the report was that the record could not be traced, is a proper presentation under the circumstances. **L** CHHOTA LAL-AMBA PARSHAD *v.* BASDEO MAL-HIRA LAL **2**

——— **O. XLI, r. 1, O. XLII**—*Appeal from decree in cross-appeal—Decree requisite for second appeal.*

Civil Procedure Code—1908—contd.

A party appealing from a decree passed against him in appeal need only file the decree made in his appeal and his failure to file the decree made in cross-appeal will not bar his appeal from being proceeded with. **L** Bhuri *v.* Asghari Begam 959

——— **O. XLI, rr. 4, 23**—*Appeal by one of plaintiffs only—Question, whether plaintiffs were collaterals—Finding that appellant was collateral—Remand of entire case, legality of.*

Where in a suit for possession of property by several plaintiffs as collaterals of the last owner, only one of the plaintiffs appeals with regard to his own share and the sole question to be determined in appeal is whether the appellant was a collateral of the deceased, a finding of the Appellate Court that the appellant was a collateral of the deceased, on the basis of a pedigree-table covering the case of all the plaintiffs, does not empower the Court to remand the whole case, including that of the plaintiffs who have not appealed. The terms of O. XLI, r. 4, C. P. C., do not apply to such a case. **L** Mangli *v.* Pohu Ram, 8 L. L. J. 132; A. I. R. 1926 Lah. 303 557

——— **O. XLI, r. 7**—*Appeal to Privy Council—Security, form of—Immoveable property, whether can be offered as security—Time for furnishing security, whether can be extended—Difficulty in procuring cash security, whether sufficient reason.*

Order XLI, r. 7 (1) of the C. P. C., requires that the security furnished by an appellant to the Privy Council must be given in cash or Government securities. Under the proviso to the rule the Court may allow some other form of security to be furnished, but an order to this effect must be obtained at the time of granting the certificate. An offer of immoveable property as security at a subsequent stage cannot be accepted.

It is open to the Court to grant an extension of time for furnishing security for cogent reasons, but the mere fact that there is difficulty in furnishing cash security would not be a sufficient cogent reason for extension of time. **R** Ma Sein *v.* Sit Paung, 4 Bur. L. J. 3; A. I. R. 1926 Rang. 44 590

——— **O. XLI, r. 23, 27**—*Remand—Local inquiry—Order, how to be made.*

Where a local enquiry is necessary for proper decision of a case the Appellate Court should either itself order a fresh local enquiry or remand the case to the Primary Court for the purpose to have the result reported to it. **C** Rajani Kanta Dey *v.* Khatir Mahomed 393

——— **O. XLI, r. 33**—*Appeal, absence of, to High Court—Appeal to Privy Council.*

Where no appeal is filed to the High Court from the decree of the Trial Judge dismissing a suit against a particular defendant except as to costs no appeal lies against him in the Privy Council. **P. C.** Mahomed Khaleel Shirazi *v.* Les Tanneries Lyonnaises, A. I. R. 1926 P. C. 34; 3 O. W. N. 568; 9 M. 435; (1926) M. W. N. 495; 24 L. W. 115 767

——— **O. XLI, r. 33**—*Appeal by one defendant—Defence common—Reversal of entire decree.*

It is open to an Appellate Court to vary the decree appealed against where there is a common defence even in favour of persons who have not appealed but were parties to the suit. **A** Mohsham Ali Khan *v.* Muloo, 24 A. L. J. 586 347

——— **O. XLI, r. 33**—*Appeal by one of plaintiffs—Reversal of dismissal in favour of all.*

Where only one of the several plaintiffs appeals from the dismissal of suit on a ground common to all, the dismissal may be set aside for the benefit of all the plaintiffs. **A** Dharam Singh *v.* Bakhshi 315

——— **O. XLI, r. 33**—*Death of one of several appellants—Legal representative not brought on record—Partial abatement—Decision in favour of all.*

Where an appeal has partially abated in consequence of the death of one of the appellants without his legal representatives being brought on the record, it is competent to the Court to accept the appeal in favour of all the appellants including the legal representatives of the deceased appellants not brought on the record. **L** Kishen Singh *v.* Moti Singh 530

——— **O. XLIII, r. 1 (w), O. XLVII, r. 7**—*Review, order granting—Appeal—Grounds of objection.*

In view of the provisions contained in r. 1 (*w*) of O. XLIII of the C. P. C., which permits an appeal against an order granting an application for review, the provisions of r. 7 of O. XLVII of the Code have become superfluous. Even if r. 1 (*w*) of O. XLIII has to be read with r. 7 of O. XLVII, the only effect of the latter rule is to enumerate certain grounds on which an order granting a review may be objected to and not to restrict the grounds which might be taken in appeal against such order. **B** Daso Keshav Panchbhavi *v.* Karbasappa Kariyappa Mudhol, 27 Bom. L. R. 1446; A. I. R. 1926 Bom 121 591

——— **O. XLIV, r. 1**—*Application for leave to appeal as pauper—Application, when can be entertained.*

An Appellate Court is entirely precluded from admitting an application for leave to appeal as pauper unless it is satisfied that the decree sought to be appealed against is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. The direction contained in the proviso to r. 1 of O. XLIV of the C. P. C. to that effect is mandatory. **Pat** Rajendra Prasad Bose *v.* Gopal Prasad Bose, 4 Pat. 67; A. I. R. 1925 Pat. 412 814

——— **O. XLV, r. 15 (1).** *See* Privy Council 813

——— **O. XLVII, r. 1.** *See* C. P. C., 1908, s. 48 613

——— **O. XLVII, rr. 4, 7**—*Appeal—Error apparent on face of record, Court incorrectly thinking, whether good ground—Contravention of r. 4, ground of appeal—Court, what to consider.*

An appeal against an order granting a review does not lie on the ground that the lower Court was incorrect in thinking that there was a mistake or error apparent on the face of record. Again, an appeal against an order passed in review on the ground that the provisions of r. 4, O. XLVII, C. P. C., had been contravened by the lower Court must be confined to a disregard of those provisions only and not to any other matter on which the granting of review is based. **A** Shaukat Ali *v.* Shakila Bano 78

——— **O. XLVII, r. 7.** *See* C. P. C., 1908, O. XLIII, r. 1 (*w*) 591

——— **Sch. II**—*Arbitration Act (IX of 1899), s. 8—Award, null and void—No appeal against judgment—Appeal from order dismissing application to set aside award—Reversal of award—Arbitration Act, conversion of matter to—Proceedings under Civil Procedure Code, legality of—Arbitration Act, order under, when to be made.*

An award may be set aside on the ground of nullity in appeal from an order dismissing an application for

Civil Procedure Code—1908—concld.

setting aside of an award, though no appeal has been preferred from the judgment.

Once the matter has been converted into one under the Arbitration Act there is no power either for the parties or the arbitrators or the Court to act under Sch. II, C. P. C., and all steps so taken must be regarded as having been taken without jurisdiction.

A Judge has no power without consent of the parties to adjudicate upon an application made under cl. (17), Sch. II, C. P. C., as though it were made under the Arbitration Act. C NARENDRA NATH DAS *v.* HARAN CHANDRA GHOSE, 43 C. L. J. 292; A. I. R. 1926 Cal. 750 177

——— **Sch. II, para 5, ss. 104, 115**—*Arbitrator, order of Court as to appointment of—Agreement to refer to arbitration, order as to—Revision.*

An order directing a party to nominate a substitute for an arbitrator or else the Court would nominate one itself can only be passed as ancillary to an order directing the agreement to refer to be filed. Non-compliance with this provision is both an exercise of jurisdiction not vested as well as a failure to exercise a jurisdiction vested by law in Court and furnishes a good ground for revision. L SHIB DIYAL *v.* ALI BAKHSH & SONS 483

——— **Sch. II, para. 10**—*Award—Notice of filing of award, absence of—Revision.*

The omission to give notice to the parties that the award has been filed by the arbitrators is a serious irregularity furnishing good ground for revision. C RANJIT CHANDRA TALUKDAR *v.* BISSAY RAM MANDAL 115

Companies Act (VII of 1913), s. 104—*Allotment of shares—Agreement before formation of Company to allot shares—Ratification by Directors after registration—Liability of Company to furnish particulars—Default—Penalty.*

Certain persons who purchased a business registered themselves as a Company under the Companies Act. By the terms of the contract of purchase the vendor was entitled to certain shares allotted otherwise than in cash and such allotment was, after registration of the Company, ratified by the Directors at a meeting:

Held, that there was no contract in writing constituting the title of the allottee within the meaning of s. 104 (1) of the Companies Act, and the Company was bound to furnish the particulars duly stamped under cl. (2) of the section and in default to do so, the officer responsible for the default was liable to be fined under cl. (3) of the section. M RAMASAMI CHETTY *v.* CHENGALRAYA PILLAI, (1926) M. W. N. 6; 23 L. W. 571; A. I. R. 1926 Mad. 380; 27 Cr. L. J. 700 892

Company—*Shares, calls for—Resolution by Board of Directors—Time, place, amount and person, specification of.*

Where the Articles of Association authorise the Directors of a Company to make calls upon the shareholders in respect of moneys unpaid, to the persons and at the time and place appointed by the Board, the Directors must, when they make a call, fix and appoint by resolution the amount to be paid, the time and place of payment and the person to whom the same should be paid. Any failure to comply with the above requirements can be remedied by any subsequent issue of notice.

In the absence of any such provisions in the Articles of Association, the fact that the amount of the call is fixed by the terms of the issue of the shares cannot be treated as creating an obligation on the share-holders to pay such amount as and by way of a call. B PIONEER ALKALI WORKS LD. *v.* AMIRUDDIN SHALEBHOY, 28 Bom. L. R. 411 681

Compromise decree. *See* C. P. C., 1908, s. 11 844

Construction of Document.

See REGISTRATION ACT, 1908, s. 17 (1) (*b*) 1039

See TRANSFER OF PROPERTY ACT, 1882, s. 58 756

——— *acknowledging former adoption.*

A document which acknowledges the fact of a previous adoption cannot itself be a deed of adoption. O BRIJ RAJ CHANDRA *v.* SUBHADRA KUAR, 3 O. W. N. 321; A. I. R. 1926 Oudh 324 294

——— *Disposition of property—Will or gift.*

The Court must not construe an instrument prepared by a layman without legal assistance, where the question is as to whether it was intended to operate as a Will or as a transfer *inter vivos*, with too great nicety, or assign too much weight to the exact words the writer uses for a transfer of the property, as if he were accurately weighing the difference between a testamentary instrument and one operating *inter vivos*. In such a case not only the words actually used in the deed should be considered, but also the circumstances should be taken into consideration, and the matter ought to be broadly looked at. C BRAHMOPADA BHATTACHARJEE *v.* RAI MOHAN HALDAR 967

——— *Judgment and decree based on compromise, interpretation of.*

The judgment and the decree have to be read as a whole and where they are based upon a compromise, they have to be interpreted in the light of the contents of the compromise itself. O PIRTHA SINGH *v.* RAJA MOHAMMAD ALI MOHAMMAD KHAN BAHADUR, 13 O. L. J. 126 188

Contempt of Court—*Chamber matters, publication of—Bombay High Court, practice of—Matters relating to wards and lunatics—Publication.*

The practice of the Bombay High Court has been that in all Chamber matters no report of the proceedings or of the judgments delivered are allowed to be published by the Press without the leave of the Court.

In regard to matters relating to wards and lunatics and matters in which the publication of certain facts would cause injury to the individuals this rule of practice is absolute and its breach constitutes contempt of Court. B PURSHOTTAM HURJIVAN *v.* NAVANITLAL HARGOVANDAS, 28 Bom. L. R. 148; A. I. R. 1926 Bom. 208; 50 B. 275 15

——— *Jurisdiction of Court, when to be exercised—Obstruction of course of justice—Procedure—Discretion of Court.*

A Solicitor's clerk while attempting to serve on the appellant a notice issued by the High Court was assaulted and ill-treated by the latter, and the notice had eventually to be served by affixing a copy thereof on the door of the appellant's flat:

Held, that appellant's conduct was calculated to obstruct and interfere with the due course of justice and the due administration of the law and that the appellant was, therefore, guilty of contempt of Court.

Where proceedings in a Magistrate's Court would be quite sufficient to meet the requirements of a case, it is not desirable to invoke the special jurisdiction inherent in the High Court by way of proceedings for contempt of Court.

Contempt of Court—concld.

Where, however, a Judge of the High Court has exercised his discretion and taken action by way of proceedings in contempt and the matter has been fully investigated and a definite conclusion has been arrived at, the Court will not, on the Appellate Side, interfere with the exercise of such discretion where the conclusion arrived at by the Judge on the merits is not challenged. **C** Bason *v.* Skone, 43 C. L. J. 41; A. I. R. 1926 Cal. 701; 53 C. 401 532

Contract Act (IX of 1872), s. 11. *See* Evidence Act, 1872, s. 115 853

——— **s. 23**—*Pro-note for existing liability—Criminal liability as well as civil—Pro-note, legality of.*

Where a *bona fide* debt exists and where the transaction between the parties involves a civil liability as well as possibly a criminal act, a promissory note given by the debtor executed for the debt constitutes a valid agreement. **A** Radha Kishen *v.* Sital Prasad 465

——— **ss. 23, 25**—*Marriage, promise of—Promise to marry married lady—Legality—Fixing day for marriage after her divorce—Promise to marry inferred.*

A promise to marry a lady who is already married is void even though made in contemplation of a divorce which is subsequently effected. But where after the divorce is effected the parties fix a day for their marriage, a promise of marriage may be inferred and one is not bound to take it as a ratification of a contract which in itself is void. **P C** Thomas Charles William Skipp *v* Lilian Mildred Kelly, 50 M. L. J. 498; A. I. R. 1926 P. C. 27; 3 O. W. N. 453; 43 C. L. J. 430; 28 Bom. L. R 873; 24 L. W. 18; 30 C. W. N. 841 331

——— **s. 25**—*Marriage, promise of—Sufficient consideration.*

A promise to marry is a sufficient consideration in itself on either side. **P C** Thomas Charles William Skipp *v.* Lilian Mildred Kelly, 50 M. L. J. 498; A. I. R. 1926 P. C. 27; 3 O. W. N. 453; 43 C. L. J. 430; 28 Bom. L. R. 873; 24 L. W. 18; 30 C. W. N. 841 331

——— **s. 28**—*Agreement to abide by decision in another matter, validity of.*

An agreement to abide by the decision in certain appeal in cognate matters pending in Court between third parties and pay and receive damages according to the rate fixed by the decision in the said appeal and not to raise any question as to breach of contract or any other contention and to treat the agreement as a new arrangement giving rise to a fresh cause of action, is neither without consideration nor illegal nor opposed to public policy and can be legally enforced. **S** Rameshwerdas Benarsidas *v.* New Jooria Bazar Sugar Co. 371

——— **s. 30**——*Contract for sale of goods—Presumption as to nature of transaction—*Badni *transaction, proof of.*

The ordinary presumption is in favour of the legality of a contract and it is for those who assert that it was not intended to perform the contract in the manner recited therein to prove their assertion.

In order to prove that a transaction is wagering one it is necessary to prove that no delivery was originally intended and also that it was agreed between the parties at the time the contract was entered into, that neither party would be entitled to enforce the actual delivery of goods.

The mere fact that a transaction is a speculative one does not make it a wagering one.

Contract Act—contd.

The mere fact that neither of the parties deal in the commodity contracted to be sold and that in previous transactions the parties merely settled by payment of differences does not prove a transaction to be a *badni* one. **L** Kanwar Bhan-Sukha Nand *v.* Ganpat Rai-Ram Jiwan, A. I. R. 1926 Lah. 318 304

——— **s. 30**—*Wagering contract, definition of.*

A wagering contract is one where two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependant upon the determination of that event, one shall win from the other and that other shall pay or hand over to him a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he shall so win or lose, there being no other real consideration for the making of such contract by either of the parties. **S** Rameshwerdas Benarsidas *v.* New Jooria Bazar Sugar Co. 371

——— **ss. 39, 48**—*Contract, refusal to perform—Other party, remedies of—Rescission of contract.*

Where a person who has contracted to supply goods to another writes to say that he will not supply the goods, the latter has three courses open to him. He can write back accepting the position and so fulfil the requirements of s. 39 of the Contract Act. He can also act upon the refusal by going to the open market and purchasing the goods therefrom. In either of these cases he can sue for damages. If he does not adopt either of these courses, he can ignore the refusal and treat the contract as still subsisting. But if he does so, it must *inure* for the benefit of both sides, and s. 48 of the Contract Act will apply.

Therefore, where a person has contracted to supply goods to another throughout the year according to his requirements, the latter, on a refusal by the former to supply the goods, must accept or reject the offer of rescission there and then. It is not possible for him to go on accepting the offer by instalments throughout the year. If he does not take action by word or deed, he cannot keep alive the contract for his own purpose and treat it as rescinded so far as any benefit to the other party is concerned. In other words if he does not adopt either of the alternative courses by which he can put an end to the contract, he must inform the other party of his requirements as they arise, to enable him, if he wishes, to carry out the contract as it affects the remaining instalments. **L** Jawahar Singh *v.* Secretary of State for India, 8 L. L. J. 114; A. I. R. 1926 Lah. 292 635

——— **s. 48.** *See* Contract Act, 1872, s. 39 635

——— **ss. 51, 93**—*"Readiness and willingness" of promisee, meaning of—Purchaser's duty to demand delivery.*

The expression "readiness and willingness" as used in s. 51, Contract Act, does not require a party to prove that on the due date he had the goods actually in his possession. It is quite sufficient if he is able to prove that he had control of the requisite goods or that he had the capacity to deliver them to the purchaser when called upon to do so.

Under s. 93, Contract Act, it is the duty of the purchaser to apply for delivery on tendering the agreed price. **L** Kanwar Bhan-Sukha Nand *v.* Ganpat Rai-Ram Jiwan, A. I. R. 1926 Lah. 318 304

——— **s. 59**—*Appropriation of payment to one of several debts—Uncommunicated appropriation, effect of.*

A debtor who has more than one debt to pay to the

same creditor and makes a payment, is not bound to intimate to the creditor the appropriation he desires along with the payment itself or so soon afterwards as to form part of the same transaction, but may do so after a reasonable interval.

The essence of an appropriation under s 59, Contract Act, is that it should be known to both parties.

An uncommunicated entry in an account-book of the creditor is not effective as between the parties. **M** CHEGGANMULL *v.* DESUR MANIKA MUDALIAR, 50 M. L. J. 242 384

——— ss. 59, 61—*Debtor and creditor—Payment—Appropriation*

The rights to adopt the manner of appropriation rests directly with the debtor. In the absence of any direction of the debtor it is open to his creditor to appropriate the payment towards any of his debts, and lastly, if there is no intimation by the debtor at the time of payment with regard to appropriation by the creditor, then it is open to the creditor to insist upon the appropriation being made in the chronological order in which the debts stand. **Pat** F. H. MANISTY *v.* J. V. JAMESON, 5 Pat. 326 273

——— s. 68—*Bulls supplied to minor, whether necessaries.*

The question whether the bulls supplied to a minor are a necessity or not depends upon the particular circumstances of the case. **M** SRINIVASA PILLAI *v.* BALASUBRAMANIA ODAYAR, (1926) M. W. N. 294; A. I. R. 1926 Mad 592 534

——— s. 69—*Mortgage—Decree for sale—Decree obtained by landlord for arrears of rent, paid off by mortgagee—Sale of property by mortgagor—Mortgagee, whether entitled to recover money paid by him.*

Section 69 of the Contract Act includes cases not only of personal liability but all liabilities to payment for which owners of land are indirectly liable, when such liabilities are imposed on lands held by them.

Where a mortgagee who has obtained a decree for sale of the mortgaged property pays off a decree obtained by the landlord in respect of such property in order to save the property from sale under the landlord's decree, he is entitled to maintain a simple suit for money against a subsequent purchaser from the mortgagor for the purpose of recovering the amount paid by him under the landlord's decree. **C** SARAJUBALA ROY CHAUDHURANI *v.* KAMINI KUMAR, 43 C. L. J. 142; A. I. R. 1926 Cal. 765 811

——— ss. 69, 70, *scope of—Contribution—Equity—Liabilities of parties, determination of.*

The right of contribution has its foundation in and is controlled by the principles of justice, equity and good conscience. It does not arise from contract, although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between the parties jointly liable *ex-contractu*.

A Court as a Court of justice, equity and good conscience may, in certain circumstances, although such circumstances do not bring the case strictly within the purview of ss. 69 and 70 of the Contract Act, allow contribution if the claim appears to be either just or equitable.

In a suit for contribution, the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the

parties to the suit. **C** REGISTERED JESSORE LOAN CO. *v.* GOPAL HARI GHOSE, 30 C. W. N. 366; A. I. R. 1926 Cal. 657 159

——— s. 73. *See* INTEREST ACT, 1839, s. 1 647

——— s. 73—*Contract for payment of money—Breach—Damages—Method of assessment—Civil Procedure Code (Act V of 1908), s. 35, scope of—"Court rate of interest", meaning of—Court, whether bound to award 6 per cent. per annum.*

In ascertaining under s 73 of the Contract Act the loss or damage caused by a breach of contract for the payment of money all that is to be done is to find out the rate of interest that the person to whom it ought to have been paid, would have got on it in the ordinary way, if it had been paid. The rate or amount of interest which was originally promised and that promised in case the original promise was broken come in only as a guide in ascertaining what rate of interest ought to have been paid and as a maximum.

There is no such thing as a "Court rate of interest". What is usually so called is merely the maximum rate which the Court may order to be paid on the costs under s. 35 of the C. P. C.

The rate of 6 per cent. per annum may in some cases be the appropriate rate of interest to allow for damages, though the fact that it is the rate mentioned in s. 35, C. P. C., does not make it so. **N** KISHANLAL *v.* BAPU 971

——— s. 73—*Suit based on breach of contract and for damages—Maintainability.*

In one and the same suit one defendant may be sued for breach of contract and the other for damages for wrongful detention of goods, both claims being covered by two parts of the same section of the Contract Act, *i. e.*, s. 73. **N** RAMCHARAN *v.* SARWAR KHAN 999

——— ss. 73, 107—*Civil Procedure Code (Act V of 1908), s. 34—Sale of goods—Breach of contract—Re-sale beyond reasonable time after breach, effect of—Damages, suit for—Date of breach, determination of—Measure of damages—Interest* pendente lite, *whether can be awarded.*

Where a contract for the sale of goods empowers the seller to re-sell the goods at the risk of the buyer in case the latter fails to take delivery, the re-sale must be held within a reasonable time from the date of such failure and the same rule applies to a re-sale held under the provisions of s. 107 of the Contract Act.

Where the time for performing a contract of sale has been postponed, at the request either of vendor or purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place and, therefore, alters the date with reference to which the damages are to be calculated. The old contract continues, but the date of the breach is shifted. The damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence.

A plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage the defendant is entitled to the benefit of it.

Contract Act—contd.

Where a breach of a contract for the sale of goods is committed by the buyer and the seller does not exercise his power of re-sale within a reasonable time, the correct measure of damages is the difference between the contract rate and market rate at the date of breach and not the market rate at the expiration of a reasonable time from the date of breach within which the re-sale should have taken place. It is immaterial in such a case whether the property in the goods has or has not passed to the buyer.

A clause in a contract for the sale of goods giving the power of re-sale to the seller confers a valid right on the latter to claim the difference between the contract price and the price realized at the re-sale, provided that power has been exercised in accordance with the provisions of the clause. But where that power has not been exercised within a reasonable time the only right of the seller is to claim damages on the footing of the difference between the contract price and the market value of the goods on the date of the breach, without any reference to the price which might be realized by a re-sale at any time after the limit of the reasonable time has been exceeded.

Where a party responsible for a breach of contract improperly delays the ascertainment of damages for a long time, interest on the damages awarded from the date of the institution of the suit may be decreed under s. 34 of the C. P. C. **B** Coorla Spinning & Weaving Mills Co. *v.* Vallabhdas Kallianji, 27 Bom. L. R. 168; A. I. R. 1925 Bom. 547 **575**

——— **s. 93.** *See* Contract Act, 1872, s. 61 **304**

——— **s. 107.** *See* Contract Act, 1872, s. 73 **575**

——— **s. 116**—*'Latent defect', meaning of—Sale by sample—Open delivery—Refund, suit for, whether maintainable—Damages.*

Where in a case of sale of goods by sample open delivery is taken after examination of the goods and the goods are subsequently discovered to be defective, the purchaser cannot claim a refund of the purchase-money, his only remedy is by way of damages.

The expression "latent defect" in s. 116 of the Contract Act means a defect which is not obvious to the eye and is not apparently noticeable.

Section 116 of the Contract Act is applicable to a case of sale by sample. **C** Jatindra Chandra Banerjee *v.* Murlidhar, 43 C. L. J. 126; A. I. R. 1926 Cal. 749 **873**

——— **s. 121**—*Sale of shares of Company by delivery of certificates and blank transfers—Cheque for price dishonoured—Title in shares—Vendee transferring certificates and transfers to third party—Plaintiff vendor's suit for recovery of certificates and transfers—Proper remedy of plaintiff.*

Plaintiff sold certain shares of Company to defendant No. 1. He took from various brokers blank transfers signed by the registered holders along with corresponding certificates and handed them over to the defendant No. 1. The defendant No. 1 gave the plaintiff a cheque which was dishonoured. The defendant No 1 made certain propositions as to the raising of money with defendant No. 2 and handed the certificates and transfers to him. Defendant No. 2 did likewise with defendant No. 3. In an action by the plaintiff against all the three defendants asking for return of the certificates and blank transfers or otherwise for damages :

Held, that as soon as the plaintiff handed over the certificates and transfers and the defendant accepted them and gave a cheque, property in the shares passed to the defendant No 1 and the plaintiff had neither any *jus in re* of the certificates and transfers nor had he any statutory lien on them. The plaintiff could only sue the defendant No 1 on the cheque or on the price of the shares unpaid in respect that the cheque had not been honoured and could not sue defendants Nos. 2 and 3 for delivery of shares. **P. C.** Maneckji Pestonji Bharucha *v.* Wadilal Sarabhai & Co., A. I. R. 1926 P. C. 38; 43 C. L. J. 508; 24 A. L. J. 657; 28 Bom. L. R. 777; 51 M. L. J. 1; 50 B. 360; (1926) M. W. N. 499 **824**

——— **ss. 140, 141**—*Principal and agent—Contract entered into by guaranteeing agent—Breach of contract—Suit to recover damages—Principal, whether necessary party—Principal added as co-plaintiff after expiry of limitation—Limitation Act, 1908, s. 22—Suit, whether barred.*

Where a contract for the sale of goods is entered into by a selling agent who is in the position of a guaranteeing agent towards his principal and who on default by the buyer in taking delivery of the goods has paid to the principal the amount due in respect of the goods, the agent is entitled in equity to assignment of the principal's rights against the buyer under the contract and is entitled to maintain a suit against the buyer for recovery of damages. Such an agent may also be treated as being in the position of a surety who has paid all that he is liable for and who upon such payment is invested with all the rights which his principal had against the buyer and becomes entitled to the benefits of every security held by the principal. To a suit by the agent in such a case to recover damages from the buyer, the principal is a proper rather than a necessary party and the suit will not be deemed to be barred by time if the principal is not added as a co-plaintiff until after the period of limitation has expired. **B** Coorla Spinning & Weaving Mills Co. *v.* Vallabhdas Kallianji, 27 Bom. L. R. 1168; A. I R 1925 Bom. 547 **575**

——— **ss. 251, 263**—*Partnership, dissolution of—Rights and obligations of partners.*

Under ss. 251 and 263 of the Contract Act after dissolution of partnership the rights and obligations of partners continue in all things necessary for winding up the business of the partnership. **S** Rameshwerdas Benarsidas *v.* New Jooria Bazar Sugar Co. **371**

——— **s. 253**—*Partnership—Death of partner—Agreement by managing member of joint Hindu family to continue partnership, effect of—Right to sue for accounts of old partnership, whether survives.*

Ordinarily a partnership is dissolved by the death of one of the partners but there may be an implied contract to continue the partnership after the death of a partner and in such a case the partnership would continue between the persons who have entered into such contract. Where such a contract is entered into by the managing member of a joint Hindu family not on behalf of the members of the family but acting merely on his own behalf, the contract is not binding on the other members of the family.

Where a partnership is continued after the death of one of the partners it is, however, technically a new partnership and not the old partnership. On the death of a partner each surviving partner is presumed, where the partnership is continued, to invest in

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the new partnership his share of the assets of the dissolved partnership and to take over his share of the liabilities of that partnership. So that even where a partnership is so continued one of the continuing partners has a right to demand a settlement of accounts of the old partnership up to the date of the death of the deceased partner, and he does not lose his right to such an account by reason of his agreement with the surviving partners to continue the partnership. **S** TANUMAL *v.* GANGA RAM, A. I. R. 1925 Sind. 103 **547**

Contribution. *See* CONTRACT ACT, 1872, s. 69 **159**

Co-operative Societies Act (II of 1912), s. 42 (6), r. 42—*Dissolution of registered society—Jurisdiction of Civil Courts—Liquidator's order, appeal from.*

A Civil Court has no jurisdiction to question the legality of the acts of a liquidator in a matter connected with the dissolution of a registered society.

Under r. 42 of the rules under the Co-operative Societies Act II of 1912 made applicable to the Central Provinces by Notification No. 355 of the 26th September 1916 no appeal lies from any order of a liquidator. **N** SADASHEO *v.* FADNAVIS **40**

Co-owners—Possession of one, whether adverse to others. *See* LIMITATION ACT, 1908, s. 144 **855**

——— Suit for rent by one. *See* C. P. C., 1908, O. VI, R. 17 **244**

Co-sharers—*Joint land—Exclusive occupation by one—Partition—Joint possession.*

Where one of the co-sharers exclusively occupies land which he holds in common with the rest of the co-sharers, the remedy of the other co-sharers is by means of partition. A suit for joint possession is not maintainable. **O** KESHO PRASAD *v.* GAYA BUX SINGH **921**

Counsel and Client—*Attorney—Costs, charging order for—Decree-holder's claim—Priority.*

The attorney's right to a lien for his costs is ancillary to the right he has of recovering his costs against his client. Where the attorney is unable to show that he cannot get payment from his client where others besides the client are interested in the fund, the Court would not exercise its discretion in favour of attorney against the other parties so interested. **B** ANANDRAO BHICARI SABNIS *v.* NAPU PATRAMUL, 28 Bom. L. R. 386; A. I. R. 1926 Bom. 289 **153**

Court Fees Act (VII of 1870), ss. 7 (1), 17—*Redemption of* kanom, *suit for—Damages, claim for—Court-fee payable.*

Where in a suit for redemption of a *kanom*, the plaintiff seeks to deduct from the *kanom* amount certain damages to which he claims to be entitled, he is bound to pay Court-fee not only on the *kanom* amount but also an *ad valorem* fee on the amount claimed as damages.

When damages are sued for, s. 7 (1) of the Court Fees Act must apply, and redemption and damages are two distinct subjects as contemplated by s. 17. **M** GOVINDAN NAIR *v.* KANHAIRATHOTIKAYIL ITALLUTTY, 50 M. L. J. 213; A. I. R. 1926 Mad. 542; (1926) M. W. N. 442 **557**

——— **s. 7 (iv) (c)**—Valuation of injunction accepted by District Judge—Interference in revision. *See* C. P. C., 1908, s. 115 **103**

——— **s. 7 (iv) (c), Sch. I, Art. 1**—*Suit for declaration with general prayer for any other relief—Ad interim injunction granted—Appeal from dismissal of suit—Court-fee payable.*

A vague and indefinite prayer for "any other relief to which plaintiff may be entitled" which is customarily added in a suit, does not turn a suit for mere declaration into one for a declaration with a consequential relief within the meaning of s. 7 (*iv*) (*c*) of the Court Fees Act.

Where, however, in a suit for declaration an *ad interim* injunction is granted on the application of the plaintiffs and on dismissal of the suit the plaintiffs in appeal seek reliefs which they had sought in first Court, the case falls under s. 7 (*iv*) (*c*) of the Court Fees Act and the Court-fee leviable on memorandum of appeal is *ad valorem*. **Pat** GANGADHAR MISRA *v.* DEBENDRABALA DASI, 5 Pat. 211; A. I. R. 1926 Pat. 249 **22**

——— **s. 7 (iv) (d)**—*Suits Valuation Act (VII of 1887), s. 8—Injunction, suit for—Valuation—Court-fee payable.*

Under the provisions of s. 8 of the Suits Valuation Act the value of a suit for an injunction for the purposes of Court-fees and of jurisdiction must be the same and Court-fee must be paid according to the amount at which the relief sought is valued in the plaint. **A** BACHHAN *v.* MUNICIPAL BOARD, MIRZAPUR, 24 A. L. J. 478 **951**

——— **s. 7 (iv) (f)**—*Suit for accounts—Plaintiff's valuation.*

In a suit for rendition of accounts, the option or discretion of the plaintiff in fixing his valuation is not confined to those cases where the value of the relief cannot be ascertained at the time the plaint is presented. **L** RIKHI KESH *v.* MELA RAM, 8 L. L. J. 78; A. I. R. 1926 Lah. 242 **650**

——— **s. 7 (v) (b)**—*Land assessed to revenue—Suit for possession by cancellation of deed—Court-fee payable.*

A suit for possession of land assessed to revenue by setting aside the sale in favour of the defendant falls under s. 7 (*v*) (*b*) of the Court Fees Act and the Court-fee payable is on five times the revenue. **O** SARJU *v.* SHEORAJ, 13 O. L. J. 124; A. I. R. 1926 Oudh 380 **179**

——— **s. 7 (v) and (xi) (e)**—*Suit for possession by occupancy tenant—Valuation of suit.*

A suit for possession by an occupancy tenant against his landlord on the basis of illegal ejectment falls under s. 7 (*xi*) (*e*), Court Fees Act, only when there is no question of title to be gone into. But when a question of title is involved the case would fall under s. 7 (*v*) of the Act and the Court-fee payable would be on the market value. **Pat** KRISHNA CHANDRA GAUNTIA *v.* RAJA MAHAKUR, 5 Pat. 208; A. I. R. 1926 Pat. 251 **19**

——— **s. 12**—*Set-off—Court-fee not paid—District Judge, power of, in appeal—Document admitted without Court-fee—Party's right to object.*

It is open to an Appellate Court to direct a defendant, who has obtained a set-off in the Trial Court without paying Court-fee on his written statement, to pay the Court-fee before allowance of the set-off.

Where once a document, such as an unstamped written statement of a defendant claiming a set-off, has been admitted in the Trial Court without objection, it is not for the plaintiff to say in appeal that the document should be struck off from the record; the Court is entitled to allow the defendant on payment of proper fee, to rely upon the set-off. **B** MANEKLAL

Court Fees Act- concld.

VADILAL *v.* CHANDULAL BALABHAI SHAH, 28 Bom. L. R. 525 **646**

——— **s. 17.** *See* COURT FEES ACT, 1870, s. 7 (*i*) **557**

——— **s. 19-I**—*Hindu Law—Joint family—Survivorship—Letters of Administration, application for—Court-fee payable.*

No administration need be taken out to the estate of a Hindu governed by the Mitakshara Law when the estate passes by the right of survivorship to his co-parceners, but where a grant is sought the applicant must comply with the provisions of s. 19-I of the Court Fees Act. The provisions of the section are imperative and the Court has no power to relax them. **C** *In the goods of* BHUBANESHWAR TRIGONAIT, 29 C. W. N. 372; A. I. R. 1925 Cal. 627 **986**

——— **Sch. I, Art. 1**—*Appeal from decree on award—Court-fee.*

An appeal from a decree based on an award filed through the intervention of Court must bear *ad valorem* Court-fee. **L** GAURI SHANKAR *v.* ANANT RAM **646**

——— **Sch. II, Art. 10**—*Power of appointment filed by Advocate, whether liable to pay Court-fee.*

A power of appointment in writing filed by an Advocate, whether he is a Barrister or not, authorising him to make or do any appearance, application or act on behalf of his client, requires the Court-fee payable upon a *vakalatnama* as prescribed in Art. 10 of Sch. II to the Court Fees Act. **Pat** ABDUL GHAFFAR *v.* MRS. F. B. DOWNING, (1925) Pat. 4; 7 P. L. T. 213; 5 Pat. 255; A. I. R. 1926 Pat. 246; 5 Pat. 415 **841**

Court of Wards Act (IX B. C. of 1879), s. 60—*Hindu widow—Surrender, validity of—Estate under management of Court of Wards, effect of.*

A surrender by a Hindu widow of the whole of her interest in the estate of her deceased husband in favour of the nearest reversioner or reversioners at the time of the surrender is valid, provided it is a *bona fide* surrender and not a device to divide the estate with the reversioners.

Where a Hindu widow's estate is under the management of the Court of Wards, the widow is not competent to surrender the estate to the nearest reversioner of her husband. Any such surrender is void under the provisions of s. 60 of the Court of Wards Act. **P. C.** MAN SINGH *v.* NAWLAKHBATI, A. I. R. 1926 P. C. 2; 24 A. L. J. 250; 50 M. L. J. 332; 43 C. L. J. 259; (1926) M. W. N. 332; 7 P. L. T. 223; 5 Pat. 290; 28 Bom. L. R. 841 **830**

Criminal Procedure—*Corroboration—Evidence Act (I of 1872), s. 114, illus. (b)—Approver—Corroboration of approvers* inter se—*Penal Code (Act XLV of 1860), s. 411, offence under—Corroboration required.*

An approver is unworthy of credit as against each accused unless corroborated in material particulars.

One approver cannot corroborate another approver unless there is something on the record to show that they had no chance of collaboration before giving evidence.

The evidence that the accused appeared before certain *panchayats* which made certain enquiries into certain thefts or that they received moneys (*bhungas*) promising to restore property cannot be corroborative evidence of an offence under s. 401, Penal Code.

The corroborative evidence of witnesses that the assembling of the accused at a particular well was always followed by a theft is not sufficient corroboration where none of the witnesses ever reported to the Police at the time of the occurrence of any one of the thefts that it was preceded by a meeting of the accused at a particular well. **L** MUNSHI *v.* EMPEROR, 27 Cr. L. J. 600 **264**

——— *Defence, weakness of.*

The guilt of a person accused of a crime has to be established by the evidence for the prosecution and not by the weakness of the defence. **L** EMPEROR *v.* SAIN DASS, 8 L. L. J. 180; 27 Cr. L. J. 593 **257**

———.

Distinction between an irregularity and illegality discussed. **R** ABDUL RAHMAN *v.* EMPEROR, 4 Bur. L. J. 213; A. I. R. 1926 Rang. 63; 27 Cr. L J 669 **717**

——— *Examination of witnesses, mode of—Medical witness, whether can prove statement made in another trial.*

A medical witness, like any other witness in a case, must be examined orally in the presence of the accused and cannot in lieu of such examination be allowed to prove statements made by him at the trial of other accused persons in the absence of the accused against whom his evidence is being recorded. **L** SARDARA *v.* EMPEROR, 27 Cr. L. J. 571 **139**

——— *Hostile witnesses.*

The prosecution is not entitled to declare a witness hostile merely because he is a neighbour of the accused and does not support the prosecution story unless there is something in his deposition which conflicts with earlier statements made by him, and which would afford ground for thinking that he has been gained over by the defence. **Pat** PARMESHWAR DAYAL *v.* EMPEROR, (1926) Pat. 139; 27 Cr. L. J. 657; A. I. R. 1926 Pat. 316; 7 P. L. T. 567 **705**

——— *Murder case—Local inspection and preparation of plan by Trying Judge—Trial Judge's opinion about witnesses—Witnesses credibility not shaken—Judge's duty.*

It is a commendable procedure on the part of the Trying Judge to visit the spot on the conclusion of a murder case and to prepare a plan of the locality showing as to who are the witnesses who live in close proximity to the house of the deceased.

Considerable weight must be attached to the opinion of the Judge who hears the witnesses as to their relative credibility. Where the record does not show that the witnesses on either side have been materially discredited or greatly shaken in cross-examination it is the duty of the Judge to decide which side are telling the truth. Where the Judge has tried the case with marked care and intelligence, his opinion as to credibility of witnesses should ordinarily be accepted. **O** MUKTA PRASAD *v.* EMPEROR, 13 O. L. J. 69; 27 Cr. L. J. 577 **193**

——— *Police diaries, nature of entries in—Discrepancy between diaries and inquiry—Effect.*

The entries in the Police diaries are not exhaustive and in a protracted inquiry before the Trial Court little weight attaches to a discrepancy between those entries and the inquiry. **O** MUKTA PRASAD *v.* EMPEROR, 13 O. L. J. 69; 27 Cr. L. J. 577 **193**

——— *Technical objections by Crown.*

The Crown does not usually take technical objections either on the criminal or the civil side, whereby the doing of substantial justice may be defeated. **L** EMPEROR *v.* ATMA SINGH, 8 L. L. J. 82; 27 Cr. L. J. 696 **888**

Criminal Procedure Code (Act V of 1898), ss. 55, 110—*Arrest of suspected criminal—Powers of Police Officer—Warrant, nature of, when action contemplated under s. 110.*

A Police Officer may first arrest any person as is mentioned in s. 55 of the Cr. P. C., and then make up his mind whether to proceed against him for some substantive offence or to put him before a Magistrate in order that proceedings under Ch. VIII may be taken against him.

If it is intended that a Police Officer should arrest a man with a view of taking proceedings under s. 110, Cr. P. C., it is strictly and specifically necessary that he should specify one of the clauses given in s. 55, although it may be for the cause so stated that he intends to proceed under s. 110. S HARDAYAL SINGH *v.* EMPEROR, 27 Cr. L. J. 628 **404**

——— **ss. 69, 70, 71, 133, 134 (1)**—*Nuisance—Conditional order—Service of notice—Procedure.*

The procedure for service of summons which is provided by s. 71 of the Cr. P. C., cannot be made use of unless service in the manner mentioned in ss. 69 and 70 cannot be effected by the exercise of due diligence.

Where the report of a peon shows that service cannot be effected in the manner provided by s. 69, but it does not show that service cannot be effected in the manner provided by s. 70, the peon is not justified in effecting service in the manner provided by s. 71.

A return of service of notice of a conditional order made under s. 133 of the Cr. P. C. showed that the person to be served was not found in his house and that two copies of the notice were affixed to the door of the house:

Held, that there being nothing to show that service could not be effected in the manner provided by s. 70 of the Code, the service effected in the manner provided by s. 71 was not sufficient. C BENI MADHAB SAPUI *v* JARU NATH SAPUI, 43 C. L. J. 113; 27 Cr. L. J. 715 **907**

——— **s. 106**—*Penal Code (Act XLV of 1860), s. 452, conviction under—Security for keeping peace.*

On conviction under s. 452, Penal Code, no security can be demanded for keeping the peace as the offence does not involve any breach of the peace. L SANTOSH SINGH *v.* EMPEROR, 27 Cr. L. J. 571 **139**

——— **s. 109**—*Attempt to avoid Police patrol—Security.*

An attempt to avoid a Police patrol cannot bring the case of a shop keeper residing in a town within the ambit of s. 109, Cr. P. C. L GANDOO *v.* EMPEROR, 27 Cr. L. J. 573 **141**

——— **s. 110.** *See* CR. P. C., 1898, s. 55 **404**

——— **ss. 110, 112, 115**—*Copy of order not sent with notice—Notice, defective—Effect.*

Where it appears that the person proceeded against under s. 110, Cr. P. C., was sufficiently informed as to the allegation against him an order passed against him on such proceedings cannot be set aside on the sole ground that the provisions of ss. 112 and 115 of the Code were not strictly complied with. L DAYA RAM *v.* EMPEROR, 27 Cr. L. J. 575 **143**

——— **ss. 110, 118, 406, 417**—*Magistrate directing security to be furnished for good behaviour—Sessions Judge ordering accused to be discharged—Appeal by Local Government to High Court, whether maintainable—High Court's power to interfere on revision.*

The order of a Sessions Judge passed on appeal under s. 406, Cr. P. C., discharging an accused ordered by a Magistrate under s. 118, Cr. P. C., to furnish security for good behaviour under s. 110, Cr. P. C., cannot be considered to be an original or an appellate order of acquittal within the meaning of s. 417 of the Cr. P. C., so as to give the Local Government a right of appeal to the High Court.

The Local Government has, however, a right to approach the High Court in revision and where the evidence against the accused is sufficient to justify his being bound over to be of good behaviour, it is open to the High Court to set aside the order of discharge and direct the accused to furnish security. O EMPEROR *v.* SAMAI DEEN, 3 O. W. N. 390; A. I. R. 1926 Oudh 399; 13 O. L. J. 276; 27 Cr. L. J. 626 **402**

——— **s. 133.** *See* CR. P. C., 1898, s. 69 **907**

——— **s. 145**—*Dispute with regard to immoveable property—"Forcibly and wrongfully," meaning of—Order confirming possession, duration of—Revision.*

Per *Marten, J.*—The distinction drawn in the first proviso to sub-s. (4) of s. 145 of the Cr. P. C., is between forcible entries which are rightful and forcible entries which are wrongful; and that depends on whether the person entering was entitled to use force, and not merely on whether he had a legal right to possession.

Per *Pratt, J.*—The phrase "forcibly and wrongfully" used in the first proviso to sub-s. (4) of s. 145 of the Cr. P. C., has the same meaning as forcible entry without due warrant of law; in other words "wrongfully" means no more than "otherwise than in due course of law."

Possession taken by a show of force is a forcible dispossession within the meaning of the first proviso to sub-s. (4) of s. 145.

Per *Fawcett* and *Madgavkar, JJ.*—Sub-s. (6) of s. 145 of the Cr. P. C., and the connected form No. 22 of Sch. V to the Code allow a Magistrate to give directions as to possession with a legal effect that is valid until actual eviction or ouster by due course of law and not merely until the institution of a civil suit for the purpose of determining the legal right to the property. B BAI JIBA *v.* CHANDULAL AMBALAL, 27 Bom. L. R. 1353; A. I. R. 1926 Bom. 91; 27 Cr. L. J. 661 **709**

——— **ss. 145, 537**—*Dispute as to immoveable property—Preliminary order, service and publication of—Irregularity.*

Under sub-s. (3) of s. 145 of the Cr. P. C., a copy of the preliminary order made by the Magistrate must be served on the parties and must also be published by being posted on the land itself. The failure to serve and publish the order in this manner is, however, an irregularity which is curable under the provisions of s. 537 of the Code and does not by itself vitiate the proceedings. R MAUNG MAUK *v.* MAUNG PO YON, 3 R. 169; A. I. R. 1925 Rang. 270; 27 Cr. L. J. 660 **708**

——— **s. 148 (3).** *See* CR. P. C., 1898, s. 439 **709**

——— **s. 162.** *See* EVIDENCE ACT, 1872, s. 27 **901**

——— **s. 162**—*Evidence Act (I of 1872), s. 27—Statement of accused by gesture in Police custody—Admissibility.*

Section 162, Cr. P. C., prevails over the provisions of s. 27 of the Evidence Act.

A statement can be made by means other than words. Therefore, the gesture of the accused in pointing out to the Police where revolver lies is inadmissible in evidence. R EMPEROR *v.* NGA KYAING, 3 R. 656; 27 Cr. L. J. 658; A. I. R. 1926 Rang. 112 **706**

——— **s. 162**—*Police diaries, improper use of.*

To believe a witness because a perusal of the Police diaries shows that he was examined at earliest opportunity and had made the same statement is to

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make an improper use of the diaries. L Fazal v. Emperor, 27 Cr. L. J. 614 **358**

——— s. 162—*Police diaries, use of.*

A Magistrate is not justified in referring to the statements made in the Police diaries unless and until the witnesses have been confronted by these statements. L Municipal Committee, Simla v. Mukand Singh, 27 Cr. L. J. 607 **271**

——— s. 162—*Statement before Police during investigation, use of, at trial—Duty of Judge.*

Statements made by any person to a Police Officer in course of an investigation under Ch. XIV, Cr. P. C., cannot be used for any purpose except to contradict a witness at the request of the accused in the manner provided in second paragraph of s. 162 of the Code.

Where a witness supported prosecution in his statement before the Police but resiled from that statement before the Committing Magistrate and Sessions Court, it is the duty of the Judge to withhold from the Jury's knowledge the statement made by the witness to the Police unless it was proved in the manner provided by law at the request of the accused. C Gahur Howldar v. Emperor, 30 C. W. N. 503; 27 Cr. L. J. 641; A. I. R. 1926 Cal. 793 **593**

——— s. 164—*Confession, recording of, in Calcutta of offence committed in* Mofussil—*Formalities to be observed.*

Where an accused is arrested in Calcutta in pursuance of a request made by the Police at Burdwan who evidently were holding the investigation with regard to the matter under the provisions of Ch. XIV, Cr. P. C., the arrest and production of the accused before a Magistrate at Calcutta for recording of confession must be taken to have been an act done in the process of investigation that was being held and the Magistrate is bound to comply with provisions of s. 164, Cr. P. C., in recording the confession.

Where a Magistrate records the accused's confession not in the form prescribed for recording confessions but puts down the gist of the confession in the narrative form without recording the questions put to and answers given by the accused, though both the Magistrate and the accused are *Bengalees*, and does not remember the exact words used by the accused, and the only warning which he gives to the accused is that he asks the accused whether he is willing to make a voluntary confession and that if he makes a confession that might be used against him, and does not inform the accused that he is a Magistrate nor does he put to the accused questions to find out whether the reply which the accused is about to make is a voluntary one, there is no compliance with requirements of law for recording a confession. C Emperor v. Garib Hari, 30 C. W. N. 454; 27 Cr. L. J. 921; A. I. R. 1926 Cal. 712 **365**

——— s. 172—*Police diaries, use of.*

To disbelieve defence story on the ground that it is nowhere mentioned in the Police *zimnis* amounts to using the *zimnis* in such a way as to strengthen the case for prosecution and it is against the provisions of the Cr. P. C. L Dini v. Emperor, 27 Cr. L. J. 572 **140**

——— ss. 196, 403—*Sanction to prosecute, absence of—Acquittal for want of sanction—Subsequent trial after obtaining sanction, whether barred.*

In the absence of a sanction by the Local Government a Court is not competent to try an accused person for an offence under s. 171F of the Penal Code. Where, therefore, an accused person who is charged with an offence under s. 171F is acquitted on the ground of want of sanction, such an acquittal does not bar a subsequent trial for the same offence after the necessary sanction is obtained. A Ram Nath v. Emperor, 24 A. L. J. 180; A. I. R. 1926 All. 231; 27 Cr. L. J. 705; L. R. 7 A. 18 **897**

——— ss. 200, 201, 202, 203—*Preliminary inquiry—Magistrate, duty of—Procedure—Accused, whether can be called upon to show cause.*

The procedure which a Magistrate is required to adopt on a complaint being lodged before him is laid down by ss. 200 to 203 of the Cr. P. C. Section 200 of the Code makes it incumbent on a Magistrate to examine the complainant forthwith at sufficient length to satisfy himself as to his veracity and as to any points on which the complaint is silent. If the result of such examination is that he finds no *prima facie* reason to distrust the complaint and he is satisfied that the facts alleged before him constitute a criminal offence, it is incumbent on him to issue process forthwith. If, on the other hand, he distrusts the complaint altogether or comes to the conclusion that no offence is made out, it is equally his duty to dismiss the complaint. It is only in a case where he distrusts the complainant, but his distrust is not sufficiently strong to warrant him to act upon it, that it is open to him to postpone the issue of process pending further inquiry as contemplated by s. 202, Cr. P. C., provided he records his reasons in writing for adopting this intermediate course.

The procedure of calling upon an accused person to render an explanation to enable the Magistrate to decide if he should issue process is undesirable. It is not fair to the accused that he should be called upon to state his defence before the prosecution have laid all their cards on the table. Though there is no obligation on him either to appear or to render an explanation in the preliminary inquiry, a refusal or failure on his part to attend in answer to a Rule *nisi* issued by a Magistrate is likely to prejudice the mind of the Magistrate and a compliance therewith to expose him to serious risks.

In determining whether he should exercise his criminal jurisdiction, a Magistrate should apply his mind to see if there is "*prima facie* evidence for the alleged offender to answer" irrespective of what the motive of the complainant was. S Crowder v. Morrison, 27 Cr. L. J. 711 **903**

——— ss. 201, 211. *See* Cr. P. C., 1898, s. 509 (a) **896**

——— ss. 235, 233, 190 (1) (c)—*Conspiracy—Sameness of transaction—Complaint, offence disclosed in—Joint trial—Joint charges—Non-compliance with s. 360, whether illegality.*

The offence of conspiracy and offences committed in pursuance of that conspiracy form one and the same transaction.

When a Magistrate has taken cognizance of an offence upon complaint, it is competent for him to take cognizance of any offence that is disclosed by evidence.

Therefore, where a Magistrate acting on the facts disclosed in the evidence for the prosecution adds a second charge in respect of an act alleged to have been done in pursuance of the alleged conspiracy contained in the complaint, his action is not only justified under s. 235, Cr. P. C., but such initiation

taken by him is on the original complaint and not upon his own knowledge or suspicion.

Where an act of the accused is done in pursuance of the conspiracy mentioned in the original complaint, a charge in respect of that act may be framed without any further complaint.

Where the offences form part of the same transaction and law allows their joint trial, it is immaterial whether the two offences are included in one charge or whether they are separated and each of them made the basis of a charge **R** ABDUR RAHMAN *v.* EMPEROR, 4 Bur. L. J. 213; A. I. R. 1926 Rang. 53; 27 Cr. L. J. 669 **717**

——— **ss. 236, 237**—*Penal Code (Act XLV of 1860), ss. 467, 471—Charge of abetting forgery—Conviction for using forged document—Legality.*

An offence of abetment of forgery is quite distinct from one of using a forged document. In a trial on a charge of abetment of forgery, an accused cannot be convicted for an offence of using a forged document.

Before a person is convicted under a particular section of the Penal Code or of any other enactment it is imperative that subject to the provisions of s. 237, Cr. P. C., he should be formally charged with having committed the offence specified in the section and be given an opportunity to defend himself against the specified charge. **C** HARUN RASHID *v.* EMPEROR, 30 C. W. N. 432; A. I. R. 1926 Cal 581; 27 Cr. L. J. 606; 53 C 466 **270**

——— **s. 237**—*Charge under s. 302, Penal Code—Conviction under s. 201, Penal Code.*

A person charged with an offence of murder can be convicted under s. 201, Penal Code, without a further charge being made against him under that section. Such a conviction is warranted by s. 237, Cr. P. C. **L** RANNUN *v.* EMPEROR, A. I. R. 1926 Lah. 88; 7 L. 84; 27 Cr. L. J. 709 **901**

——— **ss. 238, 269 (3), 418**—*Penal Code (Act XLV of 1860), ss. 411, 412—Trial by Jury—Conviction for minor offence triable with Assessors, legality of—Appeal on facts, whether lies.*

Accused were charged with an offence under s 412 of the Penal Code, which was an offence triable by a Jury, and were tried by a Jury. The Jury brought in a verdict of guilty under s. 411 of the Code, which was an offence triable with the aid of Assessors:

Held, (1) that having regard to the provisions of s. 238 of the Cr. P. C, the accused could be convicted of an offence under s. 411 of the Penal Code;

(2) that the provisions of s. 418 of the Cr. P. C. were applicable to the case and that the accused were not entitled to appeal against their conviction on the facts. **B** GULABCHAND DOSAJI *v.* EMPEROR, 27 Bom. L. R. 1416; A. I. R. 1926 Bom. 134; 27 Cr. L. J. 650 **602**

——— **s. 249**—*Warrant cases—Magistrate's power to stop case and release accused—Starting case afresh on complaint—Legality.*

Section 249, Cr. P. C., is inapplicable to warrant cases. Therefore, an order by a Magistrate stopping a warrant case and releasing the accused under the section is illegal.

Where a Magistrate stops a warrant case and releases the accused purporting to act under s. 249, Cr. P. C., the case is still on the pending file of the Magistrate and can be re-opened either by an application by the Crown or *suo motu* by the Magistrate but cannot be started *de novo* upon a private complaint, the Police case being already on the pending file. **Pat** FIRANGI SINGH *v.* DURGA SINGH, 5 Pat. 213; 7 P. L. T. 449; 27 Cr. L. J. 698; A. I. R. 1626 Pat. 292 **890**

——— **s. 250**—*Appellate Court, power of, to award compensation.*

Section 250 does not authorise a Court of Appeal to grant compensation. **L** NOTIFIED AREA COMMITTEE, KHARAR *v.* KARTA RAM, 7 L. 152; 27 Cr. L. J. 570 **138**

——— **s. 250**—*Complaint, false and vexatious or frivolous—Compensation.*

Where there are depositions of some witnesses and a *Zaildar's* report to support a complaint without any rebuttal on the part of the accused, the complaint cannot be said to be false and vexatious or frivolous. **L** SANWALYA *v.* BARU, 27 Cr. L. J. 633 **409**

——— **s. 250**—*Informer, whether can be directed to pay compensation—Maximum compensation, amount of.*

It is open to a Magistrate under s. 250 of the Cr. P. C. to pass an order directing a person, upon whose information given to a Police Officer or to a Magistrate the proceedings were started, to pay compensation to the accused.

Under s. 250 (2) of the Cr. P. C. all that is prohibited is that compensation to the accused or each or any of them should not exceed Rs. 100 in amount. The section does not mean that if there are a number of accused persons the total amount awarded to all of them must not exceed the maximum specified in the section. **A** FARIDUDDIN *v.* EMPEROR, 24 A. L. J. 221; A. I. R. 1926 All. 295; 27 Cr. L. J. 702 **894**

——— **s. 250**—*'Vexatious' case, meaning of—Acquittal—Compensation.*

An accusation cannot be said to be vexatious unless the main intention of the complainant is to cause annoyance to the person accused and not merely to further the ends of justice.

Where a report regarding the conduct of the accused, a Municipal Supervisor, was made by the Municipal Engineer, on which the President set a more or less informal inquiry on foot through the Police, and the report of the Police showed that the Supervisor had been guilty of falsification of accounts but the accused was acquitted on trial, it cannot be said under the circumstances that the object in instituting the proceedings was primarily to annoy the accused. **L** MUNICIPAL COMMITTEE, SIMLA *v.* MUKAND SINGH, 27 Cr. L. J. 607 **271**

——— **s. 256**—*Prosecution witnesses coming from Native State—Accused, whether can be asked forthwith about cross-examination.*

The fact that the prosecution witnesses come from a Native State and it would take a long time to again secure their attendance, is a sufficient reason under s. 256, Cr. P. C., for requiring the accused to state forthwith whether he wishes to cross-examine any of the witnesses. **L** KURA *v.* EMPEROR, 27 Cr. L. J. 720 **912**

——— **ss. 262, 263, 264, 265**—*Summary trial—Charge, necessity of—Record, what consists of.*

In a summary trial, whether it be appealable or otherwise, a formal charge in writing need not be framed.

In a summary trial judgment and judgment alone, embodying as it does the substance of the evidence, and the particulars mentioned in s. 263, Cr. P. C., is the self-contained record of the case and apart from this record there is no other and, what is more, there is no docu-

Criminal Procedure Code—contd.

ment which can be defined or described as a portion of a record **L** Emperor *v.* Salig Ram, 8 L. L. J. 140; 27 Cr. L. J. 639; A. I. R. 1926 Lah 301; 7 L 303 **415**

——— **s. 263 (g).** *See* Cr. P. C., 1898, s. 342 **408**

——— **ss. 287, 350**—*Statement by one Magistrate but committal by another—Admissibility of statement in trial before Sessions Judge.*

Where a statement of the accused during inquiry is recorded by one Magistrate but the case is committed by his successor, the statement so recorded is admissible in evidence at the trial before the Sessions. **L** Ghulam Jannat *v.* Emperor, 7 L. 70; A. I. R. 1926 Lah. 271; 27 Cr. L. J. 627 **403**

——— **s. 288**—*Evidence before Committing Magistrate—Admissibility at trial—Weight to be attached.*

Section 288 of the Cr. P. C. makes the previous evidence of a witness taken before a Committing Magistrate, evidence admissible at the trial and the limitation imposed to such admission by the words 'subject to the provisions of the Evidence Act' merely means, that such evidence can be used at the trial for all purposes so long as the evidence is evidence within the meaning of the Evidence Act.

Unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of the conviction. **Pat** Bigna Kumhar *v.* Emperor, (1926) Pat. 167; 27 Cr. L. J. 594 **258**

——— **s. 307**—*Reference to High Court—Procedure.*

In making a reference to the High Court under s. 307 (2), Cr. P. C., the Sessions Judge should not enter his finding on any of the charges but should refer the entire case for consideration. **C** Emperor *v.* Ekabbor, 27 Cr. L. J. 617 **361**

——— **s. 340**—Vakalatnama—*Criminal cases—Appearance by Advocate or Vakil on behalf of accused—Written authority, necessity of filing.*

There is no provision either in the Cr. P. C., or in the rules of the Patna High Court requiring an Advocate or Vakil of that Court to file a duly stamped appointment in writing in order to enable him to present an application or appeal or conduct a criminal case on behalf of the accused. **Pat** Subda Santal *v.* Emperor, (1926) Pat. 125; 27 Cr. L. J. 666; A. I. R. 1926 Pat. 296; 7 P. L. T. 524 **714**

——— **s. 342**—*Non-compliance with provisions—Absence of prejudice—Effect.*

An omission to comply fully with the provisions of s. 342, Cr. P. C., does not vitiate the trial unless the accused has been prejudiced. **A** Rammu *v.* Emperor, 27 Cr. L. J. 719 **911**

——— **ss. 342, 263**—*Scope—Provisions, whether mandatory—Omission to examine accused—Effect—"If any" in s. 263 (g), meaning of.*

In every case, whether summons or warrant one, there must be an examination of the accused, under s. 342 of the Cr. P. C. the provisions of which are mandatory.

The words "if any" in cl. (*g*) of s. 263 of the Cr. P. C., do not leave the Magistrate any discretion as the words are intended merely to cover cases in which owing to the admission or plea of the accused or the weakness of the prosecution evidence, the accused can either be convicted on his own plea or can be acquitted on the evidence without an examination of the accused. **N** Bhagwan *v.* Emperor, 9 N. L. J. 43; A. I. R. 1926 Nag. 300; 27 Cr. L. J. 532; 22 N. L. R. 65 **408**

——— **s. 344**—*Complainant's witnesses not present—Adjournment—One accused, absence of—Costs.*

A complainant should not be burdened with costs for an adjournment occasioned by his failure to produce evidence when one of the accused also happens to be absent on that day. **L** Bishambar *v.* Ram Chand, 27 Cr. L. J. 572 **140**

——— **s. 345**—*Compromise with some of several accused—Effect on others.*

The compounding of an offence with some of the accused does not effect the acquittal of the rest. **L** Emperor *v.* Mohna, 27 Cr. L. J. 576 **144**

——— **s. 350.** *See* Cr. P. C., 1898, s. 287 **403**

——— **s. 350 (1) (2)**—*Magistrate, transfer of—Accused, application of, for de novo trial—Subsequent waiver—Mere cross-examination of prosecution witnesses, effect of—Re-trial, privilege of, whether claimable by complainant.*

Where an accused, on a transfer of a Magistrate, claimed the privilege of re-trial under s. 350, Cr. P. C., but when the prosecution witnesses appeared, changed his mind and was content to cross-examine the witnesses:

Held, that the procedure adopted was not irregular and the Court was free to exercise its statutory option and act upon the evidence recorded by its predecessor.

The privilege under s. 350, Cr. P. C., is that of the accused and not of the complainant and if the accused declines to act under sub-cl. (1) (*a*) the complainant of necessity must suffer any disadvantage which follows upon the Magistrate electing to proceed upon the evidence already recorded. **M** *In re* Arulay, 27 Cr. L. J. 659 **707**

——— **s. 360**—*Depositions of witnesses, reading over of—Procedure—Reading over of deposition of witnesses in interval and after close of day—Effect.*

The evidence of a witness must be read over to him after it is completed and before the examination of another witness is started.

Where the depositions of witnesses who are examined one after another until the midday adjournment are read over to them during the interval and the depositions of the witnesses examined in the afternoon are similarly read over to them in the afternoon after the close of the day there is no compliance with the provisions of s. 360, Cr. P. C., and the trial is vitiated. **C** Samserali Hazi *v.* Emperor, 53 C. 129; A. I. R. 1926 Cal. 563; 27 Cr. L. J. 688 **736**

——— **s. 360,** *non-compliance with, whether illegality.*

Where the Magistrate has tried to consult the convenience of the defence Counsel and also at the same time tried to comply with the requirements of s. 360, Cr. P. C., as far as possible and it is not alleged that failure to comply with this provision of law has resulted in any inaccuracy in the deposition of any of the witnesses, the defect is a mere irregularity curable under s. 537, Cr. P. C, and not an illegality vitiating trial. **R** Abdul Rahman *v.* Emperor, 4 Bur. L. J. 213; A. I. R. 1926 Rang. 53; 27 Cr. L. J. 669 **717**

——— **s. 386 (1) (a).** *See* Cr. P. C., 1898, s. 488 **604**

——— **s. 403.** *See* Cr. P. C., 1898, s. 196 **897**

——— **s. 403**—Autrefois acquit—*Acquittal on charge under ss. 325, 147, Penal Code—Subsequent trial under s. 302, Penal Code.*

Criminal Procedure Code—contd.

Acquittal of an accused under s. 325/147, Penal Code, by a Magistrate does not bar a subsequent trial of the accused on the same facts for an offence under s. 302, Penal Code. **A** Yad Ram *v.* Emperor, 27 Cr. L. J. 615 **359**

——— **ss. 406, 417.** *See* Cr. P. C, 1898, s. 110 **402**

——— **s. 418.** *See* Cr. P. C., 1898, s 238 **602**

——— **s. 423 (d).** *See* Cr. P. C., 1898, s. 439 **709**

——— **s. 437**—*Accused discharged—Further enquiry, when to be ordered.*

Further enquiry should not be ordered unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. The opinion of the Court that the prosecution evidence requires more careful attention than it has received is no ground for ordering further enquiry. **L** Harnam Singh *v.* Emperor, A. I. R. 1926 Lah. 130; 27 Cr. L. J. 661 **709**

——— **s. 437**—*District Magistrate—Further enquiry, when to be ordered.*

District Magistrate's powers to direct further enquiry should be exercised in exceptional cases and for good reasons. Further enquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence obviously incomplete.

A Magistrate's disbelieving witnesses for reasons not cogent is no ground for ordering re-trial. **L** Maji *v.* Emperor, 2 L. C. 231; 27 Cr. L. J. 535 **133**

——— **s. 439**—*Interlocutory order—Revision.*

It is under very rare and exceptional circumstances that the Judicial Commissioner's Court would interfere on the revisional side with an interlocutory order of a Magistrate rejecting a piece of documentary evidence. **N** Wamanrao *v.* Emperor, 22 N. L. R. 31; A. I. R. 1926 Nag. 204; 27 Cr. L. J. 707 **899**

——— **s. 439**—*Revision—Acquittal, conversion of, into conviction.*

Where an accused has been convicted of one offence and acquitted of another, the High Court is competent on the revision side to convert the acquittal into conviction. **L** Kanshi *v.* Emperor, 8 L. L. J. 188; 27 Cr. L. J. 566 **134**

——— **s. 439 (2) (6)**—*Alteration of sentence, issue of notice for, to accused—Right of accused to show cause against conviction.*

Where a notice under s. 439 (2), Cr. P. C., is issued to the accused to show cause why the sentence should not be altered, sub-cl. (6) of the section becomes applicable and the accused becomes entitled to show cause against his conviction. **L** Emperor *v.* Sain Das, 8 L. L. J. 180; 27 Cr. L. J. 593 **257**

——— **s. 439 (4)**—*Murder trial—Conviction under s. 323, Penal Code—Revision—High Court's power to record conviction and sentence under s. 325.*

If in a case tried under s. 302, Penal Code, on the facts disclosed and found an offence under s. 325, Penal Code, is committed but the Trial Court without considering the applicability of s. 325 acquits the accused under s. 302 but convicts and sentences him under s. 323, Penal Code, the High Court is not precluded by anything in s. 439 (4), Cr. P. C., from recording the conviction and sentence under s. 325, Penal Code, inasmuch as there was no acquittal under s. 325. **A** Duli *v.* Mangli, 24 A. L. J. 414; 27 Cr. L. J. 564; A. I. R. 1926 All. 332; L. R. 7 A. 100 Cr. **132**

Criminal Procedure Code—contd.

——— **ss. 439, 145, 148 (3), 423 (d)**—*Revision—Costs whether can be awarded.*

The High Court has power, under s. 439 read with ss. 423 (*d*) and 148 (3) of the Cr. P. C. to pass an order for costs incurred in the hearing of a revision petition arising out of a proceeding under s. 145 of the Code. **B** Bai Jiba *v* Chandulal Ambalal, 27 Bom. L R. 1353; A. I. R. 1923 Bom. 91; 27 Cr. L. J. 661 **709**

——— **s. 476**—*Case filed in one Court—Trial by another—Jurisdiction to file complaint.*

It is the Court trying the case and not the Court in which the complaint was originally filed that is competent to make a complaint under s. 476, Cr. P. C. **C** Tarakeswar Mukhopadhyay *v.* Emperor, 30 C. W. N. 504; 27 Cr. L. J. 648; A. I. R. 1926 Cal. 788; 53 C. 488. **600**

——— **ss. 476, 476A, 476B**—*Complaint—Appellate Court, order by—Appeal to High Court, when lies—Discretion of Court—Interference by High Court.*

Upon a proper construction of ss. 476, 476A and 476B, Cr. P. C, an appeal would lie to the High Court from an order passed by a District Judge in the following cases :—

(*a*) where a Munsif has refused an application made to him under s. 476 to make a complaint, there has been an appeal to the District Judge and the District Judge, disagreeing with the Munsif, has made a complaint;

(*b*) where under s. 476A (the Munsif having taken no action *suo motu* and not having been asked to take any action) the District Judge, on application to him, makes a complaint or refuses to make a complaint.

In no other case would an appeal lie to the High Court from an order passed by a District Judge as an Appellate Court.

The same procedure would apply to any other chain of three Courts (contemplated by s. 476) of ascending jurisdiction.

The question whether a complaint should be made under s. 476, Cr. P. C, is one of discretion and the High Court is always loath to interfere except in extraordinary cases. **Pat** Ranjit Narayan Singh *v.* Ram Bahadur Singh, 7 P. L. T. 114; A. I. R. 1926 Pat. 81; (1926) Pat. 89; 5 Pat. 262; 27 Cr. L. J. 641 **593**

——— **s. 488**—*Chinese Customary Law—Marriage, proof of—Long cohabitation—Presumption.*

For the purpose of determining, in a proceeding under s. 488, Cr. P. C., whether a valid marriage exists between a Burmese woman and a Chinese half-caste who claims to be a Confucian, the Court must find whether the requirements of the Chinese Customary Law have been fulfilled. Under that Law a marriage must be preceded by a betrothal contract and the usual ceremonies and festivities must be performed and celebrated. The Court may, however, draw a presumption of marriage from the intention of the parties, long cohabitation, habit and repute. **R** Ma U *v* Kyin Htat, 4 Bur. L. J. 255; A. I. R. 1926 Rang. 82; 27 Cr. L. J. 656 **608**

——— **s. 488**—*Maintenance—Another's child, maintenance of—Maintenance prior to date of application.*

An order directing payment of maintenance for any period prior to the date of application is illegal.

A father is liable for the maintenance of his own child whether legitimate or otherwise but not for the child of another man. **L** Abdul Rahim *v.* Amir Begum, 27 Cr. L. J. 610 **354**

Criminal Procedure Code—contd.

——— **ss. 488, 386 (1) (a)**—*Order for maintenance charged on joint estate—Sale and attachment of moveable property owned jointly by husband, whether permissible.*

Where the amount of maintenance awarded under s. 488 of the Cr. P. C. is made a charge on the joint estate of the husband and his brothers, the order can be enforced by attachment and sale of the husband's share in moveable property owned jointly by the husband and his brothers.

Per *Fawcett, J.*—The words "moveable property belonging to the offender" in s. 386 (1) (*a*) of the Cr. P. C. are wide enough to cover the share of the offender in a joint Hindu family estate so far as it consists of moveable property, and an order for maintenance under s. 488 of the Code can, therefore, be enforced by the attachment and sale of such share, although this method of recovery should not ordinarily be resorted to. **B** SHIVALINGAPPA NIJAPPA TUBCHI *v.* GURLINGAVA, 27 Bom. L. R. 1363; 49 B. 906; A. I. R. 1926 Bom. 103; 27 Cr. L. J. 652 604

——— **ss. 509 (a), 190 (2), 201, 203**—*Penal Code (Act XLV of 1860), ss. 211, 302—Complaint of murder—Second Class Magistrate, whether competent to take cognizance—Procedure—Complainant charged with offence under s. 211, legality of.*

Section 509 (*a*) of the Cr. P. C. saves the proceedings before a Magistrate taken on a complaint of which cognizance is taken without authority; but this will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it without power to do so.

A complaint that certain persons had committed the offence of murder was made to a Second Class Magistrate who sent the complaint to the Police for enquiry and on their reporting the case to be false dismissed the complaint under s. 203, Cr. P. C., without even examining the complainant on oath and then himself complained against the latter under s. 211 of the Penal Code:

Held, (1) that the Magistrate was not competent to take cognizance of the complaint and the proper procedure for him to adopt was that laid down in s. 201, Cr. P. C., which required him to return the complaint for presentation to the proper Court with an endorsement to that effect;

(2) that the proceedings before the Magistrate were void *ab initio* and that the Magistrate had, therefore, no jurisdiction to make a complaint against the complainant for an offence under s. 211 of the Penal Code. **Pat** BENGAL GOPE *v.* EMPEROR, 7 P. L. T. 335; 27 Cr. L. J. 704; 5 Pat. 417 896

——— **s. 520**—*Scope.*

An order by an Appellate Court under s. 520, Cr. P. C., staying or modifying, altering or annulling an order of a Subordinate Court can be made only when the order of the subordinate Court is one relating to property and made under ss. 517, 518 or 519, Cr. P. C. **L** SARAJ DIN *v.* KHALIL SHAH, 27 Cr. L. J. 574 142

——— **s. 526**—*Magistrate accepting hospitality of complainant's son—Transfer of case.*

A Magistrate's accepting hospitality of the complainant's son is a circumstance which would naturally raise a reasonable apprehension in the mind of the accused that he would not have a fair trial though the Magistrate may have been quite ignorant of the fact that his host was the son of the complainant. **L** NARAIN SINGH *v.* EMPEROR, 27 Cr. L. J. 565 133

Criminal Procedure Code—concld.

——— **s. 526**—*Transfer of case—Convenience of parties.*

For purposes of transfer, it is the convenience of the accused rather than that of the complainant that has to be considered. **L** SOHAN LAL *v.* GOPAL SINGH, 27 Cr. L. J. 563 131

——— **s. 526 (e)**—*Complaint dismissed in default—Fresh complaint in another Court—Transfer to Court dismissing original complaint.*

Where a case has been dismissed in default by a particular Magistrate, a fresh complaint based on the same facts should be transferred to the same Magistrate for trial. **L** DHARI MAL *v.* EMPEROR, 27 Cr. L. J. 719 911

——— **s. 537.** *See* CR. P. C., 1898, s. 145 708

——— **s. 562.** *See* PUNJAB EXCISE ACT, 1914, s. 61 (1) 129

——— **s. 562**—*Accused above 21 years—Benefit of section—Revision, interference in.*

In case of an accused not under 21 years of age s. 562, Cr. P. C., is only applicable when the accused is convicted of an offence punishable with the imprisonment for not more than seven years.

The High Court is not bound to interfere on its revision side with an order under s. 562 even when it is illegal. **L** EMPEROR *v.* HOSHIARA, 27 Cr. L. J. 624 368

——— **s. 562**—Lambardar *pocketting money received as water rate—Sentence.*

Where the accused, a *lambardar*, is convicted for pocketting the water rate money received by him as an agent of the Government from the complainant a landowner, the case is not a fit one to be dealt with under s. 562, Cr. P. C. **L** EMPEROR *v.* SOHAN SINGH, 27 Cr L. J. 562 130

Custom, whether question of fact or law. *See* C. P. C., 1908, s. 100 987

——— **Alienation**—*Alienation by widow—Suit for declaration by reversioners—Consent by father, whether binds son.*

An assent given by a reversioner to an alienation by a widow of her late husband's property is not binding on the sons of such reversioner when the consent given is not *bona fide*. **L** SUNDAR SINGH *v.* GANDA SINGH 761

——— *Gift—Sayyads of Basti Kesa in Okara Tehsil of Montgomery District—Gift of ancestral property to daughter's son.*

Amongst Sayyads of Basti Kesa in the Montgomery District custom permits a gift to a daughter's son of ancestral property provided it is made in writing and is followed by possession. **L** FATEH SHAH *v.* NURAN 1037

——— *Gift—Sonless* Awan *of Tallagang Tahsil, District Attock—Gift of ancestral property to daughter.*

A sonless *Awan* of Tallagang Tahsil of Attock District has an unrestricted power of gifting his property, ancestral or non-ancestral, to a daughter or her issue. **L** MOHAMMAD ASLAM KHAN *v.* JAHAN KHAN 398

——— *Necessity—Purchasing of house to live in.*

Where the only house which a man possessed is sold in an execution sale and he is in imminent danger of being turned out and it is not easy to rent a house, the buying of a house to live in is a legal necessity. **L** LACHI *v.* SURJA 114

Custom—contd.

——— **Applicability**—*Sikh Sodhi Khatris of Anandpore, District Hoshiarpore—Law of inheritance.*

Sodhis of Anandpore, District Hoshiarpur, do not follow Hindu Law in matters of inheritance. Therefore, there is no presumption that an Anandpore Sodhi family constitutes a co-parcenary body in accordance with Hindu Law of Mitakshara. **L** Wazir Singh *v.* Moti Singh 492

——— **Customary right**, suit for declaration of—Custom found against. *See* Pleadings and proof 226

——— **Extension of custom** *by deductions—Personal law, falling back upon, when no custom proved.*

It is outside the province of a Court to extend custom by the process of deduction from the principles which seem to underlie custom which have been definitely established.

Among parties generally following Customary Law it is permissible to fall back as a last resort on their personal law for the decision of a point on which no definite rule of custom applicable to the parties can be found. **L** Shahab Din *v.* Umran 148

——— **Partition**—*Widow's right to claim partition —Onus of proof.*

A widow of a deceased co-sharer in a joint holding has a statutory right to demand partition of her share and the burden of proving that she cannot claim partition of her share is upon the person denying her such right. **L** Amir Hamza *v.* Murad Bibi, 6 L. 196; A. I. R. 1925 Lah. 458 525

——— **Pre-emption.** *See* C. P. C., 1908, s. 11 463

——— **Right of privacy**—*Right, whether attached to property.*

It is settled law in the United Provinces that there is a customary right of privacy existing in them and that a substantial interference with such a right would afford a person, whose such right has been invaded, a good cause of action. This right is not only personal but attaches to the property in respect of which that right is claimed. **O** Sheo Bhagu *v.* Janki, 29 O. C. 136 914

——— **Succession**—*Widow succeeding as* malik kamil—*Absolute estate.*

The words "*malik kamil*" convey the idea of absolute ownership.

Where the widow of a childless proprietor succeeds to him as *malik kamil* as recorded in the *wajib-ul-arz* she inherits an absolute estate, particularly where no line of devolution of the estate after the death of the widow is indicated in the entry. **O** Sahai Singh *v.* Surajpal Singh 653

——— **v. Personal Law**—*Alienation—Presumption —Tarkhans of Hassan Abdal, Attock District.*

In the case of a person who is not a member of an agricultural tribe and whose main occupation is not agriculture, there is no initial presumption against a free power of alienation.

In matters of alienation the *tarkhans* of Hassan Abdal in the Attock District are governed by their personal law and not by custom. **L** Lachhmi Narain *v.* Mahammedji, 6 L. 294; A. I. R. 1925 Lah. 525 559

——— **Wajib-ul-arz,** *construction of—Use of future tense in recording of custom—Interpretation.*

Prima facie an entry in a *wajib-ul-arz* is intended to be a record of custom and not a record of the expression of wishes of the proprietors of the village, and use of the future tense does not in any sense negativ the existence of the custom but it only denotes that the pre-existing custom shall be applicable to cases which arise thereafter. **O** Sahai Singh *v.* Surajpal Singh 653

Custom—concld.

Damages *for breach of promise to marry—Interference by Privy Council.*

Their Lordships of the Privy Council will not interfere with a measure of damages unless there is something very clearly wrong with the figure. **P. C.** Thomas Charles William Skipp *v.* Lilian Mildred Kelly, 50 M. L. J. 498; A. I. R. 1926 P. C. 27; 3 O. W. N. 453; 43 C. L. J. 430; 28 Bom. L. R. 873; 24 L. W. 18; 30 C. W. N. 841 331

——— for interference with another's property—Suit —Maintainability. *See* Limitation Act, 1908, Sch. I, Art. 36 444

Debt. *See* Lease 741

Debtor and creditor. *See* Contract Act, 1872 s. 59 273

——— *Payment by debtor to third person—Authority to receive payment.*

When a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had, or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor. **P. C.** Mahomed Khaleel Shirazi *v.* Les Tanneries Lyonnaises, A. I. R. 1926 P. C. 34; 3 O. W. N. 568; 49 M. 435; (1926) M. W. N. 495; 24 L. W. 115 767

Decree, joint, what is. *See* C. P. C., 1908, O. XXII, r. 4 300

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2—*Date for determination of status as agriculturist.*

Under s. 2, Dekkhan Agriculturists' Relief Act, the term 'agriculturist' applies to a person who is an agriculturist at the time of the transaction and not at the time of suit. **S** Shakarkhan *v.* Lakhimal, A. I. R. 1926 Sind 56 664

——— **s. 15B**—Ex parte *decree—Execution—Instalments.*

Where a decree is passed *ex parte*, the defendant can, at any stage in the execution proceedings, show that he was an agriculturist at the date of the decree and claim instalments. **B** Narayan Govind Deshpande *v.* Dhondo Krishna Tathe, 28 Bom. L. R. 305; A. I. R. 1926 Bom. 246 76

——— **s. 63A**—*Sale by agriculturist through agent —Requirements of law.*

An alienation by an agriculturist must comply with the provisions of s. 63-A, Dekkhan Agriculturists' Relief Act, whether the alienation is effected by him personally or through a person holding his power-of-attorney. **B** Bhagu Govinda Patel *v.* Narayan Tukaram Survashi, 28 Bom. L. R. 428 658

Digwars or ghatwal tenures, *whether under zemindar—Burden of proof—Service tenures, kinds of.*

The question whether certain *digwars* or *ghatwals* are or are not subordinate to the *zemindar* is always one of fact and the burden of proving that they are under him lies on the *zemindar*.

Various forms of service tenures enumerated and defined. **P. C.** Secretary of State for India *v.* Jyoti Prashad Singh Deo, A. I. R. 1926 P. C. 41; 30 C. W. N. 745; 24 A. L. J. 761 974

Divorce—*Misconduct, proof of—Burden of proof—Withdrawal of charge—Condonation.*

In a proceeding for dissolution of marriage, the burden of proving the respondent's misconduct lies heavily upon the petitioner. In such a proceeding the duty of the petitioner is to show that on or between the dates specified in the petition, the respondent was guilty of misconduct with the co-respondent, and that must be a matter of proof upon evidence which, though it may not be direct, must at all events be so clear and cogent, both as to inclination, opportunity and conduct as to lead to the inevitable inference that the offence has been committed.

A withdrawal of a charge of adultery amounts in law to a condonation of such offence, if any, committed prior to the date of the withdrawal. **C** WATSON *v.* WATSON, 43 C. L. J. 37; A. I. R. 1926 Cal. 703 **528**

Divorce Act (IV of 1869), ss. 3 (1), 10—*Oudh Chief Court, whether has original jurisdiction to entertain petition for divorce—Residence within jurisdiction, nature of.*

Under s. 10 of the Divorce Act the Oudh Chief Court has original jurisdiction in matters of divorce under the Act.

The word 'together' in s. 3 (1) of the Divorce Act governs only the word 'resided' and not the word 'reside'. Where a petitioner and respondent both reside within the jurisdiction of a Court, even though they did not reside together within the jurisdiction of such Court, the Court has jurisdiction to entertain a petition for divorce. **O** ROBERT HENRY LEADON *v.* EATHEL MAY LEADON, 3 O. W. N. 403; 13 O. L. J. 236; A. I. R. 1926 Oudh 319 **952**

Easement, *definition of.*

Every right peaceably enjoyed as an easement, and as of right without interruption for the prescribed period becomes absolute and indefeasible after the expiry of such period. **Pat** JUGAL SARKAR *v.* RAJ MANGAL PRASAD, A. I. R. 1926 Pat. 187 **929**

——— *Occasional use of right.*

The proprietor of a piece of land, over which the members of the public exercise a right of easement, does not lose his right to the land as proprietor on account of the occasional user for the purpose of exercising the right of easement. **C** MOHENDRA NATH ROY *v.* NABADWIP CHANDRA NANDY, 43 C. L. J. 180 **5**

Easements Act (V of 1882), s. 4—*New kind of easement, creation of.*

If a right comes within the four corners of the statutory definition of an easement, whether it be a new one or novel one, the Court is bound to give effect to it. **B** OFFICIAL TRUSTEE OF BOMBAY *v.* SALEBHAI SARAFALLY BHAGAT, 28 Bom. L. R. 403; A. I. R. 1926 Bom. 328 **673**

——— **ss. 4, 13**—*Right of going upon property of another person to white-wash one's wall—Easement, whether of necessity—Easement of necessity, what is.*

The right claimed by a person of going upon the premises of another person with a view to erect a scaffolding for purposes of white-washing and plastering his own wall is an easement though not one of necessity.

An easement of necessity is not created merely when the easement is necessary but when it is absolutely necessary for the beneficial enjoyment of the dominant property.

But there cannot be an easement of necessity for enabling the dominant owner to enjoy another easement. **B** OFFICIAL TRUSTEE OF BOMBAY *v.* SALEBHAI SARAFALLY BHAGAT, 28 Bom. L. R. 403; A. I. R. 1926 Bom. 328 **673**

Easements Act—concld.

——— **s. 7**—*Lands, upper and lower, owners of—Right of upper owner to let surface water on to lower land.*

Where two contiguous plots of land belong to different proprietors, one of which stands upon higher level than the other, the owner of the plot of land on a lower level, into which water flows in the ordinary course of nature from the adjacent land on a higher level, is not entitled in law so to deal with his land as to obstruct the escape of water from the higher land. **M** SHEIKH HUSSAIN SAHIB *v.* PACHIPULUSU SUBBAYYA, 50 M. L. J. 377; (1926) M. W. N. 370; A. I. R. 1926 Mad. 449; 49 M. 441 **677**

——— **s. 17.** *See* WATER RIGHTS **929**

——— **s. 60 (4)**—*License—Execution of permanent works—Revocability—Intention of parties—Estoppel—Principle, whether applicable to licensor's heirs.*

Where a license has been acted upon and cost has been incurred in executing works of a permanent character, the license is not revocable unless the power of revocation is expressly reserved or the terms of the grant limit the license as to its duration.

The presence of a covenant in the agreement executed by the licensee that the agreement shall be binding on his estate and the heirs is an indication of the intention of the parties that a heritable grant was to be made.

The principle of estoppel where applicable as against the licensor is equally applicable as against his heirs. **N** DAYARAM *v.* DEORAO **923**

Estoppel.

See EASEMENTS ACT, 1882, s. 60 (4) **923**

See MORTGAGE **538**

——— Kabuliyat *acted upon by lessors—Denial of lease by persons claiming under lessors.*

Where a *kabuliyat* has been accepted and acted upon by the lessors, third parties claiming under the lessors are, equally with the lessors, estopped from denying the validity of the lease. **C** HAR MONDAL *v.* DURJODHON MANDAL **661**

——— *Transfer as guardian of minor—Subsequent transfer as owner—Subsequent transferee, whether estopped.*

Where a Hindu widow, as guardian of her alleged adopted son, mortgages certain property as belonging to the son, and subsequently transfers the same property in her own right as a Hindu widow, the transferee from the widow is not estopped from asserting his vendor's title. In fact there is no question of estoppel in such a case. **M** MYLAVARAPPA RANGAPPA NAIDU *v.* BASANNA SIMON, 23 L. W. 467; A. I. R. 1926 Mad. 594 **639**

Evidence, *admission of—Principle of acquiescence.*

It is a well-known rule of practice that when a fact relevant in itself has been wrongly allowed to be proved in a manner not permitted by law unless the opposite party objects to the evidence at the time, when it is offered, he cannot object afterwards. But this principle of acquiescence can only be applied when the secondary evidence has been of the contents of a document which if produced itself could have been admitted under the provisions of the law. **L** JHANDA SINGH *v.* HARNAM SINGH **75**

———, *circumstantial—Inference of guilt—Motive, value of—Accused, producing body of deceased—Offence.*

Evidence—concld.

In order to justify the inference of guilt, on circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

Motive for a crime while it is always a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of an accused person can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged.

Where the sole evidence against an accused is that in consequence of information supplied by him the body of a murdered person was recovered from his field he cannot be convicted under s. 302, Penal Code, but he can be convicted of an offence under s. 201 of the same Code. **L** RANKUN *v.* MORRISON, A. I. R. 1926 Lah. 88; 7 L. 84; 27 Cr. L J. 709 **901**

——— *Document not public, admitted as such—Effect.*

If a document is admitted in evidence on the understanding that it is a public document, it loses all evidential value when it is discovered that it is not a public document. **L** THAKAR SINGH *v.* GHANAYA SINGH **125**

——— *Relevant evidence, admission of, without objection, effect of—Omission to object to inadmissible evidence, effect of.*

Where evidence is admitted in the first Court without objection and the evidence is admissible as relevant, no party will be allowed to object to the reception of such evidence at any later stage of the litigation.

An omission to take objection to reception of a document which is irrelevant or inadmissible in evidence does not make it admissible. **C** MANMATHA NATH KAR *v.* PROBODH CHANDRA RATARI, 43 C. L. J. 274 **279**

——— *Witness, demeanour of—Rejection of testimony—Appellate Court, when would interfere.*

A Court of first instance sees a witness and can, therefore, better judge his demeanour than a Court of Appeal; and, therefore, the rejection by the former Court of the testimony of a witness is not disturbed in a Court of Appeal. But if such rejection is based on the inherent probabilities of the story told by the witness, then it is open to the Appellate Court to consider the inherent probabilities of the story and come to a different conclusion. **P. C.** MAUNG KYI OH *v.* MA THET PON, A. I. R. 1926 P. C. 29; (1926) M. W. N. 489 **916**

Evidence Act (I of 1872), s. 27. *See* CR. P C., 1898, s. 162 **706**

——— **s. 27**—*Criminal Procedure Code (Act V of 1898), s. 162—Evidence Act* v. *Cr. P. C.—Relative scope of s. 27, Evidence Act and s. 162, Cr. P. C.*

The Evidence Act is a separate Statute dealing with an important branch of law and its provisions are independent of the rules of procedure contained in the Cr. P. C., and must have full scope unless it is clearly proved that they have been repealed or altered by another Statute.

Section 162, Cr. P. C., applies to the statements of persons examined as witnesses by the Police in the course of investigation and not to the statement of an accused person and does not override or modify the provisions of s. 27 of the Evidence Act. **L** RANKUN *v* MORRISON, A. I. R. 1926 Lah. 88; 7 L. 84; 27 Cr. L. J. 709 **901**

Evidence Act—contd.

——— **s. 30**—*Exculpatory statement, whether confession.*

Per *Fawcett, J.*—A statement made by an accused person denying his guilt is not a "confession" within the meaning of s. 30 of the Evidence Act. **B** VALLABHRAM GANPATRAM *v.* EMPEROR, 27 Bom. L R. 1391; A. I. R. 1926 Bom. 122; 27 Cr. L. J. 689 **881**

——— **s. 32 (3)**—*Admission, splitting up of.*

An admission against the pecuniary interests for the maker when admitted into evidence under s. 32 (3) of the Evidence Act, must be admitted in its entirety and cannot be split up into parts. **Pat** SITA RAM SINGH *v.* KHUB LAL SINGH, 5 Pat. 168; A. I. R. 1926 Pat. 255 **13**

——— **s. 70**—*Mortgage—Execution admitted—Proof, necessity of—Executant* pardanashin lady—*Consideration, proof of.*

Admission of execution of a document dispenses with necessity of its proof.

But where the defendant executant of the deed is an illiterate *pardanashin* lady the mere admission of her execution of the document is not sufficient to dispense with the necessity of proving the passing of consideration. **Pat** RAM LAL SINGH *v.* SEPTI, (1926) Pat. 117; A. I. R. 1926 Pat. 295 **558**

——— **s. 80**—*Deposition—Identity of deponent, proof of*

Under s. 80 of the Evidence Act the presumption can be made only as to the genuineness of the statement recorded in a deposition. No presumption can be made regarding the identity of the deponent. Where, however, the document containing the deposition is a very old document, the Court can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent. **O** BHAGWAT PRASAD *v.* SHER KHAN **985**

——— **s. 90**—*Document deposited with Collector—Production after 30 years—Presumption.*

The mere fact of a certain document having been produced from a Court where it had been filed, does not necessarily bring that document within the requirements of s 90 of the Evidence Act. The application of this proposition, however, depends upon the circumstances of each particular case.

A Hindu who died suddenly of cholera was alleged to have left an *anumatipatra* authorising his widow to make an adoption to him and also a Will. His father who arrived at the place where the death had taken place ten days after the date of the death, obtained the two documents from a servant of the deceased and deposited them with the Collector of the District with a request that the estate of the deceased may be taken under the management of the Court of Wards. The documents remained in the custody of the Collector for 54 years, and were then produced in Court in the course of a litigation between the reversioners of the deceased and a person who had been adopted by the widow of the deceased under the authority contained in the *anumatipatra*:

Held, that under the circumstances the Court was entitled to accept the documents as presumably genuine under the provisions of s. 90 of the Evidence Act. **Pat** RAJENDRA PRASAD BOSE *v.* GOPAL PRASAD BOSE, 4 Pat. 67; A. I. R. 1925 Pat. 442 **814**

——— **s. 91.** *See* REGISTRATION ACT, 1908, s. 17 (1) (*b*) **567**

——— **s. 92**—*Oral evidence, admissibility of, to prove consideration.*

Evidence Act—contd.

Under s. 92 of the Evidence Act oral evidence is admissible to determine what the consideration for an agreement in writing was. **S** Rameshwerdas Benarsidas *v.* New Jooria Bazar Sugar Co. 371

——— **s. 92 (4)**—*Lease registered- Subsequent arrangement for giving credit out of rent, proof of.*
Though a subsequent oral agreement varying the terms of a registered lease cannot be proved, an arrangement to give credit to the extent of a certain amount out of the rent owing to certain groves having been cut by the lessor may be proved. **A** Jhabba Singh *v.* Chajjoo, 24 A. L. J. 548; L. R. 7 A. 141 Rev. 169

——— **s. 102**—*Judgment-debtor claiming to be member of agricultural tribe—Burden of proof—Doubt, benefit of.*
The burden of proving that the judgment-debtor is a member of an agricultural tribe within the meaning of the Punjab Alienation of Land Act is on him especially when in Settlement Records he is shown as belonging to one of the non-agricultural tribes.
Law does not recognise the principle of giving the benefit of doubt to a party on whom the burden of proof lies. **L** Thakur Das *v.* Ghulam Mahommad 158

——— **s. 114, ill (b).** *See* Criminal procedure 264

——— **s. 114**—*Letter posted under registered cover—Note of refusal by postman—Presumption.*
Where a letter under a registered cover is proved to have been posted and bears a note by the postman that the addressee refused to take it, the presumption is that he did refuse to take it. **L** Sher Afzal *v.* Mohan Lal 103

——— **s. 114**—*Stolen property, possession of—Presumption—Possession, recent.*
In a case of possession of stolen goods no fixed time limit can be laid down to determine whether possession is recent or otherwise. Every case must be judged on its own facts.
If a few stolen articles are found in possession of a person under circumstances which may give rise to the probability of his coming by them honestly some time after the theft the presumption does not arise.. **C** Emperor *v.* Ekabbor, 27 Cr. L. J. 617 361

——— **s. 115**—*Estoppel—Attachment and sale of property in execution—Vendee from judgment-debtor standing by—Denial of judgment-debtor's title—Estoppel.*
Where a purchaser from a judgment-debtor sees the property, the subject-matter of his purchase, being attached and sold in execution of a decree against his vendor and keeps silent, he is estopped from denying the title of the judgment-debtor at the time of execution sale as against the auction-purchaser. **L** Jhanda Singh *v.* Harnamsingh 75

——— **s. 115**—*Estoppel—Building house in absence of plaintiff—Silence.*
Where the defendant has built a house on plaintiff's land in the latter's absence, no question of estoppel by acquiesence can possibly arise. **O** Dawarka *v.* Sankatha 307

——— **s. 115**—*Litigant changing position—Estoppel.*
A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted, when he fails upon that branch, to withdraw from the position and assert the contrary, more especially when he thereby places his opponent at a great disadvantage. **P. C.** Mirza Raja *v.* Secretary of State for India, A. I. R. 1926 P C. 18; 50 M. L. J. 391; 49 M. 249; 43 C. L. J 378; 28 Bom. L. R. 865; 24 L. W. 9 501

Evidence Act—contd.

——— **s. 115**—*Specific Relief Act (I of 1877), s. 41—Minor, execution of sale-deed by, representing to be adult—Suit to set aside alienation—Minor whether estopped—Refund of purchase-money on setting aside sale.*
Where a minor represented himself to be a major and joined in the execution of a sale-deed and the alienee believed in that representation and acted on it in taking the sale, in a suit by him on attaining majority for a declaration that the sale-deed was void against him on the ground that he was a minor on the date of sale:
Held, (1) that the plaintiff was not estopped from proving that he was a minor at the date of sale;
(2) that under s. 41, Specific Relief Act, the decree in favour of the plaintiff could be made conditional on the plaintiff re-paying the consideration paid by the alienee in respect of the sale. **M** Koduri Venkataramayya *v.* Thumuluri Punnayya, 23 L. W. 521; A. I. R. 1926 Mad. 607 853

——— **s. 124**—*Official Reports whether privileged.*
Reports by one Government Officer to another written in official confidence are privileged under s. 124 of the Evidence Act and are not documents that an outsider has a right to inspect. **B** Vallabhram Ganpatram *v.* Emperor, 27 Bom. L. R. 1391; A. I. R. 1926 Bom. 122; 27 Cr. L. J. 689 881

——— **s. 124**—*State document—Rejection by Court.*
It is incumbent upon a Court to prevent the disclosure of State documents in proceedings before it. No sound distinction can be drawn between the duty of the Judge when objection is taken by the responsible officer of the Crown, or by the party, or when, no objection being taken by anyone, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information sought. **N** Wamanrao *v.* Emperor, 22 N. L. R. 34; A. I. R. 1926 Nag 304; 27 Cr. L. J. 707 899

Excise cases—*Sentence—Imprisonment desirable—Government Circulars—Reference by Magistrates—Practice.*
In the case of the crimes such as illicit traffic in drugs where the offender may make great profits by breach of the law the payment of the fine is apt to be considered merely in the nature of a tax which is no deterrent at all.
Where there have been several cases when persons living on the border-land of foreign territory have imported excisable articles in British territory, it is desirable that the Courts should as far as possible inflict a substantive sentence of imprisonment to prevent the recurrence of such crimes.
Per *Tyabji, A. J. C.*—The object of Government in issuing Circulars is to bring to the notice of the Magistrates certain circumstances mentioned therein which when relied upon must be openly stated in Court and the parties allowed to comment thereon.
Nothing can be more deleterious to the administration of criminal justice than a notion that the Magistrate conceives himself to be under orders to pass any particular kind of sentence or that any considerations affect his decision but such as are openly stated in Court and are subject to comment by the prosecution and the defence. **S** Emperor *v.* Mustali, 27 Cr. L. J. 633 409

Execution of decree.
See C. P. C., 1908, s. 48 613
See EVIDENCE ACT, 1872, s. 115 75

———— *Attachment, wrongful—Damages, suit for—Malice, proof of, whether necessary.*

In a suit to recover damages for wrongful attachment by a person other than the judgment-debtor it is not incumbent on the plaintiff to allege and prove that the person at whose instance the wrongful attachment was made acted maliciously or without reasonable or probable cause. The defendant may have acted in perfectly good faith and innocently, but he is nevertheless liable if damage has been caused by his mistake. **N** LOBO *v.* BABULAL, 8 N. L. J. 170; A. I. R. 1925 Nag. 390 573

———— Decree against dead man. *See* C. P. C., 1908, O. XXII, R. 4 28

———— *Decree sent to Collector for partition—Collector going beyond decree—Court's power to refer it back to Collector.*

Where the Collector to whom a decree has been sent for effecting a partition of the property, disregards the terms of the decree and divides the property, in contravention of its terms, the Court is within its rights to refer the case back to Collector to partition the property in accordance with the terms of the decree.

A Collector when asked to partition lands in accordance with a decree must follow the terms of the decree and is not at liberty to read the decree together with the judgment so as to effect partition in a manner not contemplated by the decree. **B** TIMMANNA PARMESHWAR BHAT *v.* GOVIND GANPATI BHAT, 28 Bom. L. R. 523; A. I. R. 1926 Bom. 258 656

————*Orders passed, whether appealable—Civil Procedure Code (Act V of 1908), s. 2 (2) (b), scope of.*

An order passed in execution is not appealable merely because it fulfils the conditions laid down in s. 47, C. P. C. In order to be appealable, it must fall within the definition of decree in s. 2 (2), C. P. C.

The expression "any order of dismissal for default" in sub-cl. (*b*) of s. 2 (2), C. P. C., is not confined to suits only, but it also covers an order of an Execution Court dismissing the objections of an objector judgment-debtor for default. **A** HIRA LAL *v.* TIKAM SINGH 1

———— *Original application pending—Further application, if necessary.*

Where there has been no dismissal of the original application for execution, no special application is necessary to revive the first application which remains pending before the Court. **C** AKSHOY KUMAR *v.* NALINI KUMAR 80

———— *Relief not given by decree.*

An Executing Court cannot grant a relief which is not given by the decree itself. **L** HUSSAIN BIBI *v.* NUR HUSSAIN SHAH 212

———— *Sale—Bid, inadequate—Court, if has discretion to refuse bid.*

By virtue of the third condition on the back of the sale certificate, it is in the discretion of the Court or the officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

When the Court thinks fit not to accept a sale and orders a re-sale, the order should state reasons for the same. **C** RAM SAKHI DEBYA CHOWDHURANI *v.* RADHA NATH DE 46

———— *Sale of property of person not party to decree, effect of.*

Persons who are not parties to a decree are not bound by it and, therefore, a sale in execution of a decree does not operate to pass the property of any person who is not bound by the decree.

The Court has no jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record. As against such persons decrees and sales would be a nullity and might be disregarded without any proceedings being taken to set them aside. **O** LACHMI NARAIN *v.* NAZEER FATIMA 927

———— *Stay of execution—Executing Court staying execution on furnishing surety for interest—Appellate Court subsequently staying execution on payment of security—Effect on previous surety.*

Where a judgment-debtor obtains a stay order from the Executing Court pending the decision of appeal on his furnishing a surety for the payment of interest from the date of the decree upto a particular time, an order by the Appellate Court for stay of execution on judgment-debtor's furnishing security for a particular sum puts an end to the future liability for interest of the previous surety from the date of such order. **B** HIRALAL AMBALAL *v.* MANILAL MAGANLAL, 28 Bom. L. R. 517 645

Execution of document—*Illiterate executant—Document signed by another at request of executant—Authority to sign.*

Where an illiterate person requests another to sign a document for him and the latter signs such document with a pen touched by the former, the signature must be taken to have been made under the authority of the executant himself. **O** BHAGWAT PRASAD *v.* SHER KHAN 985

Fraud—*Fraudulent transaction—Burden of proof.*

The burden of proving the fraudulent nature of a transaction lies ordinarily on the person who seeks to impeach it, and the question is always one of fact. **O** LACHMI NARAIN *v.* NAZEER FATIMA 927

Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 32. *See* C. P. C., 1908, s. 79 433

———— **s. 107**—*Civil Procedure Code (Act V of 1908), s. 115—Madras Estates Land Act (I of 1908), ss. 171, 172—Orders of Board of Revenue—Revision to High Court, whether competent.*

The High Court has revisional jurisdiction over the orders of the Board of Revenue passed under ss. 171 and 172 of the Madras Estates Land Act.

Where there is no remedy to the party aggrieved by an order of the Board of Revenue, the High Court would be justified in exercising revisional jurisdiction.

Per *Devadoss, J.*—All Courts which are governed by the C. P. C. are Civil Courts and therefore the High Court as having the right of superintendence over all the Civil Courts in the Presidency has power over such Civil Courts as are erected by any enactment. **M** NARASINHA RAO *v.* RYOTS OF PEDAMA MIDIPALLI, (1926) M. W. N. 131; 23 L. W. 320; A. I. R. 1926 Mad. 480; 49 M. 499 164

Grove—*Plot of land given for planting trees—Landlord's right to re-enter on portion becoming devoid of trees—Grove-holder, status of—Illegal ejectment of grove-holder—Rights of grove-holder.*

Where a plot of land has been given to a person to plant a grove thereon, the landlord is not entitled to enter into possession of portions of the grove which have become vacant or to cultivate them himself or to let them for cultivation to others.

Where a grove-holder is ejected illegally by the landlord whether through the Revenue Court or out

Grove—contd.

of Court, a suit for possession by him would clearly lie in the Civil Court. If, after an order of ejectment by the Revenue Court, the grove-holder is able to recover possession or refuses to deliver possession, he is quite justified in his action and if he is subsequently sued in the Civil Court, the decision passed by the Revenue Court does not constitute a bar in his way to plead in the Civil Court that he was a grove-holder and was wrongly ejected by the Revenue Court.

A grove-holder cannot be considered to be a tenant within the meaning of the said word as defined in s. 3, cl. (10) of the Oudh Rent Act, such a person neither paying rent to the landlord, nor being liable to pay rent to him. O LAL JAGDISH BAHADUR SINGH *v.* RAGHO RAM, 3 O. W. N. 392; 13 O. L. J. 265; L. R. 7 A. (O.) 237 349

Guardians and Wards Act (VIII of 1890), s. 17—*Guardianship of adopted son—Matters to be considered—Natural father, whether proper person to be guardian—Guardian, whether must live with minor.*

In appointing a guardian to the adopted son of a deceased Hindu the first consideration of the Court must be with regard to the interest and the welfare of the minor and the Court must next see how far the intentions of the adoptive father can be best carried out.

The object of an adoption by a Hindu is to affiliate the adopted boy into his family, to disassociate him completely from his natural father and family. The adopted boy is to become a member of the adoptive family to own the adoptive father and the adoptive mother as his parents and the relations of the adoptive family as his own relations; all traces of relationship with the natural parents or their relations have to be effaced. The adopted boy must, therefore, be reared up in sentiments such as the adoptive father wants him to imbibe. Care must, therefore, be taken in appointing the guardian of an adopted son after the death of the adoptive father, that the intentions of the adoptive father should not be frustrated, and if a suitable person is forthcoming from among the members of the adoptive father's family to act as the guardian of the minor, the natural father of the minor should not be appointed his guardian.

In the absence of the adoptive mother, the adoptive grandmother of the minor should be appointed as guardian in preference to the natural father.

It is desirable that the person who is appointed the guardian of a minor should live with him and look after him and attend to his daily needs. Pat MONOMOHINI DASI *v.* HARI PRASAD BOSE, 4 Pat. 109; A. I. R. 1925 Pat. 444 808

——— **ss. 34 (d), 45**—*Moneys invested in unapproved security—Realisation from guardian on pain of punishment.*

Section 34 (*d*), Guardians and Wards Act, does not apply to moneys invested whether in approved or unapproved securities but is limited to such a balance of cash as the accounts show to be in the hands of the guardian and it is only such cash that he can be compelled to produce on pain of punishment under s. 45 of the Act.

Where the guardian in defiance of the order of Court invests moneys belonging to the minor in an unapproved instead of an approved security, it is such cash only that he would have had if he had followed the directions of the Court that he can be compelled to produce. M RAMANUJULU REDDY *v.* RANGIAH REDDIAR 79

Gujarat Taluqdars' Act (VI of 1888), s. 33—*Bombay Land Revenue Code (Act V of 1879), s. 111—Taluqdari Settlement—Officer's powers to recover arrears of rent.*

Section 33, Gujarat Taluqdars' Act, gives complete powers to a Government Officer in the temporary management of a *taluqdar's* estate to recover arrears of revenue including rent. B JINABHAI NATHABHAI RATHIA *v.* COLLECTOR & T. S. OFFICER, 28 Bom. L. R. 416; A. I. R. 1926 Bom. 325 752

High Court—Attachment before judgment—Property outside jurisdiction—Procedure. *See* C. P. C., 1908, O. XXXVIII, R. 5 116

Hindu Disposition of Property Act (XV of 1916)

—*Act, whether retrospective.*

There is nothing in the Hindu Disposition of Property Act to suggest that it is retrospective in its operation. B ATMARAM JAMNADAS SHAH *v.* NAZIR, DISTRICT COURT, 28 Bom. L. R. 431 704

Hindu Law—Adoption. *See* GUARDIANS AND WARDS ACT, 1890, s. 17 808

——— *Adoption of son in another family after father's death—Rights of adoptee in his natural family—Adoptee's sons, rights of, in natural family of their father.*

An adopted son's rights are extinguished in his natural family on his adoption whether he is adopted during the lifetime or after the death of his natural father. But the sons, if any, of the adopted in existence at the time of adoption retain their rights in the natural family of their father. A DHARAM SINGH *v.* BAKHSHI 315

——— **Debts**—*Joint family—Money lent by manager—Discharge, who may give, after manager's death.*

If money is lent by a manager of joint Hindu family in his capacity as a manager, a valid discharge for payment after his death can be given only by a person representing him as manager of such family. But if the money was lent by the manager in his personal capacity the discharge can be given by a person holding the heirship certificate. S SHAKARKHAN *v.* LAKHIMAL, A. I. R. 1926 Sind 56 664

——— *Sums misappropriated by father as trustee—Sons, liability of.*

Under the Hindu Law a son is liable to account for amounts collected by his father in his capacity as trustee but subsequently misappropriated by him. The fact that the misappropriation amounts to a criminal offence does not affect his liability. M VENKATAKRISHNAYYA *v.* KUNDRITHI BYRAGI, (1926) M. W. N. 194; 50 M. L. J. 353; 23 L. W. 714; A. I. R. 1926 Mad. 535 634

——— **Guardianship and minority**—*Minor wife, custody of.*

Under Hindu Law husband is the natural guardian of the minor wife and is entitled to her custody unless good cause be shown to the contrary. The fact that a girl is not mature would be a ground for the Court refusing to give the custody of his wife to a husband unless her parents were dead and the Court could be convinced that no attempt to enter into conjugal relations would be made before maturity. B NAVANITLAL HURJIVANDAS *v.* PURSHOTTAM HURJIVAN, 28 Bom. L. R. 143; A. I. R. 1926 Bom. 228; 52 B. 238 11

——— **Inheritance**—*Guru* and *chela*. *See* HINDU LAW—RELIGIOUS ENDOWMENT 703

——— **Interpretation.**

In the administration of the Hindu Law it is not the literal meaning of the original text that is to be

Hindu Law—contd.

looked to. Though commentators may have been wrong in their interpretation of an original text their opinion should be enforced as having the sanction of usage B. KESARLAL GIRDHARILAL DESAI *v* JAGUBHAI HIRALAL, 27 Bom. L. R. 226; A. I. R. 1925 Bom. 406; 49 B. 282 686

——— **Joint family**—*Alienation by father—After-born son, when may impeach.*

If there be an alienation invalidly made by a Hindu father where a son was either born or *in gremio matris*, the rights of any after-born son attach thereto and the latter is entitled to challenge the validity of the transaction. N GUNAJI *v.* RAMCHANDRA 948

——————— *Debts—Goods supplied for family business—Co-parceners, liability of.*

Where a debt represents money due for goods supplied for a Hindu joint family business, it is one for necessity and binding on the co-parceners. L RAM GOPAL *v.* BHAN RAM-MANGAL CHAND 163

——————— *Debts—Joint family property—Widow's right of residence and maintenance.*

Where a debt is incurred for a family purpose and necessity, a Hindu widow's right to maintenance and residence in the family property must be postponed to the just claims of her late husband's creditors. L LAKHO *v.* LACHHMAN DAS, A. I. R 1926 Lah. 241 181

——————— *Father, mortgage by—Mortgagee obtaining decree against father—Suit by sons to contest mortgage—Burden of proof.*

In a suit by the sons of a Hindu father to contest the legality of a mortgage executed by him of the joint family property, it is the duty of the mortgagee to prove the existence of a legal necessity.

But if the mortgagee obtains a decree upon his mortgage against the father, and thus the mortgage merges in the decree and ceases to subsist independently, the burden lies upon the sons, if they desire to escape liability under the decree, to prove the immoral nature of the judgment-debt. O KEDAR NATH *v.* SHANKAR DAYAL 250

——————— *Father—Sale in execution of decree against—Quantum of interest purchased—Question whether of fact or law.*

The question whether a purchaser on execution of a decree against a Hindu father got the entire family property or only the father's share therein is a mixed question of law and fact.

The mere fact that the father might have transferred his son's interest affords no presumption that he had done so.

The fact that the sons have not been made parties to the proceedings in execution of a decree against father is a material element in considering whether the creditor aimed at the larger or was willing to limit himself to the minor remedy. M NATESA PATHAR *v.* GANAPATHI SUBBU, 23 L. W. 349 68

——————— Manager, money lent by—Death of manager—Discharge, who may give. *See* HINDU LAW—DEBTS 664

——————— *Self-acquisitions—Alienation—Will—Pension*—Jagir—*Priestly income.*

The father of an undivided family subject to Mitakshara Law has full powers of disposition over his self-acquired property.

Jagir money as well as pension is the self-acquired property of each recipient though the *jagir* or the pension may have continued from father to son.

Hindu Law—contd.

Income from priestly-source is the self-acquired property of the man who receives the offerings though the offerings are made to him for his being a member of a ancient priestly family. L WAZIR SINGH *v.* MOTI SINGH 492

——— **Joint family**—Survivorship—Letters of Administration. *See* COURT FEES ACT, 1872, s. 19-1 986

——— **Partition.** *See* HINDU LAW—WIDOW 932

——————— *Joint family—Separation—Separate acquisitions—Burden of proof.*

Where a party comes into Court claiming a share in a certain property, it lies upon him to establish the foundation of his case, *viz.*, that the property was Hindu joint family property, to which he as a surviving member is entitled.

The presumption of jointness of a Hindu family does not arise where it appears that before the suit there has been a division of the family property or a separation in the family all the members of which are living separately, though the date of the separation is unknown.

Where a family is admitted to be separate on the date of the suit, it is on a party who alleges that certain acquisitions were made at a time when the family was joint to prove that they were so made.

A separation in mess and worship may be due to various causes and yet the family may continue joint in estate. In other cases separation may take place and yet partition of the family property may be postponed. A PARTAP NARAIN SINGH *v.* RAM KUMAR SINGH, 24 A. L. J. 513; L. R. 7 A. 230 Rev. 944

——————— *Step-mother, whether entitled to share.*

Under the Hindu Law a step-mother, with or without sons, is entitled to get a share on a partition amongst the sons. N PADMAN SINGH *v.* SUBRANSAI, 22 N. L. R. 28; A. I. R. 1926 Nag. 291 791

———————, whether transfer—Son's share, whether liable to be attached in execution of decree. *See* TRANSFER OF PROPERTY ACT, 1882, s. 53 282

——— **Religious endowment**—*Inheritance—*Guru *and* chela—*Deity, property belonging to—Manager, power of, to sue—Idol, status of.*

For purposes of inheritance under the Hindu Law, the relationship of a *guru* and his *chela* is that of father and son, and a *chela* is for this purpose the grandson of his *guru's guru* and two *chelas* of the same *guru* are brothers and so on. There is no limit to which this principle may be extended.

A manager of the property of a deity can sue as a next friend of an infant plaintiff for the recovery of property belonging to the deity even though there is a flaw in his title as the *mahant* of the temple in which the deity is lodged.

A Hindu idol is a juristic entity and has a juridical status with the powers of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers, which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. N NANDKISHORDAS *v.* KALA BAI 703

——————— Priestly income, whether constitutes self-acquired property of recipient. *See* HINDU LAW—SELF-ACQUISITION 492

——————— Shebaitship, *alienation of—Distinction between spiritual obligations and temporalities—Doctrine of benefit or necessity.*

The office of a *shebait*, *i. e.*, the spiritual rights and duties the fulfilment of which is the primary func

Hindu Law—contd.

tion of a *shebait*, is not alienable. The doctrine of benefit or necessity is confined in its application to an alienation of the temporalities of the idol.

There is a distinction between the *shebait's* obligation to perform the spiritual obligations of his office and his obligation to manage the temporalities of the idol. A *shebaitship* is primarily and mainly a sacred office and it does not follow that because in certain circumstances a *shebait* may be entitled to alienate the temporalities of the deity, in similar or certain circumstances he is entitled to transfer the spiritual duties and privileges which appertain to the office. **C** Nagendra Nath Palit *v.* Robindra Narain Deb, 30 C. W. N. 289; 53 C. 132; A. I. R. 1926 Cal 490 . **212**

——— **Religious endowment**—*Temple—Scheme of management—Practice, departure from—Right of worship—Levy of fees—Rules under scheme—Court's power to alter.*

A distinction must be drawn between a temple and its inner sanctuary. Every Hindu has a right to enter a Hindu temple and obtain sight of the idol and perform his act of worship from a distance without payment of fees. But the right of access to Holy of Holies is not equally free and may be regulated by special rules.

Rules framed under a scheme become a part of it and are liable to be superseded or altered by the Court having power to modify or alter the scheme.

A right of worship at a temple is not an absolutely unrestricted right. It is subject to reasonable regulations for preventing overcrowding, etc. Courts should be slow to recognise without proper evidence claims of right which would materially interfere with the rights of trustees to regulate the worship and ceremonials of temples in the interests of the whole community.

Though due consideration is to be given to an established practice in an institution when framing a scheme, it is not necessary that scheme and rules thereunder must conform to it. The interests of the institution and the facilitating of the work of management are the primary matters for consideration both in preparing the scheme and making any modifications in it. There should be provided means of progress even if it involves some departure from the established practice. **B** Shankarlal Purshottam Gor *v.* Dakor Temple Committee, 28 Bom. L. R. 309; A. I. R. 1926 Bom. 179 **47**

——— **Succession**—*Father's sister's son and maternal uncle, preference between.*

Under the Hindu Law prevailing in the Bombay Presidency the father's sister's son is a preferential heir to the maternal uncle of the deceased. **B** Sakhram Narayan Patvardhan *v.* Balkrishna Sadashiv Modak, 27 Bom. L. R. 1003; A. I. R. 1925 Bom. 451; 49 B. 739 **817**

——————— Mayukha—*Sons of deceased brother, whether entitled to succeed along with brothers.*

In the *Mayukha* the sons of pre-deceased brothers succeed along with surviving brothers to the estate of a deceased Hindu. **B** Kesarlal Girdharilal Desai *v.* Jagubhai Hiralal .27 Bom. L. R. 226; A. I. R. 1925 Bom. 406; 49 B. 282 **686**

——— **Widow**—*Alienation—Permanent lease by widow in consideration of alienee looking after her—Legal necessity.*

A permanent lease granted by a Hindu widow in consideration of the alienee looking after her and her property is for good legal necessity and is valid. **C** Rajendra Nath Das *v.* Peyari Mohan Das **321**

Hindu Law—contd.

——— **Widow**, *alienation by—Necessity—Purchase of other properties—Benefit of estate.*

If the parties who have to support an alienation made by a Hindu widow can show that the estate has been improved by selling immoveable property and buying other lands of equal or greater value and more convenient for cultivation and management, the Court will not set aside such a transaction. **M** Suryadevar Mahalakshamma *v.* Vennam Nagayya, (1926) M. W. N. 253; 23 L. W. 596; 50 M. L. J. 651; A. I. R. 1926 Mad. 641 **950**

——————— *Alienation — Partial necessity — Principle to be applied—Time-barred debts of husband.*

In a case where the validity of a sale by a Hindu widow is in question and it is only in part supported by legal necessity, the proper principle to be applied is not whether the bulk of the sale consideration was taken for legal necessity, but whether the portion which was not taken for the said purpose was such a small fraction of the total consideration that it might reasonably be left out of account.

If a sale has been made in order to discharge a debt the essential point involved is whether on the date of the sale there was any pressure on the widow to meet this debt. The fact of its being time-barred is not conclusive on the question of the obligation resting on the widow to discharge. **N** Govinda *v.* Krishnaji **1002**

——————— *Co-widows—Partition, effect of—Alienation by one widow, whether binding upon co-widow.*

Where the widows of a separated Hindu governed by the Mitakshara Law succeed as co-heirs to the estate of their deceased husband, a partition of the estate between them can in no circumstances have the effect of destroying the right of survivorship, and whatever may be the authority, under a friendly arrangement, of each widow to enjoy the usufruct of a separate portion of the estate, there is no right of alienation by one widow alone, which will bind the other widow after her death. It is the right of each of the co-widows to enjoy her deceased husband's property by partition *inter se*, and she can assign her share to any one she chooses and if she has already obtained her share by partition, she can alienate that share; but in either case the assignment or alienation cannot take effect or have validity beyond her lifetime. It is good as long as she lives, and on her death, her interest in the property ceases and the share goes to the surviving co-widow. **O** Gaya Kunwar *v.* Gauri Nath Kakajee, 3 O. W. N. 414 **932**

——————— *Debts—Charge on estate.*

Even the fullest legal necessity cannot make a debt incurred by a Hindu widow a charge on her husband's estate after her death unless she specifically creates that charge. A personal debt of the widow is payable out of the income of the estate until she declares her inability to pay it herself by alienating a part of the estate to pay it. **N** Bisheshwardas Daga *v.* Anjor Singh, A. I. R. 1926 Nag. 334 **394**

——————— Maintenance, right of. *See* Hindu Law—Joint family **181**

——————— *Maintenance—Unchastity, effect of—Reversion to moral life, effect of—Bare maintenance.*

The right of a Hindu widow to maintenance is dependent upon her continuing to be chaste. In case her incontinence is proved she forfeits that right.

Hindu Law—contd.

Where a Hindu widow, who has been unchaste, is proved to have given up the life of unchastity she is entitled to bare maintenance which should ordinarily be fixed by a rough and ready reference to the general condition of the family as disclosed in the evidence The amount of maintenance should be the bare minimum which is necessary in order to enable the widow to live. **B** BHIKUBAI YESAWANTRAO MEHER *v.* HARIBA SAWALARAM MEHER, 27 Bom. L. R. 13; A. I R. 1925 Bom. 153; 49 B. 459 665

——— **Widow,** *powers of -Family arrangement.*

A Hindu widow is entitled to protect a right purported to be given to her under her husband's Will, and to make a compromise with a contesting party in defence of that right, provided always that the transaction as a whole is fair and reasonable from the point of view of reversioners.

A Hindu died leaving behind a widow and four married daughters. By a Will left by him, the widow was given authority to adopt a son, and was also appointed executor of the estate. An application being made by the widow for a Probate of the Will, certain objections were raised to it by the daughters, and an administrator *pendente lite* was appointed thereon. Some sort of family settlement was brought about among the members by the intervention of friends, the objections were withdrawn, and the widow paid a sum of Rs. 30,000 to one of the daughters in pursuance of the settlement. Subsequently, in accordance with the provisions of the Will, the widow adopted a son who about seven years after the settlement brought a suit contesting the payment of Rs. 30,000 to the daughter:

Held, (1) that *qua* executor it was a breach of trust for the widow to spend the testator's property in buying off disputes about the Will;

(2) that, however, whether the Will was bad or good everything went to the widow herself as a Hindu widow and she was fully entitled to represent the estate, and consequently a payment out of the estate was payment out of the beneficiary interest which at the moment was the widow's;

(3) that the arrangement which was made, was within the powers of the widow, and it was a beneficial and not an improper arrangement;

(4) that the fact of the estate being at the time of making the arrangement in the control of the administrator *pendente lite* did not affect her powers to make it.

A family arrangement by a Hindu widow, a limited owner, entered into with reversioners, themselves limited owners, cannot cure an act which is otherwise wrong.

There can be no family arrangement in the strict sense of the term, where it is not proved who the parties were to the settlement and what were the terms settled upon. **C** SUDHIR CHANDRA DAS *v.* INDUMATI CHAUHURANI, 43 C. L. J. 187; A. I. R. 1926 Cal. 627 616

——— Surrender. *See* COURT OF WARDS ACT, 1879, s. 60 830

——— **Will,** *construction of—Disposition to named person and 'his male heirs'—Estate-in-tail.*

When a Hindu bequeaths property to some one and his male heirs, he means that the property should devolve upon the legatee and the male heirs in succession and thereby creates an estate-in-tail in favour of male heirs. Such a Will fails in its entirety, the estate created being unknown to Hindu Law. When a person devises property to a person and "his male heirs" and then lower down, instead of repeating the expression uses the expression "aforesaid person and his heirs" it cannot be said that he intended to change the course of devolution of the property already provided for in the preceding clause of the Will. **M** MADURA HINDU PERMANENT FUND LD. *v.* KAMAKSHI AMMAL, (1926) M. W. N. 137; 50 M. L. J. 355; A. I. R. 1926 Mad. 492 487

Inam. *See* TRUST 489

———, *Sarva Dambala.*

The phrase "*Sarva Dambala inam*" only means that no money payment is insisted on the holding of the *inam* and it does not necessarily show that it is not a service *inam.* **M** TADANKI BRAHMAYYA *v.* PUVVALA MADHAVAN, 50 M. L. J. 282; A. I. R. 1926 Mad. 496 489

——— *Service* inam, *resumption of—Nature of service* inams—*Incidents of service—Presumption of grant in lieu of wages, permissibility of—Right of resumption—Burden of proof*—Mudam *service, duties of.*

To determine whether a grant of a service *inam* land is resumable or not, regard must be had to the nature of the tenure, whether the grant was made in lieu of wages for service or whether it was an absolute grant subject to the condition of the performance of the service. In grants of the former description, the relation between the grantor and the grantee is that of master and servant, and the grant may be resumed on the services being dispensed with. In a grant of the latter description, *i.e.*, one burdened with service, it is an absolute grant with a condition annexed to it, namely, the rendering of service. In the absence of provision to the contrary it is only on breach of that condition and on the grantee committing default in the performance of that service that the grantor becomes entitled to resume the grant.

Where there is a grant in writing and it is produced, on a construction of it will depend the nature of the tenure, whether the grant was made in lieu of wages or was burdened with service. But where, either the original grant is not in writing or in any event is not before the Court, the nature of the tenure can be determined only on the evidence given and the facts and circumstances of each case.

When the question arises as to the class to which a specified grant belongs, there is no presumption that the grant was one made in lieu of wages for services. Nor can such a presumption arise even where it is proved that the services are personal.

The burden of proving the right of resumption lies on a plaintiff who seeks to resume.

Presumptions are not made at random. In order to raise a presumption some connection must be shown to exist between the fact proving and the fact to be proved, which warrants an inference from the one to the other when the two are brought into proximity.

The duties of *mudam* service consist in looking after the harvest of the crops, watching the heaps of harvested produce, placing seals upon them, preventing removal of cow-dung from waste lands and general supervision of harvest operations. **M** KANDADA THIRUVENKATA CHARLU *v.* SHAIK ALTOO SAHIB, 50 M. L. J. 251; (1926) M. W. N. 314; A. I. R. 1926 Mad. 411 458

Income Tax Act (XI of 1922), ss. 2 (4), 4 (1), 6, 42 (1)—*Non-resident assessee, liability of, to income tax—Non-resident limited company in India engaged in manufacture and export of worked up goods and raw materials—Principles of assessment.*

Income Tax Act—1922—contd.

Under s. 42 (1), Income Tax Act, all profits or gains accruing or arising to a non-resident, whether directly, or indirectly, through or from any business connection or property in British India are deemed to be income accruing or arising within British India.

A limited Company was registered in London under the English Companies Act with its headquarters in London and was admittedly a non-resident of British India. It carried on large business operations in Burma in connection with rice, timber and cotton. It also had various rice mills, saw mills, cotton ginning mills and vegetable oil mills in Burma whereby commodities or raw material was worked up into forms suitable for use. The Company exported the material thus worked up as well as raw commodities without working them up in any way:

Held, (1) that in determining whether any income, profits or gains arise or accrue, it is not only the last stage of the accrual that has to be looked to but the previous stages also have to be taken into consideration and that, therefore, the mere fact that produce of the Company was sold in London and the money was received there did not prevent profits or gains accruing or arising or being deemed to accrue or arise in British India from being taxable under the Income Tax Act;

(2) that no distinction, so far as liability to income tax was concerned, could be drawn between profits on produce which had undergone some process of conversion or working up by the assessee in Burma, and profits on produce purchased by the assessee in Burma and exported in the same form as when purchased;

(3) that in arriving at the amount of profits liable to income-tax, a reasonable commission, agents' commission, should be allowed on goods exported and sold in London;

(4) that profits arising from contracts of insurance entered into by the Head Office in rice cargoes consigned to it by the Rangoon branch were not taxable in India;

(5) that commission earned by the Company through its export department on stores, etc., purchased and shipped from the United Kingdom to Burma could not be assessed to income-tax. R COMMISSIONER OF INCOME TAX *v.* STEEL BROTTHERS & Co., 3 R. 614; A. I. R. 1926 Rang. 97 466

——— **s. 13.**

See INCOME TAX ACT, 1922, s. 22 (4) 150, 615

——— **s. 22**—*Assessment—Procedure.*

An Income Tax Officer should be governed in his procedure by judicial considerations. He should base his assessment on legal and not on mere hearsay evidence. L BAIJ NATH *v.* COMMISSIONER, INCOME TAX, LAHORE, A. I. R. 1926 Lah. 238 156

——— **ss. 22 (4), 23 (2), 13, 37**—*Accounts, production of—Assessment without opportunity to justify accounts—Legality—Procedure of Income Tax Officers—Accounts as basis for assessment—Petty traders, accounts of.*

Production by an assessee of his accounts is a substantial compliance with the notice received under s. 22 (4), Income Tax Act, and the Income Tax Officer is not justified in rejecting the return and the accounts and in assessing on a rule of thumb until he has given notice to the assessee under s. 23 (2) of the Act to appear before him and justify his return.

When a return is furnished and accounts are put in, in support of that return, the accounts should be taken as the basis for assessment. They should not be rejected because they are complicated. Strictly regular accounts are not available particularly in the case of petty traders who very often have only a poor knowledge of accounts.

Section 37 of the Income Tax Act indicates that the procedure of the Income Tax Officers is of a judicial nature and in making assessment they should proceed on judicial principles. If evidence is produced by the assessee in support of his return it should be accepted unless it is rebutted by other admissible evidence and not by mere hearsay. L DUNI CHAND-DHANI RAM *v.* COMMISSIONER OF INCOME TAX, PUNJAB, 8 L. L. J. 106; A. I. R. 1925 Lah. 161; 7 L. 201 614

——— **ss. 22 (4), 23 (2), 13 proviso**—*Returns by assessee incomplete or incorrect—Procedure in assessment.*

When a return furnished by an assessee in compliance with a notice under s. 22 (4) of the Income Tax Act, is found by the Income Tax Officer to be incorrect, the proper procedure for him is not to compute the income as he thinks fit but to serve the assessee with a notice under s. 23 (2) requiring him on a date to be specified therein, either to attend at the Income Tax Officer's Office or to produce or to cause to be produced any evidence on which he intends relying in support of his return. Non-compliance with this procedure makes an assessment illegal.

Proviso to s. 13, Income Tax Act, applies only where no method of accounting has been regularly employed or where the method employed is such that in the opinion of the Income Tax Officer, the income, profits and gains cannot properly be deduced therefrom. L *In the matter of* INDIAN INCOME-TAX ACT, A. I. R. 1926 Lah 201; 7 L 138 150

——— **s. 37 (22).** *See* INCOME TAX ACT, 1922, s. 22 (4) 615

——— **s. 42.** *See* INCOME TAX ACT, 1922, s. 2 (4) 466

——— **s. 66 (3)**—*Income Tax Officer's decision on method of accounting—Finality.*

The proper stage for questioning the competency to issue a *mandamus* under s. 66 (3), Income Tax Act, is the date of hearing the application and the question cannot be agitated after an order has been passed on the application. L GOKAL CHAND JAGAN NATH *v.* COMMISSIONER OF INCOME TAX 128

——— **s. 66 (3)**—Mandamus, *competency to issue, when should be challenged.*

Income Tax Officer is the sole arbiter on the question of the possibility of deducing the income, profits and gains from the method of accounting employed and an assessee is not entitled to challenge his opinion. L GOKAL CHAND-JAGAN NATH *v.* COMMISSIONER OF INCOME TAX, PUNJAB 128

Inherent powers of Court. *See* PROBATE AND ADMINISTRATION ACT, 1881, s. 50 329

———, *when to be exercised.*

It is not open to the Court to invoke the inherent powers overriding distinct provisions in the C. P. C. C RAJANI KANTA DEY *v.* KHATIR MAHOMED 393

Inherent powers of Police. *See* CALCUTTA POLICE ACT, 1866, s. 78-A 266

Insolvency—*Property sold by Receiver as belonging to insolvent—Claim to such property by third person dismissed—Appeal—Receiver necessary party.*

In an appeal by a claimant whose claim with regard to a property sold by the Receiver as belonging to an insolvent has been dismissed, the Receiver is a necessary party. L CHIRANJI LAL *v.* MUNSHI 560

Insolvency Rules of Calcutta High Court, rr. 74, 150. *See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, s. 15 793

Interest. *See* PARTNERSHIP 306

——— *Decree silent as to interest—Interest, recovery of, in execution—Damages, recovery of, in separate suit.*

Where a decree for maintenance is silent as to future interest, interest cannot be recovered in execution proceedings on arrears of maintenance remaining due under the decree, but it may be recovered as damages for detention of decretal amount by a separate suit. C NARESH CHANDRA BOSE *v.* KRISHNA BHABINI DASI, 53 C. 42; A. I. R. 1925 Cal. 505 997

Interest Act (XXXII of 1839), s. 1, *applicability of—Contract Act (IX of 1872), s. 73—Payment made by plaintiff on behalf of defendant—Interest, whether can be allowed.*

The Interest Act forbids nothing. It permits the Court to allow interest in certain circumstances, but does not limit the allowance of interest to those circumstances.

It is hard to imagine a case in which the Court is permitted to allow interest by the Interest Act, which it is not expressly permitted to allow by some later Act, so that the Act as it contains nothing prohibitory is now obsolete unless such a case exists.

Where one person makes a payment on behalf of another under the mistaken impression shared by both of them that he is bound to make the payment, he is entitled to recover the amount of the payment from the person on whose behalf it was paid together with interest. N HARIDAYAL *v.* SUNDERLAL, 21 N. L. R. 16; A. I. R. 1925 Nag. 451 647

Interpretation—*Ancient grant.*

Should the general words of an ancient grant be uncertain they may be fairly explained by subsequent usage. P C SECRETARY OF STATE FOR INDIA *v* JYOTI PRASHAD SINGH DEO, A. I. R. 1926 P. C. 41; 30 C. W. N. 745; 24 A. L. J. 761 974

Interpretation of Statutes. *See* RAILWAYS ACT, 1890, s. 113 742

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There is a presumption that the Legislature when it repeats in a latter Act an expression which has obtained a settled meaning by judicial construction, intends the words to mean what they meant before. A SHEORAM SINGH *v.* BABU SINGH, 24 A. L. J. 295; 48 A. 302 849

———

Where an Act says that a person may present a petition to a particular Court, it must be inferred that it means that the Court shall have power to entertain and decide the petition.

Generally a qualifying word in a Statute must be made to qualify the word nearest to it. O ROBERT HENRY LEADON *v.* ETHEL MAY LEADON, 3 O. W. N. 406; 13 O. L. J. 236; A. I. R. 1926 Oudh 319 952

——— Evidence Act v. Cr. P. C. *See* EVIDENCE ACT, 1872, s. 27 901

——— *General Statute* v. *Particular Statute—Repeal, constructive.*

It is a cardinal rule of interpretation that a general Statute is to be construed as not repealing a particular one.

A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together. L RANNUN *v.* EMPEROR, A. I. R. 1926 Lah. 88; 7 L. 84; 27 Cr. L. J. 709 901

———, *rule of.*

It is a rule of interpretation of Statutes that new powers must be conferred by clear and unambiguous language. The more defective and open to objection the language of a Statute, the greater the necessity to apply the canons of construction. O BRIJ RAJ CHANDRA *v.* SUBHADRA KUAR, 3 O. W. N. 321; A. I. R. 1926 Oudh 324 294

Jagodih Lat. *See* CHOTA NAGPUR AND RAMGARH JAGIRS 1007

Jews—*Marriage law applicable—Monogamy—Divorce, claim of, by Jewish wife—Grounds—Dissolution of Jewish marriage, how effected—Decree nisi—Alimony.*

Jews in Bombay, generally speaking, are monogamous, and a husband cannot marry a second wife during the lifetime of her first husband except in certain specified exceptional cases.

A jewish wife can claim divorce on account of repeated ill-treatment received from her husband or turning her out of doors or prohibiting her from visiting her parental home.

A Jewish marriage can be dissolved by Courts of State and it is not necessary to obtain a ritual 'get' or 'bill of divorcement' executed by the husband.

The Court may in a case where the parties are Jews grant a decree *nisi* for dissolution of marriage.

It cannot be doubted that the Court has also power among the Jews to grant a permanent alimony. B RACHEL BENJAMIN *v.* BENJAMIN SOLOMON BENJAMIN, 28 Bom. L. R 328; A. I R. 1926 Bom. 169; 50 B 369 59

Jurisdiction of Court—*Appellate Court assuming jurisdiction—Second appeal—Revision.*

If an Appellate Court having no jurisdiction to hear an appeal assumes jurisdiction and passes an order, a second appeal would lie, and in any case the High Court would have power to revise that order. A HIRA LAL *v.* TIKAM SINGH 1

Jurisdiction of Civil Court.
See CO-OPERATIVE SOCIETIES ACT, 1912, s. 42 (6) 40
See MADRAS DISTRICT MUNICIPALITIES ACT, 1920, 546
See OUDH RENT ACT, 1886, s. 107-H 343

Lahore High Court Rules and Orders, Vol. V, Ch. XVII, r. 8—*Fees of Counsel—Appeal from order of allotment of properties in partition suit—Power of Court to fix fees.*

An appeal from an order allotting certain properties to the respective parties in a suit for partition of immoveable property, after passing of the preliminary but before the final decree, is an appeal from an order in miscellaneous proceedings and the Court has discretion to fix fees of the Counsel as in miscellaneous proceedings. L ABDUL RAB *v.* RAHIM BAKHSH, 8 L. L. J. 99; A. I. R. 1926 Lah. 320 627

——— **Ch. XX, r. 1**—*Documents, printing of.*

The party on whom the duty falls for having a document printed is not the party which relies on the document in the sense that he produced it, but the party for whom in appeal the document is necessary and essential, and it is as necessary and essential to an appellant who impugns the correctness of a document or contends that it has not been cor-

Lahore High Court Rules and Orders—concld.

rectly weighed and interpreted that it should be printed, as that the judgment which he attacks should be printed. L JAWAHAR SINGH *v.* SECRETARY OF STATE FOR INDIA; 8 L. L. J. 114; A. I. R. 1926 Lah 292 635

Lambardar—*Suit for profits against* lambardar—*Negligence, what is*—Patwari's *register, reliance on.*

Prima facie when the collection of profits by a *lambardar* is grossly inadequate, there is a presumption of negligence on his part.

A *patwari's* register cannot be safely relied on as a conclusive piece of evidence with regard to amounts collected. A CHATURI LAL *v.* LAKHMI CHAND, L. R. 7 A. 176 Rev. 389

Land Acquisition Act (I of 1894), s. 9 (2)—*Formal statement of claim, putting in of—Uncertified copy of sale-deed, sending of.*

Section 9 (2) of the Land Acquisition Act requires all persons whose land is taken under the Act and who have any occasion to advance any specific claims to the land which require to be considered, to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests. Merely placing before the Collector an uncertified copy of the sale-deed of the land of which the land acquired formed a part does not satisfy the requirements of the section.

A District Court, when acting under s. 25 (2) of the Land Acquisition Act, cannot award a sum exceeding the amount awarded by the Collector. L ORIENT BANK OF INDIA LTD., *v.* SECRETARY OF STATE FOR INDIA 245

——— **s. 26.** *See* C. P. C, 1908, O. XLI, R. 1 145

——— **s. 54**—*Appeal, proper stage for—Apportionment of claims—Duty of District Judge.*

Section 54 of the Land Acquisition Act contemplates only an appeal from a final award or part of a final award. Where a question as to apportionment has been referred to the District Judge, unless he has decided that question there is no final award which can be appealed against.

A District Judge is bound to decide the question of apportionment when it is referred to him and the existence of a civil suit between the parties does not affect his jurisdiction to decide that question. L DEO KARAN DAS *v.* SECRETARY OF STATE FOR INDIA 249

Landlord and tenant—*Eviction, what is—Suspension of rent.*

Eviction is not a mere trespass but is something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

The facts necessary to cause suspension of rent must be distinctly found in order to bring into operation the rule of suspension of rent which has been applied as a punishment to the landlord for his illegal acts.

Mere mistake of landlord in including in a previous decree lands not forming the subject-matter of the suit in consequence of which they were sold, would not entitle the tenant to suspension of rent as the error could have been rectified by the tenant. C BISESWAR SARKAR *v.* KALI CHARAN 418

——— *Ex-proprietary tenant.*

An ex-proprietary tenant is not a tenant of the one particular proprietor who purchases *sir* land but is a tenant of the whole proprietary body A SOHAN LAL *v.* MAKHAN LAL, L. R. 7 A. 163 Rev. 171

——— *Gift by lessee of his holding—Lease of same by* zemindar *to donee—Termination of lease—Lease by* lambardar—*Subsequent lease by co-sharers—Priority—Suit by lessee against subsequent lessee for recovery of possession—Non-joinder of landlord, effect of.*

If a tenant of a holding gifts it away and the *zemindar* also grants a lease of the same to the donee, the first tenancy terminates.

In U. P. a *lambardar* is presumed to have, by established usage or with the consent of the whole body of co-sharers, *i. e., zemindars*, the power to grant leases, and unless the contrary is proved, the mere fact that some of the co-sharers also sign a lease along with the *lambardar* does not invalidate the lease.

If a *lambardar* authorised to grant lease on behalf of the whole body of co-sharers leases a land, a subsequent lease of the same by the whole body of co-sharers will have no priority over the earlier one.

The non-joinder of the lessor does not affect a suit by a first lessee against the second lessee for recovery of possession of the property on the ground of his lease being prior. O KARAMAT KHAN *v.* YASIN KHAN 3

——— *Lease—Covenant providing for assignment subject to consent of landlord—Consent withheld unreasonably, effect of.*

Plaintiff obtained a lease of a piece of land from the defendants which contained a covenant that the demised premises and the buildings erected thereon should not be assigned without the consent in writing of the defendants, but that such consent would not be unreasonably withheld in the case of a respectable and responsible person. Plaintiff erected certain buildings on the land demised and entered into an agreement with a tenant to take the buildings on rent. Defendants, however, withheld their consent and plaintiff thereupon filed a suit for a declaration that the refusal of the defendants to consent to the assignment was unreasonable and that the plaintiff was entitled to assign the lease without their consent. It was found that the proposed tenant was a respectable and responsible person and that the defendants had withheld their consent owing to the fact that there had been a dispute between them and the proposed tenant with regard to another letting:

Held, that the refusal of the defendants to consent to the assignment was unreasonable and that the plaintiff was entitled to the declaration sought for by him. B RATANJI DORABJI *v.* KISANDAS TRIBHOVANDAS, 27 Bom. L. R. 340; A. I. R. 1925 Bom 302 923

——— *Monthly tenancy—Notice to quit expiring on last day of tenancy, validity of—Notice expiring with expiration of Bombay Rent (War Restrictions) Act, validity of.*

In the case of a monthly tenancy a month's notice to quit expiring on the last day of the tenancy is a valid notice so as to terminate the tenancy.

There was nothing in the Bombay Rent (War Restrictions) Act which prevented a landlord from giving a notice to quit expiring with the expiration of that Act. B MAHOMEDALLY EBRAHIMJI *v.* ABDULLAH KAZIM, 27 Bom. L. R. 102; A. I. R. 1925 Bom. 167 631

——— *Occupancy holding, non-transferable, transfer of—Rent, suit for, whether lies—Suit by transferee for declaration that rent-decree is void, maintainability of.*

Where an occupancy tenant of a non-transferable holding transfers such holding, the landlord may, if he chooses, ignore the sale and bring a rent suit

Landlord and tenant—contd.

as against his tenant, and in execution of the decree obtained in such suit proceed to bring the holding to sale.

In such a case the transferee of the holding has no *locus standi* to maintain a suit for a declaration that the decree obtained by the landlord is invalid. **Pat** LACHMAN SAHAY *v* GAURI CHARAN MAHTON, 7 P. L. T. 137; (1926) Pat. 99 556

——— Parti *land—Presumption as to ownership of* taluqdar*—Possession of tenant—Adverse possession—Tenant, whether can put structures on land without permission of landlord—Tenant's right to retain possession over land held for more than 12 years.*

It is settled law in United Provinces that where a proprietor of a village is proved to be in rent collecting possession thereof, his possession over the lands situate in that village which bear the character of waste land, tank land and jungle land must be presumed.

Where a person is admittedly a tenant, his possession of the land must be deemed to be in that very capacity unless it be shown by satisfactory evidence that it was of a contrary nature.

The tenants residing in a village who are in the enjoyment of the land in front of their houses, the title of which is with the landlord, are not entitled, according to the custom prevailing in Oudh, to put up structures on the land without the consent of the landlord.

If a tenant in a village has been in possession of a plot of land as *sahan darwaza* for more than 12 years, he obtains a right by such possession to remain in actual enjoyment of the land and the landlord cannot deprive him of such enjoyment. **O** HULAS *v.* BARKATUNNISSA BEGUM, 3 O. W. N. 475 1034

——— *Premises damaged by combustion of cotton stored—Liability of tenant.*

In Agra, on 25th March 1920, defendants hired a room on the ground floor of the plaintiff's house and stored therein 338 bales of cotton. The cotton was of 1919 season and remained in that room throughout the hot weather of April, May and June 1920. There were three doors to the room but no ventilation and when the doors were shut the whole room was a sealed chamber. Some days prior to 28th July rain had been falling. At 4 P. M. that day the cotton was found to be on fire and the fire was not got under until great damage had been done to the upper portion of the house:

Held, that the defendants were liable for damages on the ground that the fire which occured would not have happened had the defendants exercised proper watchfulness and control over the cotton. They had the exclusive control and custody of the cotton and must be presumed to know the degree of care required by persons who store cotton in India in bulk in unventilated rooms during months of April, May, June and July. **A** MUL CHAND-NEMI CHAND *v.* BASDEO-RAM SARUP, 24 A. L. J. 420 425

——— *Rent, non-payment of, in Revenue Records—Relation between parties.*

Where, though the plaintiffs and defendants are shown in the Revenue Records as landlords and tenants, those very records show that the defendants never paid any rent and were in possession as trespassers, the relationship of landlord and tenant is not established between the parties. **L** RAHMAT ULLAH *v.* NAWAB 417

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——— 'Sharing in cultivation', meaning of. *See* C. P. C., 1908, s. 100 190

——— *Suit for rent by co-sharer landlord—Abatement, plea of, whether can be raised—Measurement, whether can be claimed.*

In a rent suit the tenants are not precluded from raising the question of abatement of rent by reason of the fact that the suit is one between one of several co-sharer landlords and the tenants, when the plaintiff co-sharer under an arrangement between himself and his other co-sharers and the tenants has been collecting his share of the rent separately.

When deduction or abatement of rent is claimed by a tenant in a suit for rent he may insist on a measurement and an order for measurement must be made if a case justifying or necessitating the order is made out. **C** SIVADAS DUTTA *v.* BIRENDRA KRISTA DUTTA, 43 C. L. J. 116; A. I. R. 1926 Cal 672 844

——— *Suit for possession—Plaintiff's title established but not contract of tenancy—Defendant's possession permissive in inception—Adverse possession—Decree for possession.*

Where the plaintiff's title to the property claimed has been established and also that the defendant has been in occupation of that property by permission of the plaintiff, the plaintiff would be entitled to a decree for possession in spite of the fact that he may have failed to establish the contract of tenancy set up by him as the basis of his claim.

The principle of law that possession *prima facie* may be considered adverse cannot apply to a case where the possession of the defendant in its inception is of a permissive nature. **O** AHMAD SHARIF *v.* UMRAO BEG, 3 O. W. N. 460; A. I. R. 1926 Oudh 353 779

——— *Transfer by tenant—Acceptance of transferee as tenant.*

A landlord cannot be taken to have accepted a transferee from his tenant as his own tenant, merely because he brings a suit for possession against the transferee, which suit is not proceeded with and comes to nothing. **C** SIATAJ SHAIKH *v.* BISHNUDAS DHAR 400

——— *Village* abadi*—Ejectment—House built by tenant—Right of tenant to retain house.*

A tenant cannot be ejected from the house in the *abadi* of the village as long as he retains any interest in the village. **O** MAHANT DASS *v.* RAM GHULAM 399

Lease, *See* LANDLORD AND TENANT 3

——— *Life-estate—Lease-money—Personal debt—Rent, when due.*

Rent due by a lessee to a lessor holding a life-estate is a personal debt to which a personal heir of the lessor would succeed on his death even though the property in respect of which the rent is due cannot be inherited by such heir.

The rent of a leased property is due as soon as the lease is granted, although it may not be payable till a particular time.

The fact that a life-estate-holder dies before the rent in respect of the estate becomes payable would not make it any the less his personal debt. **N** MARUTI *v.* UKARDA, 22 N. L. R. 13; A. I. R. 1926 Nag. 314. 741

——— *Second lease for convenient use of land under first lease—Presumption as to incidents of second lease—Indefinite tenancy, duration of—Yearly rent—Presumption as to nature of tenancy.*

Where a land is taken on lease for the convenient use and occupation of other premises already taken under a lease, there is no presumption that incidents of the first lease also attach to the second.

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The question whether a lease for an indefinite term enures for the life of the grantee and cannot be put an end to by a notice to quit, depends upon the terms of the lease.

In the absence of anything to show the contrary an agreement to pay annual rent indicates that the tenancy is yearly. C CHANDI CHARAN MITRA *v.* ASHUTOSH LAHIRI, 53 C. 95; A. I. R. 1926 Cal. 558 684

Legal Practitioners Act (XVIII of 1879), ss. 12, 13, 14—*Legal Practitioner committing criminal offence—Procedure.*

Where a legal practitioner is suspected of having committed a criminal offence, proceedings under the Legal Practitioners Act should not be taken, but if it is thought necessary, action should be taken by way of a criminal prosecution. C EMPEROR *v.* RAJENDRA KUMAR DUTTA, 30 C. W. N. 186; A. I. R. 1926 Cal. 502; 27 Cr. L. J. 701 893

Letters Patent (Bom.), cl. 12—*Jurisdiction to entertain matrimonial suits between Jews.*

Clause 12 of the Letters Patent of the Bombay High Court gives that Court jurisdiction to entertain a suit arising out of matrimonial disputes between Jews and the law applicable would be Jewish Law "with such adaptations to the circumstances of the case as justice may require." B BENJAMIN *v.* BENJAMIN, 28 Bom. L. R. 328; A. I. R. 1926 Bom. 169; 50 B. 369 59

Letters Patent (Lah.), cl. 10. *See* C. P. C., 1908, s. 47 521

Letters Patent (Mad.), cl. 15—*Order refusing leave to file memorandum of objections* in forma pauperis *—Discretion—Interference in appeal.*

When the order complained of in an appeal under cl. 15 of the Letters Patent is merely the result of the exercise of discretion on the part of the Judge in a matter which was a proper subject for the exercise of that discretion, the Appellate Court would rightly decline to interfere.

Quære.—Whether an order refusing leave to file a memorandum of objections *in forma pauperis* is a judgment under cl. 15, Letters Patent. M PARVATHI AMMAL *v.* VENKATESHWARA AIYAR, (1926) M. W. N. 255; 23 L. W. 511; 50 M. L. J. 426; A. I. R. 1926 Mad. 656 45

——— **cl. 15**—*Order transposing defendant as plaintiff—Judgment—Appeal.*

A determination, whatever it may be called, which has the effect, whether on a technical ground or on the merits, of putting an end to the proceedings as regards the particular people or *in toto* is a judgment within cl. 15 of the Letters Patent and is appealable, but if the pronouncement leaves the suit free to go on, then it is not a judgment within the meaning of the clause.

An order of a Judge of the High Court, on the Original Side transposing a person from the position of a defendant to that of a plaintiff is not a judgment under cl. 15, Letters Patent, and is, therefore, not appealable. M OFFICIAL ASSIGNEE OF MADRAS *v.* A. RAMALINGAPPA, 50 M. L. J. 361; 23 L. W. 592; (1926) M. W. N. 366; A. I. R. 1926 Mad. 554; 49 M. 539 456

Limitation—Application barred—Extension of time. *See* C. P. C., 1908, s. 115 117

——— *Contract for several lots of goods—Contract indivisible—Starting point of limitation.*

Where the contract for the supply of several lots of goods is indivisible and not an instalment one, limitation in respect of all lots would run from the date when the last lot is due to arrive. L AMBA PARSHAD-GOPI NATH *v.* JAWALA DAT-RAM KANWAR, 8 L. L. J. 101 629

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———, operation of. *See* C. P. C., 1908, O. XX, R. 7 121

———, *plea of, abandoned in Trial Court, whether can be taken in appeal.*

It is open to a party to press in appeal a point of limitation, though the issue embodying the plea of limitation may have been abandoned in the Trial Court. R MAUNG MYA *v.* MA THIN TIN, A. I. R. 1925 Rang. 313; 4 Bur. L. J. 113 611

Limitation Act (IX of 1908)—*Limitation for certain suit provided—Maintainability of suit.*

A provision as to limitation for a particular suit in the Limitation Act is no argument that such a suit is maintainable, for the Act does not create a cause of action if it does not already independently exist.—C ALBERT BONNAN *v.* IMPERIAL TOBACCO CO., 30 C. W. N. 465; A. I. R. 1926 Cal. 757 444

——— **s. 3**—*Limitation, point of, in appeal.*

The question of limitation though neither raised in the Trial Court nor in the grounds of appeal may be urged at the hearing of appeal for the first time. L DULO *v.* MUHAMMAD NATHU 251

——— **s. 3**—*Limitation urged for first time in appeal.*

Question of limitation should not be allowed to be raised for the first time in appeal where its determination requires an investigation into facts to see whether a particular payment was made in such a way as to extend time. L TEJU *v.* RALLA 457

——— **s. 5.** *See* C. P. C., 1908, O. XXII, R. 4 929

——— **s. 5**—*Copy of Trial Court judgment filed with delay—Delay due to Counsel's mistake—Extension of time—Contract for several lots of goods—Contract indivisible—Limitation, starting point of.*

Where a copy of the first Court's judgment is filed after the period of limitation for the second appeal owing to the delay caused by mistake on the part of the appellant's Counsel in asking for a copy of the decree instead of judgment in his reminder to the copying department, though originally it was the copy of the judgment that had been applied for, the delay would be excused and time extended. L AMBA PARSHAD-GOPI NATH *v.* JAWALA DAT-RAM KANWAR, 8 L. L. J. 101 629

——— **s. 5**—*Discretion, nature of—Second appeal—Interference with refusal to exercise discretion.*

Discretion vested in a Court under s. 5 of the Limitation Act is a judicial one and where a refusal of the Court to exercise this discretion is not based on appreciation and consideration of such facts as are relevant and the application of the right principles, the High Court is competent to interfere with it in second appeal. L BACHINT SINGH *v.* HARNAM SINGH 396

——— **s. 5**—*Extension of time—Sufficient cause.*

An applicant filing an application beyond time, under a mistaken view that it is within time, cannot ask for extension of time under s. 5 of the Limitation Act, where even according to his own mistaken view he has filed it on the very last possible day. N KUTUAB-UD-DIN *v.* GULAM RABBANI 121

——— **s. 5**—*Second appeal—First Court judgment, delay in preparation of—Extension of time.*

Where a copy of the judgment of the first Court is

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applied for within limitation but is not filed in time with memorandum of appeal owing to inordinate delay in its preparation, the appellant will be given the benefit of s. 5, Limitation Act. L Bhuri *v.* Asghari Begam 959

———— **ss. 6, 7**—*Minor—Limitation begun before birth—Benefit of minority.*

A minor cannot take advantage of his minority or plead ss. 6 and 7 of the Limitation Act where limitation had already begun to run before his birth. A Bohra Natha Mal *v.* Jhunia Lal 180

———— **s. 7**—*Decree obtained by joint Hindu family—Manager, whether can give discharge—Execution of decree—Minor member—Limitation.*

The manager of a joint Hindu family can give a valid discharge in respect of a decree on his own behalf and on that of a minor brother and the latter cannot, therefore, take advantage of the provisions of s. 7 of the Limitation Act for the purpose of executing the decree. A Radha Kant Shukul *v.* Butia Misir 922

———— **s. 10**—*Endowment in favour of deity.*

For application of s. 10, Limitation Act, two conditions must combine, there must be a trustee with an express trust and an estate or interest vested in the trustee. Therefore, the section is inapplicable to the case of an endowment in favour of a deity. C Ganga Prosad Chowdhury *v.* Kuladananda Roy, 30 C. W. N. 415; A. I. R. 1926 Cal. 568 235

———— **s. 12**—*Time requisite for obtaining copies.*

A Jhelum appeal was heard by the District Judge, Rawalpindi, in his capacity as Additional Judge, Jhelum, and decided on 25th May 1925. On the 24th July 1925 the appellant applied in the Court of the District Judge, Jhelum, for copies of the judgment and the decree of the Appellate Court. His deposit of the fees was accepted and an order was made on the application for supply of the copies. On 28th September 1925 appellant's application was returned with a direction that it should be made at Rawalpindi. The application was presented in Rawalpindi Court on the 29th September 1925 and copies were obtained on the 5th October 1925 and the appeal was filed on 30th October 1925:

Held, that the appellant was entitled to count the whole period from the 24th July till the 5th October as time requisite for obtaining copies. L Kalian Singh *v.* Fazal Din 1055

———— **s. 15.**

See Chota Nagpur Encumbered Estates Act, 1876, s. 3 (1) 624

See Limitation Act, 1908, Sch. I, Art. 182 482

———— **s. 18.** *See* Limitation Act, 1908, Sch. I, Art. 164 56

———— **s. 20**—*Part-payment—Payment sent through messenger by agent of debtor—Person making payment, who is.*

Where an agent of the debtor sends a sum of money through a messenger to the creditor with a slip signed by himself asking that the sum be credited to the debtor, the payment made is by the agent within the meaning of s. 20, Limitation Act. C Ramkumar Sewchand Roy *v.* Nanuram Poddar, 53 C. 163; A. I. R. 1926 Cal. 510 657

———— **s. 22.** *See* Contract Act, 1872, s. 140 575

———— **s. 22**—*Suit against Railway—Defendant described as "Agent of the Railway"—Misdescription—Amendment—Limitation.*

In a suit for damages for non-delivery of goods consigned to the East Indian Railway for carriage, the defendant was described as "Agent, East Indian Railway." The Railway Company entered appearance, put in a written statement and fought out the case and it was only in the Appellate Court that objection was taken to the description of the defendant:

Held, that as the case had been fought out on the merits by the Railway Company it was only a case of misdescription which could be rectified by a formal amendment and that, as no new defendant would be added or substituted by the amendment, the provisions of s. 22 of the Limitation Act had no application to the case. C Gopiram Behariram *v.* Agent, E. I. R., 30 C. W. N. 209; A. I. R. 1926 Cal. 612 762

———— **ss. 36, 25**—*Slander of title or of goods—Suit.*

For purposes of limitation a suit for slander of title or slander of goods is governed by Art. 36 of Sch. I to the Limitation Act. C Albert Bonnan *v.* Imperial Tobacco Co., 30 C. W. N. 465; A. I. R. 1926 Cal. 757 444

———— **Sch. I, Arts. 36, 42**—*Civil action brought maliciously and without reasonable and probable cause—Suit for damages, whether lies—Limitation—Temporary injunction obtained in suit—Damages, cause of action for—Sea Customs Act (VIII of 1878), ss. 18, 19-A—Detention of goods in customs house maliciously—Damages, cause of action for—Civil Procedure Code (Act V of 1908), s. 95, interpretation of.*

Where a party maliciously obtains an order for the detention of goods of a person under s. 19A, Sea Customs Act, the latter is entitled to bring a suit for damages and limitation for such a suit is two years under Art. 36 of Sch I to the Limitation Act.

A suit for damages for wrongful interference with the property of a person by obtaining an order from a Court in a suit or proceeding, when malice and want of reasonable and probable cause is established, is maintainable. The summary remedy provided by s. 95, C. P. C., is no bar to such a suit. C Albert Bonnan *v.* Imperial Tobacco Co., 30 C. W. N. 465; A. I. R. 1926 Cal. 757 444

———— **Art. 49**, *scope of—Suit for compensation for trees cut by occupancy tenants—Limitation.*

A suit by the landlord against his occupancy tenant for compensation for the trees cut is a suit for compensation for the breach of an implied contract not specifically provided in the Limitation Act and is governed by three years' limitation under Art. 49, Sch. I, Limitation Act.

Article 49 of Sch. I to the Limitation Act covers all other cases of specific moveable property wrongfully taken or wrongfully detained which do not arise out of theft or dishonest conversion as provided by Art. 48. A Jagdish Prasad *v.* Raghubir, L. R. 7 A. 167 Rev. 336

———— **Art. 115**—*Suit for non-delivery of goods per several shipments—Limitation, starting point of.*

The limitation for a suit for non-delivery of goods of various shipments, starts from the last day of the arrival of the last shipment and no cause of action accrues to the plaintiff until then. L Chhota Lal-Amba Parshad *v.* Basdeo Mal-Hira Lal 2

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——— **Sch. I, Arts. 115, 116**—*Dividend payable by Company—Suit for recovery by share-holder—Limitation.*

A debt created by the declaration of dividend by a Company in favour of a share-holder, whether or not in certain circumstances and for certain purposes it may be regarded as a contract, is not a contract such as is contemplated by Arts. 115 and 116 of Sch. I to the Limitation Act. **M** GURUNADHA RAM SESHAYYA *v.* TRIPURASUNDARI COTTON PRESS, 50 M. L. J. 520; 49 M. 468; A. I. R. 1926 Mad. 615; 24 L. W. 102 **515**

——— **Art. 120**—*Suit to recover remuneration for services in temple—Limitation—Recurring right.*

There is a vast distinction between a suit brought to establish a periodically recurring right and a suit brought to enforce payments due as remuneration for the performance of services arising out of that right.

A suit by the *dwaris* of a temple to recover dues which they claim to be payable to them as remuneration in respect of their services in connection with the temple is governed by Art. 120 of Sch. I to the Limitation Act and a claim relating to a period more than six years prior to the date of the institution of the suit would be barred by time. **Pat** BAIDYANATH JIU *v.* HAR DUTT DAWARI, (1926) Pat. 1; 5 Pat. 249; A. I. R. 1926 Pat. 205; 7 Pat. L. T. 465 **826**

——— **Arts. 120, 62, 115, 116**—*Dividend payable by Company—Suit for recovery by auction-purchaser—Limitation.*

A suit by an auction-purchaser of a share-holder's rights to receive dividends of a Company for recovery of dividend declared and payable by the Company is governed by Art. 120 of Sch. I to the Limitation Act and not by either Art. 62, 115 or 116. **M** GURUNADHA RAMA SESHAYYA *v.* TRIPURASUNDARI COTTON PRESS, 50 M. L. J. 520; 49 M. 468; A. I. R. 1926 Mad. 615; 24 L. W. 102 **515**

——— **Arts. 132, 147.**

Article 147 of Sch. I to the Limitation Act is applicable only to the class of mortgage generally known and defined by the Transfer of Property Act as an English mortgage. A suit to recover money due on a mortgage by conditional sale is governed by Art. 132 of Sch. I to the Limitation Act and limitation begins to run from the time when default is made in payment of an instalment of interest, where the mortgagee is given the right on such default to sue for the whole amount. **A** SHEORAM SINGH *v.* BABU SINGH, 24 A. L. J. 295; 48 A. 302 **849**

——— **Arts. 142, 144**—*Suit for possession—Land under cultivation—Burden of proof.*

In a suit for possession of land under cultivation plaintiff, in order to succeed, must prove his possession and dispossession within twelve years. **L** RAHMAT ULLAH *v.* NAWAB **417**

——— **Art. 144**—*Co-owners—Suit for possession—Limitation—Ouster—Adverse possession.*

The possession of one co-owner must be deemed to be the possession of all the co-owners, unless there was some act of ouster by which one of the co-owners was deprived of possession by another.

Where parties are co-sharers and no partition has taken place between them, mere non-participation of profits by one and occupation and enjoyment of the joint property by the others is not *per se* adverse possession. There must be a disclaimer of others' right by an open assertion of a hostile title on the part of the other co-owner setting up adverse possession and notice of such disclaimer to the others. Limitation against a co-sharer does not begin to run until his title is openly denied.

Where in a suit for possession the plaintiff has established his title as a co-owner, the onus is on the defendant co-sharer to plead and prove adverse possession for the statutory period. Article 144 of Sch. I to the Limitation Act applies to such a case. **O** AHMADULLAH *v.* BASHIR AHMAD **855**

——— **Sch. I, Art. 144**—*Possession of mortgagee after satisfaction, when adverse.*

A suit which in essence is one for declaration of title and recovery of possession is governed by Art. 144 and not Art. 148 of Sch. I to the Limitation Act.

The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage-money has been satisfied.

The question whether the possession of the mortgagee after the mortgage-debt has been satisfied is adverse to the mortgagor or not is always a question of intention of the parties concerned. **C** KESHAB LAL GOSWAMI *v.* BHOLANATH GANGOPADHYA **342**

——— **Art. 148**—*Suit by second mortgagee decreed—First mortgagee not party—Sale in execution of decree—Second mortgagee's right to redeem first mortgage—Limitation.*

A second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgage and is not bound either by the decree in the suit of the prior mortgagee or by the sale held in execution thereof.

The period of limitation for such a suit is 60 years under Art. 148, Sch. I, Limitation Act. **Pat** RAMJHARI KOER *v.* KASHI NATH SAHAI **284**

——— **Art. 164.** *See* C. P. C., 1908, O. IX, R. 13 **420**

——— **Art. 164**—*Application to set aside ex parte decree—Nature of fraud permissible to prove—Remedies open to applicant.*

It is not correct that for the purposes of Art. 164 of the Limitation Act the only fraud that is relevant to be considered in the application for setting aside an *ex parte* decree is a fraud with reference to the service of the notice and that s. 18 of the Limitation Act does not otherwise apply to such an application. It is open to the applicant in such a case to prove a fraud practised on him by the decree-holder which prevented him from appearing in Court on the date of hearing.

The applicant in such a case has a dual remedy, one by an application to set aside the *ex parte* decree and another by a civil suit to set aside the decree as having been obtained by fraud. **N M. B.** KINKHEDE *v.* MOHANTA **56**

——— **Art. 166**—*Application to set aside sale—Service of notices—Limitation.*

The sole object of O. XXI, r. 92, C. P. C., is to provide that no adverse order should be passed in the absence of the persons affected by it. Inasmuch as an application under O. XXI, r. 90 is an application in the suit itself, all the decree-holders are parties to the proceedings under the application. **Pat** ISHWAR DAS MARWARI *v.* BISESWAR DAS MARWARI, (1926) Pat. 83; A. I. R. 1926 Pat. 266; 7 P. L. T. 532 **31**

——— **Art. 177.** *See* C. P. C., 1908, O. XII, R. 4 **929**

Limitation Act—1908—contd.

—— **Sch. I, Art. 181**—*Civil Procedure Code (Act V of 1908), s. 39, O. XXI, r. 10—Transfer of execution, application for—Step-in-aid of execution—Limitation.*

An application under s. 39, C. P. C., for transfer of the execution of the decree is not an application for execution within the meaning of O. XXI, r. 10, C. P. C., but an application to take a step-in-aid of execution governed by Art. 181, Sch. I, Limitation Act. A SAHODRA *v.* BHAGWAN DAS 482

———— **Art. 182**—*Decree passed against wrong person by mistake—Application for execution—Amendment—Substitution of judgment-debtor's name—Limitation, extension of—Previous application, whether in accordance with law.*

In a suit in which there were several defendants the Court purporting to pass a decree against one particular defendant passed it by mistake against another. The decree-holder made several applications for execution of the decree against the defendant whose name was entered in the decree. The latter then applied for amendment of the decree and the decree was amended by striking out his name and substituting the name of the defendant against whom the Court had intended to pass the decree. This was done more than three years after the date of the passing of the decree. When the decree-holder made an application for execution of the decree against the defendant whose name was entered in the decree on amendment an objection was taken that the application was barred by time:

Held, (1) that so long as the wrong decree stood, the only person against whom the decree-holder could proceed in execution was the person whose name was entered in the decree and that, therefore, the applications made by the decree-holder for execution prior to the amendment of the decree were made in accordance with law within the meaning of Art. 182 (5) of Sch. I to the Limitation Act and operated to save limitation;

(2) that the present application having been filed within three years of the last application was within time;

(3) that on another view of the case, it was not possible for the decree-holder to execute the decree against the real judgment-debtor till the date of the amendment and that it was only after the amendment that a right to apply to execute the decree against him had accrued and that for this reason also the application was within time. A DEBI BAKHSH *v.* SHAMBHU DIAL-GANGA PRASAD, 24 A. L. J. 266; 48 A. 281 877

———— **Art. 182**—*Decree partly joint and partly several—Execution application—Execution of costs in execution.*

Where a decree is jointly passed against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of the Explanation to Art. 182, Limitation Act, shall apply to decrees passed severally and the second portion to the decree or decrees passed jointly.

Application for execution of costs incidental to the execution proceedings is not an application for the execution of the original decree or any part of it and, therefore, does not save limitation. A NAND LAL SARAN *v.* DHARAM KIRTI SARAN, 24 A. L. J. 465 961

———— **Art. 182**—*Execution of decree—Execution stayed till decision of another suit—Suit decided by Trial Court—Decree-holder's duty to continue pending execution—Limitation.*

Limitation Act—1908—concld.

Where execution proceedings are stayed till the decision of another case, no sooner the latter case is decided it is the duty of the decree-holder to take out execution proceedings notwithstanding the fact that the judgment-debtor may have in the interval filed an appeal, and if the decree-holder fails to do so within three years execution of the decree would be barred. A SAT NARAIN LAL *v.* GANGA JAL 1005

———— **Sch. I, Art. 182**—*Execution of decree—Sale of decree—Application for execution by purchaser directed to be filed owing to defect in sale-deed—Removal of defect—Fresh application—Limitation.*

The purchaser of a decree from a decree-holder made an application for execution of the decree but it was discovered that the number of the decree was entered incorrectly in the deed of sale. The application for execution was, however, merely ordered to be "filed". The purchaser then obtained another sale-deed which described the decree correctly and made a fresh application for execution:

Held, that the previous application having been ordered to be simply 'filed' and not having been struck off owing to a default of the decree-holder, must be deemed to have been still pending when the subsequent application was made and that the subsequent application must be treated as an application for revival of the previous application and no question of limitation arose in respect of the subsequent application, which in its turn could be availed of as giving a fresh start of limitation. A BITTEE *v.* KANHAIYA LAL MISIR 869

———— **Art. 182 (2)**—*Withdrawal of appeal.*

An appeal is withdrawn within the meaning of Art. 182 (2) of Sch. I to the Limitation Act on the date when the order permitting it to be withdrawn is made by the Court and not on the date when the application for permission to withdraw the appeal is filed. A RAM CHANDRA NAICK *v.* NAZAR ALI, 24 A. L. J. 544 390

———— **Art. 182 (5)**—*Step-in-aid of execution—Issue of notice under O. XXI, r. 66, C. P. C.—Affidavit, swearing in of—Limitation, fresh start of.*

Issue of notice under O. XXI, r. 66, C. P. C., to the judgment-debtor in order that he might be present to assist the Court in drawing up the sale proclamation, not on the motion of the decree-holder but of its own accord is not a step-in-aid of execution. Nor does the swearing in of an affidavit by the decree-holder's identifier to the effect that the notice had been served unaccompanied by any application oral or written give a fresh start to limitation. C JADU NATH SINGHA *v.* KRISHNA RANGINI DASSYA 44

———— **Art. 182, s. 15**—*Stay of execution—Deduction of period of stay in computing limitation.*

Where on the request of the parties execution of a decree is stayed and the judgment-debtor is allowed a certain period to pay the decretal amount, a subsequent application for transfer of execution made within three years from the date of the expiry of the period allowed to the judgment-debtor is within time.

The period allowed to the judgment-debtor for payment of money, during which period execution remains stayed, is deducible under s. 15, Limitation Act, in computing period of limitation for an application for transfer of execution. A SAHODRA *v.* BHAGWAN DAS 482

Madras District Municipalities Act (V of 1920) *—Rules for conduct of elections, r. 5—Candidate's name, omission of, in final list of valid nominations —Remedy of party aggrieved—Civil Courts, jurisdiction of—Statutory tribunal, creation of—Effect.*

Where a special tribunal out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. If the tribunal has functioned and given a decision whether right or wrong, the Civil Court has no jurisdiction. It is only when the special tribunal has refused to function that a Civil Court exercises the jurisdiction which the proper tribunal has failed to exercise.

Where at an election of a Councillor for one of the wards of a Municipality, the name of a candidate is omitted from the final list of valid nominations published under r. 5 of the Election Rules, the remedy of the aggrieved party is to refer the matter to the Local Government under r. 31 or to file an election petition under r. 1 of the Election Dispute Rules, and not a suit for injunction restraining election in a Civil Court. **M** VICE-CHAIRMAN, CHIDAMBARAM MUNICIPALITY *v.* GANASAMBANADHAM PILLAI 546

——— **ss. 249, 250, 338, Sch. V, cl. (q)**—*Factory, construction of, permitted by Council—Annual license, failure to take out—Prosecution—Machinery under Sch. V (q), what is.*

Where permission has been granted by a Municipal Council under s. 250 of the Madras District Municipalities Act for the construction and establishment of a factory to work a rice hulling machine, annual license is not necessary to be taken from the Chairman under s. 249 and where a person uses a 22 horse power gas engine in the factory without taking such license, he is not liable to be prosecuted under s. 338 of the Act.

The Madras District Municipalities Act clearly intends to draw a distinction between what is described as "industries" and 'factories'. The former are dealt with in s. 249 and the latter in s. 250.

The machinery referred to in Sch. V of the Act is machinery of a kind that is propelled by means other than those described in s. 250 which contemplates some sort of mechanical motive power and must be such as is likely to be dangerous to human life, health or property, the object of the clause being to bring under control the storing, manufacturing, and using of things which are dangerous to human life, health or property.

The last clause in Sch. V, cl. (q), namely, "which is likely to be dangerous to human life or health or property" governs that part of cl. (q) which begins with the words "using for any industrial purposes" and not the whole of cl. (q). **M** MADURA MUNICIPALITY *v.* MUTHUBALU CHETTY, 50 M. L. J. 384; A. I. R. 1926 Mad. 576; 27 Cr. L. J. 635 411

Madras Estates Land Act (I of 1908), s. 12, *scope of—Trees on land under lease, rights in.*

Where trees are growing in land which is held by a *ryot*, though no mention of trees be made in any lease, s. 12 of the Madras Estates Land Act applies and the landholder has no claim. But where the trees are let to a person on whose land they do not grow the landholder has a claim for full value of the trees cut by the *ryot*. **P. C.** RAJA OF RAMNAD *v.* KAMID ROWTHER, 50 M. L. J. 503; A. I. R. 1926 P. C. 22; (1926) M. W. N. 376; 49 M. 335; 24 L. W. 1; 30 C. W. N. 844 322

Madras Estates Land Act—concld.

——— **s. 30 and Ch. XI**—*Record of Rights—Fair and equitable rent, determination of—Section 30, whether can be disregarded.*

A Revenue Officer acting under Ch. XI of the Madras Estates Land Act to determine the fair and equitable rent should take into consideration the existing rate of rent, the rise in prices, the time when the rate was last settled and the present state of things as regards the facilities of irrigation and other circumstances which would enable him to settle what is a fair and equitable rent. Whatever may be the rate of rent, if he considers that it is not fair and equitable he is entitled to alter it and in doing so he is not bound by the rule in s. 30 of the Act that the increase cannot be more than annas 2 in the rupee. **M** NARASIMHA RAO *v.* RYOTS OF PEDAMA MIDIPALLI, (1926) M. W. N. 131; 23 L. W. 320; A. I. R. 1926 Mad. 480; 49 M. 499 164

——— **ss. 164, 180 (Ch. XI).** *See* MADRAS ESTATES LAND ACT, 1908, s. 30 164

——— **ss. 171, 172.** *See* GOVERNMENT OF INDIA ACT, 1915, s. 107 164

Madras Hindu Transfers and Bequests Act (I of 1914)—*Bequest in favour of unborn child, validity of—No intervening life-interest, effect of.*

The vesting of an estate cannot be kept in abeyance pending the happening of an uncertain event nor even by the appointment of trustees.

A person unborn at the death of a testator cannot avail himself of the provisions of the Madras Hindu Transfers and Bequests Act in a case where no life-estate is interposed between the death of the testator and the time provided for his taking the property. **M** APPU BHATTA *v.* UNNA SUNDARIAMMA, 23 L. W. 547; A. I. R. 1926 Mad. 668 42

Madras Land Encroachment Act (III of 1905), ss. 2, 16—*Submission—Rights of tenure-holders, effect on—Government's right to deal with property.*

Mere submergence of land held under *ryotwari* tenure does not infer a relinquishment by the holder. On the other hand, if he wishes to retain his right to the submerged lands on the off-chance of their being re-formed *in situ* at some future date, he must continue to pay year by year the assessment or rent which is due to Government. The Government may from humanitarian motives remit the rent and such remissions are provided for by the standing orders. But such remissions can only be made by the authority of the Board of Revenue and the inferior officials including the Collector have no power at their own instance to make them.

Where rights in a Government land on its submersion are relinquished by the tenure-holders, the Government are free to deal with it as they please and s. 16 of the Madras Land Encroachment Act has no application. **P. C.** MIRZA RAJA *v.* SECRETARY OF STATE FOR INDIA, A. I. R. 1926 P. C. 18; 50 M. L. J. 391; 49 M. 249; 43 C. L. J. 378; 28 Bom. L. R. 865; 24 L. W. 9 501

Malabar Compensation for Tenants Improvements Act (I of 1900), s. 6 (3)—*Re-valuation of improvements, method of—Commissioner, duty of—Burden of proof.*

On an application for re-valuation under s. 6 (3) of the Malabar Compensation for Tenants Improvements Act the valuation of the improvements as embodied in the original decree cannot be disturbed and must be accepted. The Commissioner on such re-valuation has to consider (1) if any and what com

Malabar Compensation for Tenants Improvements Act—concld.

pensation is to be given for new improvements subsequent to the date up to which compensation for improvements has been adjudged in the decree and (2) whether any improvement, which has already been adjudged has to be re-valued, in consequence of some change in its condition since the adjudication of it in the first decree. It is not his business to make a valuation *de novo*. The starting point of the second valuation is the point where the first was left off, and on the tenant rests the onus of putting before the Commissioner evidence on which he has to make his decision. M GODAN NAMBUDRIPAD *v.* KRISHNAN NAMBUDRIPAD, (1926) M. W. N. 326; A. I. R. 1926 Mad. 680; 23 L. W. 754 943

Malabar Law—*Maintenance* karar *with* tarwad karnavan—*Allotment of properties to members of* tavazhi *in lieu of maintenance—Subsequent suit for maintenance against succeeding* karnavan—*Parties, necessary.*

A *karnavan* of a Malabar *tarwad* cannot set aside an existing maintenance arrangement made by his predecessor with the members of the *tarwad* unless he makes some other suitable arrangement.

A maintenance arrangement, however, is usually subject to modification if there is an appreciable or material change in the circumstances of the family.

Where the *karnavan* of a Malabar *tarwad* entered into a *karar* with its members by which properties were allotted to various *tavazhis* for maintenance and it was provided that the *karar* was to be operative only during the lifetime of the *karnavan* although on the terms of the *karar* it was open to the *tarwad* as a whole by its conduct to adopt the *karar* as binding on its members even after the *karnavan's* death:

Held, that the *karar* was not a bar to a subsequent suit for maintenance by some of the members of one of the *tavazhis* against a succeeding *karnavan* of the *tarwad*.

Where the claim for maintenance is made not only against the *karnavan* but also against the *tarwad* properties, the *karnavans* of the various *tavazhis* who were under the prior *karar* in possession of the properties of the *tarwad* must also be impleaded as parties. M PAYOTH RANDUPURAYIL SARA UMMA *v.* KIDANGUKITTIYA, 23 L. W. 581 508

Mesne profits—*Land in occupation of tenant—Basis of assessment of mesne profits—Co-sharers—Dispossession—Excess of enjoyment, if amounts to ouster.*

Where land is in the occupation of the tenants mesne profits should be awarded not on the basis of the produce but on the basis of rent.

Where a decree for mesne profits is passed against a co-sharer there must be a finding as to dispossession.

Mere excess of enjoyment does not itself amount to an ouster. C MAJID MIA *v.* MUNSHI MIA 255

——— *Trespassers.*

A trespasser actually cultivating the land is bound to pay mesne profits on produce basis. C EASIN SHEIKH *v.* SIKANDAR SHEIKH 118

Mirasi grant, nature of. *See* SARANJAM 737

Mortgage—*Foreclosure—Decree nisi before Transfer of Property Act—Mortgagee allowed possession—Mortgagor's right to demand account and further day for payment—Long silence, effect of.*

Before the passing of the Transfer of Property Act, it was not the practice of the Bombay High Court to require a mortgagee, who had obtained a decree *nisi* for foreclosure, upon non-payment of the money due at the time prescribed, to obtain an order for foreclosure absolute as against the person or persons in default; the mortgagee was permitted to foreclose by proceedings in execution of the decree instead of obtaining an order absolute.

Mortgage—contd.

As a general rule after an order for foreclosure *nisi*, the mortgagor can apply for, and in suitable circumstances and on certain conditions obtain an order enlarging the time for redemption; but enlargement of the time is not a matter of course. The power to extend the time is in the discretion of the Court, and in order to entitle himself to such indulgence the mortgagor must apply to the Court with reasonable promptitude.

A mortgagee obtained a decree *nisi* for foreclosure in 1875. The period allowed to mortgagor for payment and redemption was six months. Soon after the mortgagee got possession of the property under some arrangement with the mortgagor. The mortgagor never took any steps to ask for further accounts, nor did he or those claiming under him ever apply to the Court for enlargement of the time. The mortgagee treated the property as his own and erected costly buildings over it to the knowledge of the mortgagor. After the lapse of 45 years the representatives-in-interest of the mortgagor brought a suit claiming the property:

Held, (1) that the mortgagor acquiesced in the position that the mortgagee was entitled to hold the property as his own and it was no longer necessary for the mortgagee to execute the decree and he became full owner of the property;

(2) that assuming that this was not so, and that the plaint in the suit could be treated as an application for extension of time for payment made in the foreclosure suit of 1875, the delay of 45 years on the part of the mortgagor was fatal to his case. B VASANTRAO GOVINDRAO *v.* NANABHAI SADANAND, 28 Bom. L. R. 347; A. I. R. 1926 Bom. 273 96

——— *Mortgage suit—Receiver—Loan by tenant to mortgagor—Payment towards rent—Money spent on improvement of mortgaged property—Collateral arrangement—Receiver, whether bound—Estoppel—Tenant in possession—Notice—Evidence Act (I of 1872), s. 115—Transfer of Property Act (IV of 1882), ss. 8, 50.*

A Receiver was appointed in a mortgage suit and thereafter the mortgagor entered into an arrangement with the tenant of the mortgaged premises under which the tenant advanced a sum of money to the mortgagor which was applied towards the repairs and improvement of the mortgaged premises, the mortgagor agreeing to set off the amount of the loan towards future rent:

Held, that irrespective of the fact whether the Receiver had or had not power to sanction the arrangement between the mortgagor and his tenant the Court would not allow him to repudiate the transaction after it had been carried through, and after he and the mortgagees had taken advantage of the transaction and the money had been advanced and spent in the improvement of the premises which were the mortgagees' security.

Where an arrangement between a mortgagor and the tenant of the mortgaged premises for pre-payment of rent, or for setting off future rent against money due from the tenant to the mortgagor, is made subse-

Mortgage—contd.

quent to the date of the mortgage, such arrangement is only a collateral bargain between these parties and is not binding upon the mortgagee.

Per *Rankin, J.*—The principle to be applied in the case of a mortgage of tenanted land is that the mortgage operates as a grant of the reversion expectant on the determination of the term of the lease, and the rents and profits accruing after the transfer pass to the mortgagee. The tenant in such a case has the protection of s. 50 of the Transfer of Property Act, if the rent is paid as rent and is not paid in advance. Any payment made by the tenant to the mortgagor in advance would be a mere loan. C TILOKE CHAND SURANA *v.* BEATTIE & Co., 29 C. W. N. 953; A. I. R. 1926 Cal. 201 **538**

——— *Mortgagor paying off earlier mortgage—Charge, keeping alive of—Presumption—Improvements by mortgagor paying off earlier mortgage—Priority of charge.*

Where there are several mortgages on a property the owner of the property may, if he pays off an earlier mortgage, keep it alive for his benefit and come in before the later mortgagees. In the absence of an indication to the contrary, it is to be presumed that the owner intends to keep alive the previous charge if it would be for his benefit.

Where the earlier mortgage-deed paid off by the owner contains a clause by which the mortgagee is entitled to be re-imbursed at the time of redemption for any expenditure incurred by him during the currency of the mortgage, the owner is entitled to the benefit of that condition and the sum which he spent on improving the property must be allowed as a prior charge. L MEHL SINGH *v.* AMAR NATH, 7 L. 212 **152**

——— Nankar *rights reserved—Foreclosure decree—*Nankar, *whether charge on property.*

A usufructuary mortgage of a share in a village with a condition for foreclosure provided that the mortgagee would take possession of the mortgaged property with the exception of the 130 *bighas sir* lands and of Rs. 100 cash annually fixed for the maintenance of the executant and his descendants, etc. The mortgagor obtained a decree for redemption with a condition of foreclosure in the event of default. The default being made decree for foreclosure was made absolute. The annuity was treated as *nankar* by both the parties before as well as after the foreclosure decree:

Held, that the entire share in the village was mortgaged subject to the liability of Rs. 100 annually which was *nankar* and that *nankar* was a charge on the property by which the ex-mortgagee was bound. O BISHWANATH PRASAD *v* ABDUS SAMAD KHAN, 13 O. L. J. 149; A. I. R. 1926 Oudh 349 **788**

——— *Redemption before time—Cause of action—Suit for possession—Premature suit for redemption—Period expiring during pendency of suit—Decree, whether can be granted—Procedure.*

A mortgagor cannot be allowed to redeem the mortgage before the expiry of the term mentioned in the mortgage-deed, unless there is a contract to the contrary in favour of the mortgagor.

Especially in the case of a usufructuary mortgage, the mortgagee is entitled to insist on his full term of enjoyment where there are no clear words in the mortgage-deed permitting the mortgagor to redeem before the expiry of the period.

Mortgage—concld.

A party suing for possession must show that on the date of the suit he is entitled to the relief.

A suit for redemption of a usufructuary mortgage, which is premature, cannot be decreed on the period of mortgage expiring during pendency of the suit. In such a case the only course is to dismiss the suit with liberty to bring a fresh one on a proper cause of action. M MYLAVARAPPA RANGAPPA NAIDU *v.* BASANNA SIMON, 23 L. W. 357; A. I. R. 1926 Mad. 594 **639**

——— Redemption suit. *See* C. P. C., 1908, s. 11 **27**

——— *Redemption decree—Costs, whether charge on mortgaged property—Decree, interpretation of.*

Costs awarded to the mortgagee in a redemption suit are, as a rule, added to the amount of the security, and the mortgagor is made personally liable for them only in very exceptional cases of misconduct.

It is competent to the Court in the exercise of its discretion to award the costs personally against the mortgagor, but where the terms of the decree are ambiguous it ought not to be construed in such a manner as to enable the mortgagee to realise his costs personally from the mortgagor. A SHEO DARSHAN SINGH *v.* BENI CHAUDHURI, 24 A. L. J. 424 **872**

——— *Redemption suit—Decree.*

In a suit for possession by a mortgagee under the terms of the mortgage, a mortgagor endeavouring to get the mortgage set aside cannot be given a decree for redemption without a suit to that effect on his plea that in the event of mortgage being held to be good against him he should be permitted to redeem it. O BHAWANI DIN *v.* SATROHAN SINGH, 3 O. W. N. 457; A. I. R. 1926 Oudh 357 **759**

——— *Redemption suit—Jurisdictional value—Suit challenging previous redemption—Nature of suit.*

In redemption suits the jurisdiction is governed by the amount of the principal mortgage money and not by the value of the property mortgaged.

A suit against the mortgagee for redemption on the ground that a redemption obtained by some of the defendants through Court under a compromise is a collusive transaction, is a suit for redemption and not a suit for possession by a mortgagor against his co-mortgagor for his share of the redeemed property. O MOHAN LAL *v.* MOHAN LAL, 3 O. W. N. 467; A. I. R. 1926 Oudh 346 **784**

——— *Several mortgages—Priority—Presumption.*

A prior mortgagee is not barred from putting forward his claim where the prior mortgage was not impugned in the suit by the subsequent mortgagee and the latter had not sought to displace the prior title of the prior mortgagee and postpone it to his own.

Where a subsequent mortgagee fails to mention a prior mortgage in his plaint the presumption is that he does not question the priority of the prior mortgage. A COLLECTOR OF MORADABAD *v.* MOHAMMAD HIDAYAT ALI KHAN **505**

——— Several mortgages—Suit by second mortgagee decreed—First mortgagee not party, effect of. *See* LIMITATION ACT, 1908, SCH. I, ART. 148 **234**

Muhammadan Law—Dower—*Claim based on contract—Customary dower, whether can be decreed.*

In a suit for dower if the plaintiff bases her claim on a contract between the parties at the time of her marriage but fails to establish the amount claimed, the only amount which the Court can allow is the amount which the defendant either admits or agrees to pay and no decree for customary dower can be passed. L BHURI *v.* ASGHARI BEGAM **[illegible]**

Muhammadan Law—contd.

——— **Dower**—*Widow in possession of husband's property—Widow's right against secured creditor.*

A Muhammadan widow in possession of her husband's estate in lieu of her dower has no right to retain possession against a creditor of her husband whose debt is secured by that estate. N ASABI *v.* KANHYALAL, 22 N. L. R. 14; A. I. R. 1926 Nag. 307 754

——— **Gift** *for services—Possession, delivery of.*

A deed of gift unsupported by any money consideration but purporting to have been effected for services rendered which cannot be given any monetary valuation is a deed of simple gift and not of *hiba-bil-ewaz* and a delivery of possession is necessary to validate such a gift. O AMIR KHAN *v.* HAKUMAT BIBI 392

——— *Transfer of Property Act (IV of 1882), s. 122—Mosque, whether person—Gift to mosque.*

Mosque is recognised by Muhammadan jurists as a juristic person and, therefore, a valid gift can be made in favour of a mosque. L MAULA BUX *v.* HAFIZ-UD-DIN, 8 L. L. J. 156 7

——— **Guardianship and Minority**—*Mother's power to alienate infant son's property Recovery by minor—Court's discretion to order refund of benefit—Specific Relief Act (I of 1877), s. 41.*

A Muhammadan mother has no power to alienate the property of her minor son and if she does, the latter is entitled to recover possession of the property alienated. But the Court may under s. 41, Specific Relief Act, make it a condition that the minor should refund the amount by which his estate and himself were benefited. L RANG ILAHI *v.* MAHBUB ILAHI, 7 L. 35; A. I. R. 1926 Lah. 170 25

——— **Inheritance**—*Descendants of brother's daughter*

Under Muhammadan Law the descendants of brother's daughter of the deceased who died during the lifetime of the deceased are not entitled to succeed in the presence of other daughters of deceased's brother. L SHAHAB DIN *v.* UMRAN 148

——— *Shia Law—Last owner dying heirless—Imam, rights of—Escheat, law of—Trust in favour of poor Shias—Community, right of, to sue for declaration.*

Even if a trust be in favour of poor men of Shia community, the entire community is interested to have the trust declared.

According to Shia Law proper where a Shia dies without leaving any heir his property goes to Imam to be dealt with by him as he pleases. But the practice of the Imam had established a rule which was binding upon the Mujtahids who took the property during the absence of Imam Mehdi on his behalf, and under that practice property was to be distributed among the poor and the indigent. But this rule of inheritance is not in force in British India. In British India any question touching inheritance is determinable in a manner personal to the last owner. But when it is made out clearly that by the law applicable to the last owner there is a total failure of heirs, then the claim to the property ceases to be subject to any personal law, the law of escheat intervenes and prevails. Private ownership not existing, the State must be owner as ultimate Lord. Pat KHURSAIDI BEGUM *v.* SECRETARY OF STATE FOR INDIA, (1926) Pat. 145 433

——— **Marriage**—Pre-nuptial *agreement to live with wife's parents—Legality.*

An agreement by which a Muhammadan husband binds himself to live presumably for all time, so long as the marital relationship continues, in his wife's house is invalid. A KHATUN BIBI *v.* RAJJAB 224

——— **Wakf**—Wakf *institution and property—Removal from office—Effect—Decree.*

A *wakf* institution is something distinct from the *wakf* property attached to the institution. Therefore, the mere removal of a *gaddi nashin* from the office does not imply his physical dispossession from the property of the institution. L HUSSAIN BIBI *v.* NUR HUSSAIN SHAH 212

Nagpur Judicial Commissioner's Court—*Practice—Reference to Bench—Appeal heard and closed for judgment—Legality.*

Though it is open to the Judicial Commissioner under the Bench Rules of the Nagpur Judicial Commissioner's Court to order that a particular case be heard by a Bench, such orders will be passed in exceptional circumstances only unless the Additional Judicial Commissioner concerned is of opinion that reference to a Bench is necessary or desirable in the case.

An application for reference to a Bench which is filed after an appeal is heard and closed for judgment, should not be granted as the granting thereof would amount to an expression of opinion of a Judge of co-extensive jurisdiction that the view the Additional Judicial Commissioner might take in the appeal in question is likely to be doubtful or erroneous one, and, therefore, he should desist from passing a judgment. N *In re* DEONATH 81

Negligence. *See* PRINCIPAL AND AGENT 860

——— *Master, liability of, for negligence of servant —Deviation from instructions—Course of employment.*

The defendant drove in his car to the Railway Station and gave the driver instructions to take the car back to the garage. The driver instead of taking the car to the garage direct went first to his own house, had his evening meal there and then drove to the garage. While driving to the garage the car collided with the plaintiff's car and it was found that the accident was due to the negligence of the defendant's driver. In a suit by the plaintiff to recover damages from the defendant:

Held, that the defendant's driver had deviated from the instructions of the defendant in going home for his meals, but inasmuch as at the time of the accident he was carrying out the defendant's instructions and was driving to the garage, he was at the time of the accident acting in the course of his employment and was not on a frolic of his own and that, therefore, the defendant was liable. B ROBERTS *v.* SHANKS, 27 Bom. L. R. 548; A. I. R. 1925 Bom. 360 551

Negotiable Instruments Act (XXVI of 1881), ss. 68, 69—*"Place", meaning of—Place of presentment, more than one—Failure to present anywhere — Cause of action to sue, whether arises.*

If more than one place is mentioned in a negotiable instrument as the place of presentment, there must be presentment at one or other of these places.

The word 'place' in ss. 68 and 69 of the Negotiable Instruments Act must be construed as including "places" as it would be anomalous to require presentment if one place is mentioned but none if two places are mentioned. M CHEGGANMULL *v.* DESUR MANIKA MUDALIAR, 50 M. L. J. 212 384

Negotiable Instruments Act—concld.

——— **s. 80**—*Promissory note on demand—Interest, date of accrual of.*

Under s. 80 of the Negotiable Instruments Act, on a promissory note payable on demand, interest begins to run from the date of the note and not from the date of demand for payment. B FRAMROZE DULJEE DINSHAW *v.* MAHOMED ESSA, 28 Bom. L. R. 141; A. I. R. 1926 Bom. 241; 50 B. 266 21

Notice. *See* TRANSFER OF PROPERTY 538

Oudh Estates Act (I of 1869), ss. 22, 29, 29-A—*Son, meaning of—Personal law, application of—Adoption, effect of—Brother, meaning of.*

Son in s. 22 (1) of the Oudh Estates Act includes a son adopted by ceremony where the personal law of the deceased *taluqdar* allows such adoption.

Adoption whether by ceremony or deed must carry with it the consequences assigned to adoption by the personal law of the persons who are parties to the adoption, that is to say, among Hindus, the civil death of the adopted boy in the natural family and re-birth in the adoptive family.

Brother in s. 22 (6) of the Oudh Estates Act does not, in the case of Hindus, refer to a natural brother where there has been a valid adoption either by ceremony or by deed of adoption.

When it is a question of succession s. 22 of the Oudh Estates Act is to be looked to but when it is a question of determining relationship it is the personal law that is to be resorted to.

A deed to be a testamentary devise must contain language from which can be inferred an intention to make a devise.

Obiter.—Section 22 (5) (8) of the Oudh Estates Act does not apply to any class but the Muhammadans and does not give Hindus an alternative mode of adoption. O BRIJ RAJ CHENDRA *v.* SUBHADRA KUAR, 3 O. W. N. 321; A. I. R. 1926 Oudh 324 294

Oudh Rent Act (XXII of 1886), s. 107-H—*Under-proprietary rights, assertion of—Potential and not actual rights—Civil Courts, jurisdiction of.*

In Oudh the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds, and the Civil Courts have the exclusive jurisdiction to decide whether or not a person in possession of the land holds a proprietary or under-proprietary right in the lands.

Where, however, the plaintiff comes into a Civil Court asking for a declaration that the defendants are neither proprietors nor under-proprietors, the defendants' reply to the effect that they never asserted that they were proprietors and that they only asserted such under-proprietary rights as could be created under s. 107-H, Oudh Rent Act, in other words potential rights in the future and not actual rights in the present, takes the case out of the jurisdiction of the Civil Court, the under-proprietary rights claimed by the defendants being not such as could be determined by a Civil Court. O UMANATH BAKHSHI SINGH *v.* RAJ BAKHSH SINGH, 13 O. L. J. 229 343

——— **s. 108**—*Mortgagee with possession, whether co-sharer—Suit for profits—Entry in* khewat, *Revenue Courts whether bound by.*

A mortgagee with possession is a co-sharer within the meaning of s. 108, cl. (15), Oudh Rent Act, and can sue and be sued for profits.

Oudh Rent Act—concld.

It is sufficient for a plaintiff, in order to establish his title to the share of profits, to prove that his name stands recorded in the *khewat*, and the Revenue Court need not go behind the entry in the revenue papers in deciding the case. O GAJADHAR SINGH *v.* HAR PRASAD 693

——— **s. 127**—*Suit for rent—Person taking possession for cultivation—Section whether applicable to person realising rent from tenants.*

Section 127 of the Oudh Rent Act is intended to cover the case of a person who has actually taken possession of the land for the purpose of cultivation and does not cover the case of a person who has merely realized the rent of the land, which originally belonged to him but has subsequently ceased to be his property, and who has thus caused the dispossession of the person to whom the land now belongs. O BADRI BISHAL SINGH *v.* RAM AUTAR, 3 O. W. N. 370; L. R. 7 A. (O.) 224 369

Pardanashin lady—Execution of mortgage—Proof. *See* EVIDENCE ACT, 1872, s. 70 558

——— Notice, service of. *See* C. P. C., 1908, O. V, R. 15 228

Parties—*Appellant dying without substitution in lower Appellate Court—Necessary parties in second appeal.*

Where some of the appellants die in the lower Appellate Court without their legal representatives being brought on the record, the decree of the Trial Court remains good against them even though the appeal is accepted and in a second appeal by the opposite party they are not necessary parties. L ISHER SINGH *v.* WIR SINGH, 8 L. L. J. 341 1000

Partnership, *dissolution of, suit for—Onus as to factum of partnership—Evidence of partnership.*

In a suit for dissolution of partnership the onus of proving the *factum* of partnership is on the plaintiff. Where there is no agreement of the partnership, it is necessary for the plaintiff that the conduct of the parties towards one another, the mode in which they have dealt with one another and the mode in which each has with the knowledge of the other dealt with other people, raises a necessary presumption that a partnership was entered into. As a rule in the absence of direct evidence of partnership the relationship is shown by books of account, by correspondence, by the evidence of employees, by admissions and so forth. L HAKAM RAI *v.* GANGA RAM, 8 L. L. J. 111 633

——— *dissolution of—Taking of accounts—Interest on monies drawn by partner, whether allowable—Interest on advances, calculation of.*

In taking accounts in a suit for dissolution of partnership, it is not the practice to allow interest on monies drawn by a partner from the partnership funds be it capital or interest unless it is so provided in the deed of partnership.

Interest is payable on advances by a partner only till the date of the preliminary decree when the partnership is dissolved, and not till the date of the final decree. M UMAMHESWARA MUDALY *v.* MUNISWAMI MUDALY, 50 M. L. J. 428; A. I. R. 1926 Mad. 642; (1926) M. W. N. 465 306

Penal Code (Act XLV of 1860), s. 34. *See* PENAL CODE, 1860, s. 381 881

——— **ss. 34, 304, 325**—*Joint attack by accused with lathis—Fracture of skull resulting in death—Offence.*

Penal Code—contd.

Where the accused in furtherance of a common intention beat a person with *lathis* and one of the blows causes fracture of the skull which results in death, the accused are guilty of an offence under s. 304 and not s. 325, Penal Code, even though it may not be ascertainable as to who dealt the fatal blow. **A** CHANDAN *v.* EMPEROR, 27 Cr. L. J. 619; L. R. 7 A. 96 Cr. **363**

——— **s. 75**—*One previous conviction—Enhanced sentence.*

One previous conviction does not necessarily mean that the convict is a habitual criminal, though a subsequent offence, shortly upon the release from Jail, is certainly a matter which entitles the Trial Court to impose a more severe sentence than would be the case if there has been no other conviction. **L** LABH SINGH *v.* EMPEROR, 8 L. L. J. 146; 27 Cr. L. J. 621 **365**

——— **ss. 79, 88, 89**—*School-master punishing pupil—Offence.*

A school-master may for purposes of discipline inflict moderate punishment and such punishment may be inflicted for offences committed not only within the school limits but also outside the school walls except when the school is closed for any length of time for a period of regular holidays. **R** EMPEROR *v.* MAUNG BA THAUNG, 3 R. 661; 27 Cr. L. J. 636; A. I. R. 1926 Rang. 197 **412**

——— **ss. 96, 302, 304**—*Private defence, plea of—Fatal blows, infliction of.*

In the course of a family quarrel between a brother and sister, as to possession of a store room, the sister was roughly handled and on hearing her cry out for help, the husband who was working near about turned up and finding the wife being assaulted by her brother and another and her hands cut and bruised, struck the brother one deadly blow with an *aruval* and on himself being attacked by the other man, dealt another fatal blow to him also :

Held, that the accused had reason to suppose that his wife might be severely injured and the blows struck by him on both the men were in exercise of the right of defence of his wife and himself. **M** BERMU CHETTY *v.* EMPEROR, (1926) M. W. N. 212; 27 Cr. L. J. 617 **361**

——— **s. 109.** *See* PENAL CODE, 1860, s. 381 **881**

——— **s. 160**—*Exchange of abuse—Offence, nature of.*

An ordinary exchange of abuse in a public street where neither side is armed and no blows are struck is an offence too trivial to be taken notice of. **L** EMPEROR *v.* ATMA RAM, 8 L. L. J. 82; 27 Cr. L. J. 696 **888**

——— **ss. 171D, 171F**—*Criminal Procedure Code (Act V of 1898), ss. 196, 403—Election—Abetment of false personation, what constitutes.*

The expression "abets the voting by any person in any such way" in s. 171F of the Penal Code means abetment of voting at an election in the name of another person living at that date, or in a fictitious name, or a second time.

Where a candidate at an election who is not aware of the fact that a person who professes to be a particular voter is not that voter and that he is falsely personating such voter, attests his voting slip but does not profess to do so on his personal knowledge and the polling officer is aware that the candidate is not attesting on personal knowledge, the candidate cannot be held guilty under s. 171F of the Penal Code of intentionally aiding the commission of an offence as defined under s. 171D of the Code. **A** RAM NATH *v.* EMPEROR, 24 A. L. J. 180; A. I. R. 1926 All. 221; 27 Cr. L. J. 705; L. R. 7 A. 18 **897**

——— **s. 174**—*Subpœna, defective, failure to comply with—Offence.*

A subpœna requiring a person to attend either at the *thana* or wherever the Inspecting Officer might happen to be is not legal subpœna as it does not require attendance at a definite place and an omission to comply with it is not an offence punishable under s. 174, Penal Code. **A** HUKUM SINGH *v.* EMPEROR, 24 A. L. J. 536; 27 Cr. L. J. 697; L. R 7 A. 132 **889**

——— **s. 193.** *See* PENAL CODE, 1860, s. 381 **881**

——— **s. 201.** *See* EVIDENCE, CIRCUMSTANTIAL **901**

——— **s. 216B**—*False information to Police, whether harbouring.*

A person giving false information to the Police with respect to a proclaimed offender or warning the latter of the approach of the Police so that he might make good his escape is guilty of the offence of harbouring. **L** TARA SINGH *v.* EMPEROR, 7 L. 30; A. I. R. 1926 Lah. 206; 27 Cr. L. J. 563 **131**

——— **ss. 225B, 332, 333**—*Arrest by Police Officer—Right to resist illegal arrest.*

Even if the action of a Police Officer in arresting a person is wholly illegal, yet the person arrested or the persons who assist the arrested person are not entitled to use more force than is necessary for protection against illegal arrest. **S** HARDAYAL SINGH *v.* EMPEROR, 27 Cr. L. J. 628 **404**

——— **s. 300, Excep. I**—*Provocation grave and sudden.*

If a man comes home and finds a person actually misbehaving with a relation of his, there is a provocation grave and sudden and his blood can hardly be expected to cool down in the course of a few seconds. **L** DINI *v.* EMPEROR, 27 Cr. L. J. 572 **140**

——— **s. 300, Excep. 4**—*Burden of proof—Offence committed without premeditation and in heat but with hatchet—Benefit of Exception.*

The onus is on the accused to show that his case falls into one of the Exceptions to s. 300, Penal Code.

Although culpable homicide may have been committed without premeditation and in a sudden fight and also in the heat of passion upon a sudden quarrel, if it appears that the accused had used a hatchet on another unarmed man and had struck a blow on the latter's head with a hatchet splitting the skull while under no reasonable apprehension of injury to himself, he cannot claim the benefit of Exception 4 to s. 300, Penal Code. **L** KANSHI *v.* EMPEROR, 8 L. L. J. 188; 27 Cr. L. J. 566 **134**

——— **s. 302.** *See* EVIDENCE, CIRCUMSTANTIAL **901**

——— **s. 302**—*Death caused by beating—Drunkenness—Sentence.*

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Where accused who have beaten a man to death, had primed themselves with drink in order to wreak vengeance on the deceased and to beat him mercilessly, they cannot escape the penalty of death on the ground of drunkenness. **L** SHERU *v.* EMPEROR, 7 L. 50; A. I. R. 1926 Lah. 232; 27 Cr. L. J. 630 **406**

Penal Code—contd.

——— **s. 304II**—Lethal *blow—Knowledge of likelihood of causing death—Presumption.*

When a person chooses to lay about with a *lathi*, it being a *lethal* weapon, with all the force at his command, it must be presumed that he knew he was likely to cause death. **L** GHULAM MUHAMMAD *v.* EMPEROR, 27 Cr. L. J. 569 **137**

——— **ss. 332, 333.** *See* PENAL CODE, 1860, s. 225-B **404**

——— **s. 334**—*Blow, striking of, under provocation—Offence.*

It is not correct to say that a person who strikes a blow under provocation commits no offence. **L** GHASITA *v.* EMPEROR, 27 Cr. L. J. 574 **142**

——— **s. 377**—*Evidence to substantiate charge.*

Evidence to support a charge under s. 377, Penal Code, must be very convincing as it is very easy to bring such a charge but extremely difficult to refute it. **L** EMPEROR *v.* SAIN DASS, 8 L. L. J. 180; 27 Cr. L. J. 593 **257**

——— **ss. 381, 34, 193, 466**—*Evidence Act (I of 1872), ss. 30, 124—Removing Official file from proper custody—Dishonest intention—Theft—Abetment—Destruction and mutilation of documents.*

A correspondence file belonging to Government was in the custody of a *mamlatdar* who handed it over for safe custody to a clerk. The latter kept the file at his house, but while he was away accused No. 1, a *karkun* in the *mamlatdar's* office, obtained the key of the house from the person with whom it had been left, and removed the file. Accused No. 1 then accompanied accused Nos. 2 and 3, who were interested in the property to which the file related, to the house of their Pleader who had been retained to prepare an appeal and for that purpose wanted to inspect the file. Accused No. 1 handed over the file to accused Nos. 2 and 3 at the Pleader's house and himself went away. He returned in the evening and having obtained the file from accused Nos. 2 and 3 replaced it in the house of the clerk. It was subsequently discovered that during the interval that the file had been in the possession of accused Nos. 2 and 3 one document had been abstracted and some others had been mutilated. The file contained documents of which accused Nos. 2 and 3 were not entitled to have inspection:

Held, (1) that accused No. 1 having removed the file from the possession of the clerk who had the custody of it on behalf of the *mamlatdar*, without the consent of the *mamlatdar* with intent to cause wrongful gain to accused Nos. 2 and 3, he was guilty of an offence under s. 381 of the Penal Code;

(2) that accused Nos. 2 and 3 were guilty of an offence under ss. 381/109 of the Penal Code;

(3) that the inference was that the removal and the mutilation of the documents had been effected by one or both of accused Nos. 2 and 3;

(4) that even if it was effected by one of them in the presence of the other in furtherance of the common intention of both of them, s. 34 of the Penal Code was applicable and both of them were guilty of offences under ss. 193 and 466 of the Penal Code. **B** VALLABHRAM GANPATRAM *v.* EMPEROR, 27 Bom. L. R. 1391; A. I. R. 1926 Bom. 122; 27 Cr. L. J. 689 **881**

——— **s. 402**—*Assemblage of accused—Preparation for dacoity.*

Where the accused, belonging to different villages are found at a lonely well at a long distance from their homes fully armed and equipped for committing dacoity, a conviction under s. 402, Penal Code, is maintainable. **L** WARYAM SINGH *v.* EMPEROR, 27 Cr. L. J. 605 **269**

——— **s. 409**—*Detention of money by postal servant against rules—False entries in register and false explanation—Offence.*

Detention by a postal servant of monies received by him in his capacity as such through V. P. parcels etc., for several days in violation of the postal rules, coupled with a false explanation that the monies were not received on the days on which they were actually received and false entries in his register showing that the articles were still undelivered in the Post Office, constitutes an offence under s. 409, Penal Code. **Pat** CHANDRA PRASAD *v.* EMPEROR, (1926) Pat. 190; 27 Cr. L. J. 611; A. I. R. 1926 Pat 299 **355**

——— **s. 409**—*Public servant, retention of Government money by—Money not included in balance—Misappropriation—Failure to give excess money to successor-in-office—Money, retention of, pending scrutiny of accounts.*

The fact that the accused a public servant, does not include the money received by him in his capacity as a public servant in the cash balance is a very strong *prima facie* evidence of misappropriation on his part. Failure to hand over the money due in his hand to his successor-in-office is a further proof of his guilt.

A public servant is not entitled to retain, pending the scrutiny of accounts, any money due to the Government in his hand in excess of what the registers show to be due. If he removes the balance he is guilty of misappropriation even if he removes it to godown belonging to the Government. **O** EMPEROR *v.* DAYA SHANKAR, 3 O. W. N. 382; 27 Cr. L. J. 589 **205**

——— **s. 411**—*Receiving stolen property—Possession of accused.*

The accused, along with several others, was found in the house of one of them, quarrelling over the division of certain stolen property, which consisted of packages of cloth which had been cut through and were lying open in the house:

Held, that the accused was in possession of the property for purposes of s. 411 of the Penal Code. **Pat** PARMESHWAR DAYAL *v.* EMPEROR, (1926, Pat. 139; 27 Cr. L. J. 657; A. I. R. 1926 Pat. 316; 7 P. L. T. 567 **705**

——— **s. 411**—*Stolen ornament found in house occupied by accused and his mother—Offence.*

Where an ornament called *kangni* stolen in a burglary is found by the Police in a jar of chillies in a house occupied by the accused and his mother and there is nothing to show that he put it there or knew that it was there, an offence under s. 411, Penal Code, has not been established. **L** EMPEROR *v.* CHHOTU, 27 Cr. L. J. 717 **909**

——— **s. 417**—*Taking thumb impression—Offence.*

Mere taking thumb impressions on a blank piece of paper may be a preparation to cheat but unless something is written on it, it cannot amount to cheating or attempt to cheat. **Pat** SHEO PRASAD *v.* EMPEROR, (1926) Pat. 110; A. I. R. 1926 Pat. 267; 27 Cr. L. J. 609 **353**

——— **s. 420**—*Sale of property—Consideration money, balance of, not paid—Offence.*

Where the complainant's case is that it was agreed between him and the accused that the consideration money for the sale of property was to be paid by the accused after execution of sale-deed and that the complainant had executed the sale-deed and had

Penal Code—concld.

got it registered but that the accused refused to pay the money, the dispute is purely of a civil nature and no offence under s. 420, Penal Code, is made out. C RAM CHANDRA DE *v.* GAJENDRA NATH DAS, 43 C. L. J. 287; 27 Cr. L. J. 588 204

——— **s. 466.** *See* PENAL CODE, 1860, s. 381 881

——— **ss. 467, 471.** *See* CR. P. C., 1898, s. 236 270

——— **s. 489-B,** *object of—"As genuine", effect of—Person selling forged note—Offence.*

The object of Legislature in enacting s. 489-B, Penal Code, is to stop the circulation of the forged notes by punishing all persons who knowing or having reason to believe them to be forged, do any act which would lead to their circulation.

A person who knowingly sells a forged note to a person who also knows it to be forged is guilty under s. 489-B, Penal Code.

The words "as genuine" in s. 489-B, Penal Code, govern only the verb 'uses' and not any other verb. L BHIKA RAM *v.* EMPEROR, A. I. R. 1926 Lah. 72; 7 L. 80; 27 Cr. L. J. 638 414

——— **s. 497**—*Adultery—Marriage, proof of—Statement of complainant, whether sufficient.*

In a prosecution for adultery the marriage must be strictly proved. For the purposes of such a prosecution the marriage cannot be held to have been proved merely by the statement of the complainant. R GOPAL *v.* EMPEROR, A. I. R. 1925 Rang. 328; 4 Bur. L. J. 107; 27 Cr. L. J. 651 603

——— **s. 499, Excep. 9**—*Defamation—Statement made by party to judicial proceeding, whether privileged—Absolute privilege, doctrine of, applicability of.*

The law of absolute privilege does not apply in India in the case of criminal prosecutions for perjury. In a prosecution for perjury, however, in respect of a statement made by a party to a judicial proceeding, the special position occupied by the party must not be lost sight of.

Parties and witnesses in all judicial proceedings are in a peculiar position and it is necessary, if their interests are to be safe-guarded, that they should be allowed to make statements freely subject to the ordinary law of perjury. Generally speaking, there would be a presumption that what they say is said *bona fide* in the protection of their own interests, and they would be protected by the provisions of the Ninth Exception to s. 499 of the Penal Code. R SYED ALLY *v.* EMPEROR, A. I. R. 1925 Rang. 360; 4 Bur. L. J. 181; 27 Cr. L. J. 648 600

Pleadings—*New plea in arguments.*

A Court is justified in rejecting a plea in argument which was not raised by the defendant in his defence. O DAWARKA *v.* SANKATHA 307

Pleadings and proof—Litigant changing position. *See* EVIDENCE ACT, 1872, s. 115 501

——— *Suit for declaration of customary right—Custom found against—Common Law right as citizen, whether can be set up.*

Where the plaintiffs who are shepherds in a village sue the defendants, the members of another community, for a declaration that they, the plaintiffs, are entitled by custom to take their procession on marriage and other festive occasions through the public streets of the village with music, dancing and torches by daylight, which they claim to be component parts of the procession itself, from time immemorial and the alleged customary right is not proved, the plaintiffs' suit must fail. Any right which the plaintiffs may have, based upon their Common Law right as citizens, must be vindicated in a separate suit.

Obiter.—Any member of the public has got the right to use a public street in any lawful manner and a declaration can be granted if he is prevented from so doing without proof of any special damage. M MUCHUMARRI MALLIAH *v.* YERRAVULU GANGANNA 226

———, *variance between.*

A party cannot be allowed to plead inconsistent facts or to give proof at variance with his pleadings. Pat JUGAL SARKAR *v.* RAJ MANGAL PRASAD, A. I. R. 1926 Pat. 187; 7 P. L. T. 747 929

Police diaries.

See (*i*) CRIMINAL PROCEDURE.
(*ii*) CR. P. C., 1898, ss. 162 and 172.

Possession as notice. *See* TRANSFER OF PROPERTY 538

——— *Land under water—Ownership.*

Possession of land under water follows ownership. C MOHENDRA NATH ROY *v.* NABADIWIP CHANDRA NANDY, 43 C. L. J. 180 5

Practice.

See (*i*) CIVIL PROCEDURE.
(*ii*) CRIMINAL PROCEDURE.
(*iii*) EVIDENCE.

——— *Witnesses in attendance—Court's duty to examine.*

A Court is not justified in refusing to examine a witness who is present in Court and for whose examination no adjournment is asked for. L AMAR SINGH-DHOOMI MAL *v.* JAI DIAL KAPUR & SONS 21

Pre-emption—*Sale-deed containing wrong number of plot—Execution of another deed after 4 years containing correct number—Subsequent deed, whether sale.*

A plot of land was transferred by sale-deed. Subsequently another deed was executed after 4 years stating that the plot of land in the first deed was misdescribed and that the correct number was mentioned in the later deed. In a suit for pre-emption on the basis of the second deed:

Held, that it was not a sale-deed and the suit was barred by time. O SHEO NARAIN *v.* KHADERU, A. I. R. 1926 Oudh 475 378

——— *Sale of nine items of properties by one deed—Pre-emption as to one—Partial pre-emption.*

Where nine items of property are sold to nine different persons for different considerations by one set of vendors by execution and registration of a single deed of sale, there are in effect nine different sales and a suit for pre-emption with regard to one of them cannot be resisted on the ground of partial pre-emption. A CHUNNI SINGH *v.* LAKSHPAT SINGH, 24 A. L. J. 534 320

——— **suit**—*Pre-emption price exceeding Court's jurisdiction—Decree.*

Where in a suit for pre-emption regarding revenue paying land the value for jurisdiction, *i. e.*, 30 times the proportionate land revenue does not exceed the pecuniary jurisdiction of the Court, but the amount payable by the pre-emptor exceeds its jurisdiction it can hear the suit but cannot pass a decree. However, if such a suit is transferred to another Court which has jurisdiction to pass the decree, the latter will pass the decree and not dismiss the suit on the ground that the first Court had no jurisdiction to entertain the suit. L ARSHAD ALI *v.* BICHHA LAL, 8 L. L. J. 58 125

Presidency Towns Insolvency Act (III of 1909), s. 15—*Insolvency Rules of Calcutta High Court, rr. 74, 150—Petition by debtor—Procedure—Petition by partner—Debts due by firm, whether can be entered in list—Debtor, whether bound to hand over books to Official Assignee before adjudication—Practice.*

Rule 74 of the Insolvency Rules of the Calcutta High Court provides that where a petition for adjudication is filed by a debtor the Court shall forthwith make an adjudication order thereon. The rule contemplates that if the petition is in form in the sense that the Court has jurisdiction and the conditions prescribed by the Act have been fulfilled, the order shall go as a matter of course.

It is open to a partner in a firm to apply to be adjudicated an insolvent and in such a case he would be right in setting out in his petition the debts due by his firm, for the reason that under the ordinary law they would be debts for the full amount of which he would be personally liable. The mere fact, therefore, that such debts are entered in the petition would not mean that the petition is made on behalf of the firm.

There is no rule requiring an unwilling debtor to hand over his books to the Official Assignee before he is adjudicated an insolvent.

A practice founded upon the willingness of debtors cannot be regarded as being a settled practice obligatory upon persons who do not wish to comply with it.

On a petition for adjudication it is open to the Court to make a reference to external matters, provided they are relevant, but if an order is to be founded upon them they should be duly brought to the notice of the parties and the parties given an opportunity of furnishing an explanation. **O** *In re* Gopaldas, 30 C. W. N. 173; A. I. R. 1926 Cal. 640 **793**

——— **s. 101**—*Party aggrieved—Order of Court confirming sale of insolvent's property by Official Assignee—Appeal.*

An insolvent has, after adjudication, no legal interest in his estate and has no right to interfere in the realisation of that estate and cannot be treated as aggrieved by any order passed in the course of such realisation.

The insolvent, therefore, has no right of appeal against an order by Court confirming a sale of part of the estate which was originally his and subsequently vested in the Official Assignee. **M** Hari Rao *v.* Official Assignee, 50 M. L. J. 358; 23 L. W. 599; (1926) M. W. N. 364; A. I. R. 1926 Mad. 556; 49 M. 461 **642**

Presumption. *See* Evidence Act, 1872, s. 114 **361**

Principal and agent. *See* Contract Act, 1872, ss. 140, 141 **575**

——— *Agency, termination of.*

Where a deadlock has been created owing to the conduct of the members of the Firm of Managing Agents, the Directors of the Company are justified in the interests of the Company to put an end to contract of managing agency. **C** Gus Alexander Mackenzie *v.* Himalaya Assurance Co., 30 C. W. N. 440; A. I. R. 1926 Cal. 745 **381**

——— *Agent acting to best of his capacity, whether liable for negligence.*

Where one person is employed by another to do a certain kind of work with full knowledge of his qualifications and the latter does the best that he can with respect to the work entrusted to him, there can be no question of negligence unless he does something which any reasonable man with his qualifications would have omitted to do. **M** Purasawalkam Hindu Janopakara Saswatha Nidhi Ltd. *v.* Kuddus Sahib, 23 L. W. 476 **860**

——— Suit for account—Negligence and misconduct alleged—Cause of action, where arises. *See* C. P. C., 1908, s. 20 **287**

Privy Council—*Arguments urged for first time—Practice.*

The Privy Council has long established it for itself as a principle of wisdom and prudence that it should be very chary of entertaining an argument which has not been sifted in the Courts below especially when the question to be decided concerns the diversified and complicated Indian Law as to tenure of land. **P. C.** Secretary of State for India *v.* Jyoti Prashad Singh Deo, A. I. R. 1926 P. C. 41; 30 C. W. N. 745; 24 A. L. J. 761 **974**

——— *Variation of its own orders—Practice—Civil Procedure Code (Act V of 1908), O. XLV, r. 15 (1)—Failure of party entrusted with order to lodge it—Remedy.*

It is only in exceptional circumstances that Privy Council varies its own orders.

If the party to whom an order of the Privy Council is entrusted delays or refuses to lodge it in the High Court concerned, the remedy of the person desiring execution of the order is an application under r. 15 (1), O. XLV, C. P. C., to the High Court for a summary order on the defaulting party to lodge the order and not a petition to the Privy Council for variation of the previous order. **P C** Sourendra Mohan Sinha *v.* Hari Prasad Sinha, A. I. R. 1926 P. C. 31; 5 Pat. 461; (1926) M. W. N. 492; 24 L. W. 84 **813**

Probate and Administration Act (V of 1881), *applicability of, to unprobated mufassal Will.*

An executor appointed by a Will in the *mufassal* of the Madras Presidency to which the Hindu Wills Act does not apply, has vested in him the estate of the testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain Probate of the Will. **M** Katreddi Ramiah *v.* Kadiyala Venkata Subamma, 50 M. L. J. 308; (1926) M. W. N. 297; 49 M. 261; A. I. R. 1926 Mad. 434 **83**

——— **s. 20**—*Civil Procedure Code (Act V of 1908), s. 16—Property situate in Burma and at Ludhiana—Probate taken out in Burma—Suit for administration of estate—Jurisdiction.*

A suit for a declaration that the Probate proceedings shall not affect the plaintiffs and for the administration of the estate is not a claim for the determination of any right to or interest in immoveable property within the meaning of s. 16, C. P. C., and the mere fact that part of the property is situate at a particular place does not confer jurisdiction on the Court at that place. Such a suit would be entertained by the Court at the place where the Probate is taken out. **L** Shiv Ram *v.* Ishri **1046**

——— **s. 21**—*Administration, grant of—Applicant claiming under Will—Administration completed—Application, whether to be rejected—Person challenging Will, position of—Grant of Letters—Title, effect on.*

The fact that an applicant for Letters of Administration claims under the Will, but his claim is unsustainable, would not deprive him of his right to administer the estate if he is otherwise entitled to the grant under s. 21 of the Probate and Administration Act.

Probate and Administration Act—concld.

The distinction between an application for Letters of Administration and for Letters of Administration with the Will annexed is important and should not be overlooked.

It is of paramount necessity that the Will should be established and the establishment of the Will is one of the functions of the Probate Court, and, in the case of an application for Letters of Administration with the Will annexed, the Probate Court cannot decline to exercise that function on the ground that there is nothing to be administered.

A person who challenges the Will as a forgery is not entitled to make an application for Letters of Administration with the Will annexed.

A grant of administration does not decide any question of title. **Pat** KAMALA PRASAD *v.* MURLI MANOHAR, (1926) Pat. 118; A. I. R. 1926 Pat. 356 **750**

——— **s. 50,** *scope of—Withdrawal of letters—Courts, inherent powers of.*

Section 50 of the Probate and Administration Act is exhaustive and not merely illustrative. But apart from that section, when the condition on the fulfilment of which alone the grant of letters can be made is not fulfilled, the Court has inherent power to withdraw the order for grant so as to prevent an abuse of its process. **L** PREM SUKH *v.* PARBATI, 7 L. 270; A. I. R. 1926 Lah. 352 **329**

——— **s. 77**—*Executor doubting genuineness of Will—Renunciation—Executorship, when may be accepted or renounced—Court's powers to refuse Probate on ground of executor's incapacity.*

Until the validity of a Will is established, an executor appointed thereunder is not bound to accept or renounce the executorship.

Where in proceedings for grant of Probate, a person appointed as executor filed a statement doubting the genuineness of the Will but expressed his willingness to act as executor if the Court considered the Will genuine and granted Probate, it cannot be said that he renounced the office of executor.

A Court cannot refuse an executor Probate because it considers him unfit to be executor unless the unfitness is of the nature of legal incapacity, that is, minority or unsoundness of mind. **M** THOPPAI VENKATARAMIER *v.* GOVINDARAYALIER, 23 L. W. 462; (1926) M. W. N. 323; A. I. R. 1926 Mad. 605 **73**

Provincial Insolvency Act (V of 1920), s. 4—*Insolvency Court, powers of, to go into question of title.*

By the Court—Under s. 4, Provincial Insolvency Act, full power is given to the Insolvency Court to decide not only all questions of title or priority, but also of any nature, whatsoever, whether they involve matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice. Therefore, there is nothing to prevent the Insolvency Court from declaring, even though it be at the instance of the Receiver, that certain property belongs to the insolvent and that any other person who is putting forward a claim to it is not really entitled to it. **A** HARI CHAND RAI *v.* MOTI RAM, 24 A. L. J. 495 **429**

——— **ss. 4, 5.** *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 56 **506**

——— **s. 5**—*Insolvency Court, power of, to review orders—Creditor who has tendered proof of debt, right of, to appeal.*

Provincial Insolvency Act—1920—contd.

By s. 5, Provincial Insolvency Act, an Insolvency Court is invested with the powers and jurisdiction to review its own orders in circumstances laid down in O. XLVII, C. P. C.

A creditor who has tendered proof of his debt is a person aggrieved by an order refusing to review an annulment of an adjudication and is, therefore, entitled to appeal against the order. **M** CHALLA ABBIREDDI *v.* CHALLA VENKATAREDDI, (1926) M. W. N. 256; 23 L. W. 644; 51 M. L. J. 60 **351**

——— **s. 20.** *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 52 **126**

——— **s. 28**—*Joint Hindu family—Insolvency of father—Property vesting in Receiver.*

Where a father in a Hindu family governed by the Mitakshara Law has been declared an insolvent, the Receiver is entitled to sell not only the share of the father that will fall to him on partition but the entire property in his hand belonging to the whole family consisting of himself and his sons. **A** OM PRAKASH *v.* MOTI RAM, 24 A. L. J. 417; A. I. R. 1926 All. 447 **175**

——— **ss. 37, 43**—*Insolvent's failure to apply for discharge—Annulment of adjudication—Protection of creditors, provision as to.*

A Court has no option but to annul adjudication where an insolvent fails to apply for an order of discharge within the time specified by the Court. But with a view to protect the creditors the Court should pass an order under s. 37 of the Provincial Insolvency Act vesting property of the debtor in a person appointed by it. **L** ROOP NARAIN *v.* KING KING & Co., A. I. R. 1926 Lah. 370 **234**

——— **ss. 52, 20**—Interim *Receiver—Delivery of property.*

An application under s. 52 of the Provincial Insolvency Act to the Court executing a decree against the judgment-debtor to deliver property to the Receiver can only be a valid application if the Receiver has been clothed by the Insolvency Court with powers to take possession of the insolvent's property.

Where the *interim* Receiver appointed under s. 20 of the Provincial Insolvency Act is not clothed with any such powers, the Court has no jurisdiction to hand over the property to the Receiver.

Quære.—Whether the term "Receiver" used in s. 52 of the Provincial Insolvency Act is restricted to a Receiver appointed after the adjudication, or will apply to an *interim* Receiver appointed under s. 20 of the Act and whether the application under that section is restricted to one by the Receiver or may be made by the insolvent or any one else. **M** ARUNACHELLAM CHETTIAR *v.* NAYANNA NAICKER, 23 L. W. 513; A. I. R. 1926 Mad. 606 **126**

——— **s. 53**—*Two years' limitation, starting point of.*

The limitation of two years prescribed under s. 53, Provincial Insolvency Act, is applicable to all cases where the transfer when originally made was a good transfer of property though it was subject to an option of avoiding it to be exercised by the receiver, that is to say, to a transfer which is only voidable and not void.

Where an alienation has been effected by a registered deed the period of two years under s. 53, Provincial Insolvency Act, is to be counted from the date of execution and not of registration of the deed.

Per *Mukerji, J.* contra.—An Insolvency Court has no jurisdiction to entertain an application of the Receiver

Provincial Insolvency Act—1920—contd.

to declare an ostensible transfer void if the transaction took place more than two years before the adjudication. **A** HARI CHAND RAI *v.* MOTI RAM, 24 A. L. J. 495 **429**

——— **ss. 53, 54**—*Fraudulent preference, intention necessary to constitute—Execution of mortgage by debtor—Act of insolvency—Adjudication, order of, as insolvent—Application to set aside mortgage under s. 53—Mortgagee, whether bound by prior order—*Bona fides, *proof of—Mortgage declared void—Prior genuine mortgage-debts, discharge of, by mortgagee—Rights of mortgagee.*

In order to make out that an alienation by an insolvent amounts to fraudulent preference under s. 54, Provincial Insolvency Act, it must be shown that the insolvent had the dominant idea of cheating his other creditors by preferring particular creditors.

Where at the instance of a creditor, a debtor is adjudicated an insolvent on the ground that a mortgage executed by him amounts to an act of insolvency, on an application by the petitioning creditor under s. 53 of the Provincial Insolvency Act to have the mortgage declared void as against the Official Receiver, it is not open to the mortgagee to attack the finding that the execution of mortgage was an act of insolvency.

To attract the operation of s. 53 of the Provincial Insolvency Act, it is not in terms necessary that the document should be to defeat or delay creditors. It is sufficient if it is a transfer not in good faith or not for valuable consideration. It is, therefore, open to the mortgagee to escape the operation of the section by showing good faith and payment of valuable consideration.

A document cannot be partly in good faith and partly not.

The general principle applicable to cases under s. 53 of the Provincial Insolvency Act is this:—The assignment, as an assignment is void; but, for money genuinely paid in discharge of genuine debts, the alienee will stand in the shoes of those whom he has paid. In the case of a mortgage-debt paid off, the transfer will not operate as a mortgage at all, not even to the extent of the amount paid, but the alienee will be entitled to rank in the schedule of secured creditors to the extent of his payment. **M** RAMASWAMI AIYANGAR *v.* OFFICIAL RECEIVER, 50 M. L. J. 448; (1926) M. W. N. 419; 23 L. W. 734; A. I. R. 1926 Mad. 672 **535**

——— **ss. 56, 415**—Ad interim *Receiver, appointment and powers of—Receiver in insolvency, duty of Court to appoint, before realisation of property—Removal of possession of property from person other than insolvent—Proper authority—Procedure.*

The Insolvency Court before taking any action under s. 56 (3), Provincial Insolvency Act, in the way of realisation of property must appoint a Receiver and that means a Receiver in insolvency and not a Receiver *ad interim.* The power to remove property from the possession of any one other than the insolvent is reserved to the Court.

The Court can before adjudication depute an *ad interim* Receiver to collect evidence as to the assets of the insolvent but such a Receiver cannot pass a final order in a claim by a creditor to a property.

Section 4 read with s. 5 of the Insolvency Act requires a Court in matters of forcible realisation of property to act with the procedure and with the judicial caution of a Civil Court. **Pat** GOBARDHAN DAS *v.* JAGAT NARAIN, (1926) Pat. 134; A. I. R. 1926 Pat. 291 **506**

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——— **s. 75 (4)**—*Receiver's report, confirmation of—Consent of parties—Jurisdiction.*

The District Judge has no jurisdiction to confirm the Receiver's report except by consent of parties until 21 days have elapsed within which the aggrieved creditors can apply to the Court for the reversal or modification of the act or decision by which they are aggrieved. **C** GOBINDA CHANDRA MAJUMDAR *v.* HARI CHARAN MARWARI, A. I. R. 1926 Cal. 826 **332**

Provincial Small Cause Courts Act (IX of 1887), s. 15 (2)—*Vendee, default by, to pay* kist—*Payment by vendor in whose name* patta *continues to stand—Suit by vendor for recovery of amount, whether cognisable by Small Cause Court—Plaintiff, right of, to personal decree—*Kist *for more than three years, whether recoverable.*

Where a vendee undertook to pay the revenue payable on the land and committed default therein, and the vendor, in whose name the *patta* continued to stand, was compelled to pay, in a suit by the vendor to recover the money in a Small Cause Court:

Held, (1) that the plaintiff was entitled to a personal decree;

(2) that the suit was cognisable by the Small Cause Court;

(3) that plaintiff was entitled to recover only three years' *kist.* **M** PUTHALATH UKKARAN NAIR *v.* PONNIGARI UKKARAN NAYAR, (1926) M. W. N. 291; A. I. R. 1926 Mad. 633 **1046**

——— **s. 23**—*Transfer of suit to Original Side—Civil Procedure Code (Act V of 1908), ss. 96, 102—Appeal, second.*

A small cause suit when transferred to the original side under s. 23 does not remain a small cause suit though it remains of a small cause nature. An appeal, therefore, lies against the decree in such a case, but where the subject-matter of the suit does not exceed Rs. 500, a second appeal is incompetent. **M** MIKKILI ANKAYA *v.* ALLAPARTI RATHAMMA, 23 L. W. 518; A. I. R. 1926 Mad. 622 **77**

——— **s. 25**—*Appeal, right of—Revision, whether lies.*

The exercise of the right of interference in revision under s. 25 of the Provincial Small Cause Courts Act does not depend upon the question whether an appeal lies or not, but it is a matter for consideration whether when there is a speedy remedy open to a party by way of appeal, he should be allowed to come up in revision and drag the opposite party to the High Court where the expense of engaging a Counsel must be greater than in the *Mofussil.* **A** BANWARI LAL *v.* SHALIMAR PAINTS COLOUR **790**

——— **s. 25**—*Civil Procedure Code (Act V of 1908), O. XX, r. 4—Judgment of Small Cause Court containing points for determination—Revision, interference in.*

A judgment of the Court of Small Causes which contains points for determination and shows that the Judge has applied his mind to the evidence and has come to a perfectly intelligent finding cannot be upset in revision. **O** CHOTKAN *v.* SITA RAM, A. I. R. 1926 Oudh 478 **397**

——— **Sch. II, Art. 31**—*Suit for damages for use and occupation, nature of.*

A suit for damages for use and occupation based on an allegation of permissive occupation is a suit of

Provincial Small Cause Courts Act—concld.

small cause nature and does not come under Art. 31, Sch. II, of the Provincial Small Cause Courts Act. M MIKKILI ANKAYA *v.* ALLAPARTI RATHAMMA, 23 L. W. 518; A. I. R. 1926 Mad. 622 77

——— **Sch. II, Art. 41.** *See* C. P. C., 1908, s. 102 949

Public street, use of. *See* PLEADINGS AND PROOF 226

Punjab Courts Act (VI of 1918), s. 41—*Second appeal—Neglect—Finding of fact.*

The finding of the lower Appellate Court that there was wilful neglect on the part of the appellant is a finding of fact and cannot be disturbed in second appeal. L B. B. & C. I. RY. *v.* MUL CHAND-SANWAL DAS 348

Punjab Excise Act (I of 1914), s. 61 (1), *offence under—Criminal Procedure Code (Act V of 1898), s. 562, application of.*

In an offence under the Excise Act it is necessary to impose a sentence which would have a deterrent effect and a mere sentence of fine will not do.

Ordinarily a person convicted under s. 61 (1), Punjab Excise Act, is not entitled to the benefit of s. 562, Cr. P. C., though the section is not only applicable to offences under the Penal Code but also to offences punishable under a special or a local Act. L EMPEROR *v.* PIARA SINGH, 7 L. 32; A. I. R. 1926 Lah. 166; 27 Cr. L. J. 561 129

Punjab Municipal Act (III of 1911), s. 131—*Reservoir, demolition of—Damages—Municipality preventing re-building of reservoir—Good faith—Perpetual injunction, issue of.*

Under s. 131 of the Municipal Act, a Committee cannot order the demolition of a reservoir, it can only have it filled up.

Where, however, a Municipality has acted in good faith in having a reservoir demolished, a plaintiff is not entitled to an injunction to the effect that the Committee should be perpetually restrained from preventing him from re-building his reservoir. L NATHU RAM *v.* MUNICIPAL COMMITTEE, MUKTSAR, 8 L. L. J. 162 192

Punjab Pre-emption Act (I of 1913), s. 15—*Pre-emptor having two qualifications higher and lower—Vendee with only higher qualification—Pre-emption.*

Where the pre-emptor and the vendee both possess the same higher qualification, the possession of an additional inferior qualification by the pre-emptor does not entitle him to a decree for pre-emption against the vendee. L RAGHA RAM *v.* DEWA SINGH, A. I. R. 1926 Lah. 300; 7 L. 306 253

Punjab Tenancy Act (XVI of 1887), s. 77—*Suit for possession of land—Defendant's plea as to right of occupancy—Jurisdiction.*

Where in a suit for possession on the allegation of defendant's trespass, it becomes necessary on the plea of the defendant that he is an occupancy tenant, to adjudicate as to the status of the defendant as occupancy tenant, the jurisdiction of the Civil Court is ousted and the suit becomes one cognizable by a Revenue Court only. L NAWAB *v.* ARURA 514

Railway Company. *See* CARRIAGE OF GOODS.

Railways Act (IX of 1890), s. 7—*Suit for damages against Railway Company—Loss of goods—Failure to put padlocks on waggons—Wilful neglect.*

A Railway Company cannot be held guilty of wilful neglect by not putting on padlocks on the waggons immediately on hearing that thefts were frequent between two Railway Stations on running trains. O JAGANNATH PRASAD *v.* AGENT, G. I. P. RY. CO., A. I. R. 1926 Oudh 468 644

——— **s. 72**—*Goods consigned to Railway for carriage under Risk Note Form "B"—Non-delivery—Damages, suit for—Loss, proof of—Burden of proof.*

In a suit to recover damages for non-delivery of goods consigned to a Railway Company for carriage under Risk Note Form "B", the burden of proving that the case falls within the exception contained in the Risk Note, *viz.*, that the goods were lost owing to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants etc., is upon the plaintiff. But before the plaintiff is called upon to prove that the goods were lost by wilful neglect or by theft, it must be shown that the goods have been lost. It is for the Railway Administration to prove in the first instance that the goods have been lost, and it will be then for the plaintiff to show that the loss was due to the wilful neglect of, or theft by, Railway servants.

Except in cases where the plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the Risk Note which *pro tanto* exempt it from liability unless and until evidence has been adduced which satisfies the Court that a loss has occurred, and the loss must be a loss of the goods by the Railway and not merely a loss to the consignor. C GOPIRAM BEHARIRAM *v.* AGENT, E. I. R., 30 C. W. N. 209; A. I. R. 1926 Cal. 612 762

——— **s. 72**—*Risk Note Form H—Time covered by note—Loss of consignment, meaning of—Wilful neglect, meaning of—Onus.*

Risk Note Form H limiting the liability of Railway Administration not only covers the time of actual transit but covers the whole period during which the goods remain with the Railway.

When the goods in the custody of the Railway become rotten and are destroyed under the orders of the Station Master, it must be said that the owner has suffered loss of the whole consignment.

A person is said to be guilty of wilful neglect when he intentionally and of set purpose does something which ought either to be done in a different manner or not at all or omits to do something which ought to be done.

The onus of proving wilful neglect lies upon a plaintiff suing a Railway for compensation for loss of goods consigned under a Risk Note. L JAGAN NATH-BAIJ NATH *v.* SECRETARY OF STATE FOR INDIA 173

——— **s. 113**—*Passenger travelling without ticket—Penalty, suit for, recovery of, whether maintainable in Civil Courts.*

The general rule of law (or rather of construction) is that where a general obligation is created by Statute and a specific statutory remedy is provided, that statutory remedy is the only remedy.

A suit by a Railway Company to recover from a passenger who has lost his season ticket, the ordinary fare plus excess charge as provided by s. 113 of the Railways Act, being a suit for recovery of a statutory penalty created by the said Act, and being unknown to Common Law is not entertainable by a Civil Court. The penalty can be enforced only by following the procedure laid down in the said Act. B BHIMJI N. DALAL *v.* B. B. & C. I. R. Co., 28 Bom. L. R. 443; 50 B. 215; A. I. R. 1926 Bom. 266 742

Ramgarh raj. *See* Chhota Nagpur and Ramgarh Raj 1007

Registration, *whether notice.*

The mere registration of a deed under Registration Act is not *per se* constructive notice of the transaction. L Jhanda Singh *v.* Harnam Singh 75

Registration Act (XVI of 1908), s. 3. *See* Registration Act, 1908, s. 35 560

——— **s. 17**—*Compromise petition presented to Executing Court—Compromise dealing with matters outside decree—Registration—Claim under compromise, how to be enforced.*

A compromise petition presented to the Executing Court dealing with matters under the decree as well as extraneous to the decree does not require compulsory registration even so far as it relates to the latter.

Where a compromise presented to a Court deals with a liability under a decree as well as a liability independent of it, the former can be enforced by a proceeding in execution and the latter by means of a separate suit. A Sital Prasad Singh *v.* Janki 210

——— **s. 17 (1) (a)**—*Gift deed, registration of.*

Every instrument of gift of immoveable property requires compulsory registration irrespective of the value of the property conveyed by the instrument. L Maula Bux *v.* Hafiz-ud-din, 8 L. L. J. 156; A. I. R. 1926 Lah. 372 7

——— **s. 17 (1) (b)**—*Transfer of Property Act (IV of 1882), s. 59—Evidence Act (I of 1872), s. 91—Suit for recovery of possession of immoveable property—Allegation that possession was given to defendant as security for advance of Rs. 100 or upwards—Oral evidence, admissibility of.*

Where a plaintiff seeks to recover possession of immoveable property on the allegation that possession of the property was given to the defendant as security for a loan of Rs. 100 or upwards, but without the execution of any registered instrument, oral evidence is not admissible to prove the transaction alleged by the plaintiff. R Maung San Min *v.* Maung Po Hlaing, A. I. R. 1925 Rang. 291; 4 Bur. L. J. 118; 4 R. 1 567

——— **ss. 17 (1) (b), 49**—*Construction of document—Compromise recognising person as successor, effect of—Annuity created and charged upon estate—Registration, whether necessary.*

A petition of compromise recited that after the death of the applicant the respondent shall be her representative and successor and provided that so long as the estate in dispute was not transferred to the respondent on behalf of the applicant, a certain sum of annuity shall by monthly instalments ever remain payable from the said estate to the respondent, his heirs and representatives on behalf of the applicant, her heirs and representatives and that the said estate shall be liable for payment of the said annuity :

Held, (1) that upon a proper construction of the compromise the respondent was to succeed the applicant only in the event of a transfer being made by her in his favour either by way of gift *inter vivos* or by bequest and that so long as the estate did not vest in the respondent in either of these ways he was entitled to receive the annuity and in the event of his dying before the happening of that contingency his heirs and representatives would be entitled to the sum ;

(2) that the compromise was an instrument of the nature described in s. 17 (1) *(b)* of the Registration Act and was compulsorily registrable and not being registered could not be received in evidence of any transaction affecting the estate. O Sakina Begum *v.* Ali Haider 1039

——— **ss. 35, 87, 3**—*Registration of document—*

Registration Act—concld.

Death of one of two executants—Admission of execution by surviving executant and widow of deceased executant—Registration, validity of—"Representative", definition of, whether exhaustive.

One of the two executants of a deed died before the deed could be registered. After his death a fresh clause was added to the deed giving a more detailed description of the properties to which the deed referred. This fresh clause was signed by the surviving executant and by one of the widows of the deceased executant, who signed as the guardian of the sons of the deceased who were infants and whose own mother was also alive. The document was then registered on an admission of execution by the surviving executant and the widow of the deceased executant who had signed the additional clause :

Held, (1) that the widow of the deceased who had signed the additional clause was a representative of the deceased executant within the meaning of s. 35 of the Registration Act and that the registration was, therefore, valid ;

(2) that even if the widow was not a representative of her deceased husband within the meaning of s. 35 the error of the registering officer in accepting her as such was only a defect in the procedure which was not sufficient to invalidate the registration.

The definition of the word "representative" as given in s. 3 of the Registration Act is not exhaustive. B Dattatraya Keshav Naik *v.* Gangabai Narayan Naik, 27 Bom. L. R. 1334; A. I. R. 1926 Bom. 137 560

——— **s. 49**—*Document reciting terms of mortgage, admissibility of, without registration.*

Where contemporaneously with the execution of a pro-note, the lender wrote a letter stating, "please retain the title-deeds of the undermentioned property as equitable mortgage of title-deeds for the amount of pro-note of this day" :

Held, that the document contained the terms of the arrangement under which the loan was made and was inadmissible in evidence without registration to create a valid mortgage. M Nageswara Iyer *v.* Alagu Srinivasa Iyengar, 23 L. W. 675; A. I. R. 1926 Mad. 743 427

——— **s. 74**—*Document ordered to be registered on payment of penalty—Requirements of law, meaning of.*

Where a document is ordered to be registered by the Registration Officer on payment of certain penalty, failure to pay such penalty is a non-compliance with the requirements of law as contemplated by s. 74 of the Registration Act. L Dulo *v.* Muhammad Nathu 251

——— **s. 87.** *See* Registration Act, 1908, s. 35 560

Religious endowment. *See* C. P. C., 1908, s. 92 695

Religious Endowments Act (XX of 1863), s. 14—*Temple Committee—Breach of trust—Trustee, appointment of—Undischarged insolvent removed from Government service, whether can be appointed.*

An insolvent ought not to be appointed to a position of trust since a necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people.

Where persons in a fiduciary capacity make an improper choice of a person to fill an office of trust, they

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must be held to have been guilty of a breach of trust and it would be wholly wrong to say that after all the choice was not improper because it has turned out that no material damage has been done to the institution through the improper appointment.

Where the members of a *Devasthanam* Committee under the Religious Endowments Act appointed to the trusteeship of a temple with an annual income of about 2 *lakhs* of rupees a retired Government servant who was an undischarged insolvent and had been removed from Government service before the age limit without a pension for flagrant violation of the Government rules regarding the conduct of public servants:

Held, that in the matter of the choice of the trustee, the members were guilty of a breach of trust in that they had not done their duty or acted reasonably in the interests of the institution of which they were in charge and they were accordingly liable to be removed by Court under s. 14 of the Act. **M** RAMANATHAN CHETTIAR *v.* KANAGASABAPATHY CHETTIAR, 23 L. W. 339; A. I. R. 1926 Mad. 500 **955**

Res judicata. *See* ALSO C. P. C., 1908, s. 11.

——— *Decision as to right of easement, whether* res judicata *in suit for title.*

The decision in a previous suit between the plaintiff and the tenants of a village declaring a right of easement in favour of the tenants over certain property claimed by the plaintiff cannot operate as *res judicata* in a suit brought against the proprietors of the village for a declaration of the right of ownership over the same property. **C** MOHENDRA NATH ROY *v.* NABADWIP CHANDRA NANDY, 43 C. L. J. 180 **5**

——— *Decision in same suit in previous proceedings —Binding force.*

A decision in previous proceedings in the same suit though not strictly speaking *res judicata* has still a binding force. **O** HAMID HUSAIN *v.* HADI RAZA, A. I. R. 1926 Oudh 420 **313**

Revenue entries, *value of,*

Where the origin of an entry in the Revenue Records is not known, the entry itself might afford an indication of the rights conferred but where the origin itself is not in doubt and where according to the entry itself the fountain-source of the rights can be traced, it is not safe to rely upon the entry itself, but recourse must be had to the origin itself to discover what the rights conferred actually are. **O** PIRTHA SINGH *v.* RAJA MOHAMMAD ALI KHAN, 13 O. L. J. 126; A. I. R. 1926 Oudh 427 **188**

Revision.
See (*i*) C. P. C., 1908, s. 115.
(*ii*) CR. P. C., 1898, s. 439.
(*iii*) PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25.
See JURISDICTION OF COURT **1**

Sale of Goods—*Breach by vendor in delivery—Series of sellers and buyers—Ultimate buyer himself vendor higher up in chain—Breach of contract with third persons—Suit by buyer for return of advance, whether maintainable.*

The *M* Mills sold certain bales of yarn to *V* and sons, who sold them to the plaintiffs, who sold to *H* who sold to *M* and sons, who sold to *A* and sons, who again sold to the defendants, who in their turn sold to the plaintiffs who paid an advance of about Rs. 7,000 towards the contract. At the time

Sale of goods—concld.

of these transactions the market was in a highly speculative state and each one of these sales was made at a profit. But at the end the market price had fallen and the goods were not worth what the various buyers had paid for them. In a suit by the plaintiffs for return of the advance with interest the defendants pleaded that the plaintiffs could not sue them because they themselves were in default higher up in the chain of buyers and sellers:

Held, that since the defendants had contracted to deliver the bales to the plaintiffs, they could not be heard to say that the plaintiffs were out of Court because they had been in default at an earlier stage of the series and broken a contract not with the defendants but with somebody else. **M** MUTHUSWAMI IYER *v.* RAMALINGA MUDALIAR, 23 L. W. 215; 50 M. L. J. 260; A. I. R. 1926 Mad. 485 **334**

Saranjam—*Nature of grant—Alienation, whether binding beyond lifetime of alienor—*Mirasi *grant, nature of.*

An alienation beyond the lifetime of the *saranjamdar*, who makes it, is not ordinarily binding on his successors.

In cases when the object of the *saranjam* grant is to make a permanent provision for the maintenance of an important family, the *saranjam* or *jagir* although ordinarily hereditary, is not alienable beyond the life of the actual holder. But in cases where the object of the grant is purely personal, *e. g.*, to ensure the rendering of certain services to the State or to reward an officer on retirement for faithful services, then the grant, in the absence of express provision to the contrary, is one of an absolute estate and alienation made by the holder for the time being is binding upon his successor. Cases of the latter type are, however, exceptions rather than the rule.

A grant of *mirasi* rights is not necessarily an alienation which will not be binding beyond the lifetime of the *saranjamdar* making the grant. **B** MADHAVRAO RASTE *v.* IMAM BAPU SHERKAR, 28 Bom. L. R. 433; 50 B. 195; A. I. R. 1926 Bom. 316 **737**

Sea Customs Act (VIII of 1878), s. 19A. *See* LIMITATION ACT, 1908, SCH. I, ART. 36 **444**

Second appeal. *See* APPEAL, SECOND.

Settlement—*Husband releasing interest in property —Widow, whether can challenge settlement.*

A widow claiming title through her husband is not competent to challenge a settlement to which her husband was a party and by which he released his interest in certain property. **P C** DADABHOY FRAMJI CAMA *v.* COWASJI DORABJI PANDAY, A. I. R. 1925 P. C. 306 **535**

Shamilat land—*Building on portion under authority of co-sharer—Suit for ejectment by some co-sharers —Demolition of building.*

A person who, either on behalf of or under the authority of one of the big proprietors and with the permission of majority of them, builds upon a portion of a *shamilat* land cannot be ordered to demolish such building at the instance of other co-owners, unless it is proved that the action of such person in building upon the joint land has caused a material and substantial injury such as cannot be remedied by partition of the *shamilat* land. **L** AMAR SINGH *v.* JAT MAL, 8 L. L. J. 313 **995**

Sovereign Act. *See* C. P. C., 1908, s. 79 **433**

Specific performance—Agreement to surrender. See Transfer of Property Act, 1882, s. 52 655

Specific Relief Act (I of 1877), s. 9—*Mortgagee in possession—Possession through tenants—Dispossession of tenants—Suit by mortgagee, whether maintainable.*

A mortgagee in possession through tenants is entitled to invoke the aid of s. 9 of the Specific Relief Act on his tenants being ejected from possession by others. N Samsherkhan v. Abdul Sattar Khan, 22 N. L. R. 30. A. I. R. 1926 Nag. 290 70

——— **s. 18 (c)**—*Contract of sale—Specific performance, suit for, against vendee—Direction to vendor to discharge encumbrances, legality of*

When a vendor undertakes to discharge the encumbrances on the property, the Court decreeing specific performance as against him can direct him to discharge the encumbrances before he is paid the consideration for the sale. M Katha Muthu Pillai v. Subramania Chettiar, 50 M. L. J. 228; (1926) M. W. N. 271; A. I. R. 1926 Mad. 569 561

——— **s. 41.**

See Evidence Act, 1872, s. 115 853

See Muhammadan Law—Guardianship and Minority 25

Stamp Act (II of 1899), ss. 32, 37, 57—*Collector's certificate—Civil Court's power to question.*

A Civil Court cannot review the certificate granted by the Collector under s. 32 of the Stamp Act and its validity cannot be challenged except under s. 57 of the said Act, on a reference by the Chief Controlling Revenue Authority. S Firm of Parsram Hirji v. Firm of Parsram Hassanand 747

——— **s. 57.** See Stamp Act, 1899, s. 32 747

Statutory tribunal, creation of. See Madras District Municipalities Act, 1920 546

Succession (Property Protection) Act (XIX of 1841), s. 14—*Idol, competency of, to make application under Act—Testate succession, application of Act to—Six months' limitation, starting point of.*

There is nothing in the Curators Act to show that its application is confined to intestate succession and does not cover cases of testamentary succession.

An idol is a juridical person and is entitled to make an application under the Curators Act. But as an idol must make an application through human agency, an application by a *shebait* on behalf of idol for possession of property under the Act is competent.

To bring the Curators Act into operation, it is sufficient that the application under the Act be made within six months of the death of the last proprietor, even though the claimant claims succession through an earlier proprietor dead more than six months before the application. C Benode Behary Saha v. Sundari Dassya, 30 C. W. N. 500; A. I. R. 1926 Cal. 779 588

Suits valuation—Redemption suits. See Mortgage 784

Suits Valuation Act (VII of 1887), s. 8. See Court Fees Act, 1870, s. 7 (iv) (d) 951

Tort—*Person in wrongful possession—Damages for loss—Burden of proof.*

The word "tort" does not occur in the law administered in India except in cases of actionable wrongs where the English Law has to be applied because no Indian Statute covers them.

After an owner who has been wrongfully dispossessed has given evidence as to the loss caused to him, it is for the defendant to prove that the loss was less than the amount claimed. N Ramcharan v. Sarwar Khan 999

Trespass. See Acquiescence 168

Trespasser, whether liable for mesne profits. See Mesne profits.

Transfer of property—*Tenant. in possession—Notice.*

In the absence of an enquiry by a transferee of tenanted premises, the open possession of the tenant over the premises is notice not only of the immediate terms of his tenancy but of collateral agreements as well. C Tiloke Chand Surana v. Beattie & Co., 29 C. W. N. 953; A. I. R. 1926 Cal. 204 538

Transfer of Property Act (IV of 1882), s. 50.

See Mortgage 538

——— **s. 52**—Lis pendens—*Applicability to surrenders of tenancy holdings—Specific performance—Agreement to surrender.*

A surrender of tenancy holding during the pendency of suit for possession by a purchaser is void against him. An agreement to surrender tenancy land at some future time cannot be specifically enforced. N Mohan v. Bodhan, 21 N. L. R. 144; A. I. R. 1925 Nag. 421 655

——— **s. 53**—*Fraud—Delay—Intention to delay—Ostensible owner, when entitled to retain property.*

It is not fraudulent to shield some particular property from being proceeded against by creditors so long as there are other properties from which the just dues of the creditors may be realized.

An intention to delay creditors is not necessarily fraudulent or unlawful.

Mere delay caused to creditors in the realization of their dues is not of any consequence so long as there has been no deprivation of the creditors in respect of their just dues.

Fraud in respect of creditors involves an element of loss or injury of a substantial character and not merely inconvenience caused by delay in the realization of what is due.

Where nothing has been done to carry the fraud or illegal purpose into effect the disposer is entitled to have the property reconveyed.

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must be effected.

Overt acts done or steps taken for the purpose of effecting the fraud or the accomplishment of the illegal purpose, if comparatively insignificant or harmless, do not disentitle the disposer to relief but a partial yet substantial execution of an illegal purpose disentitles the disposer to the assistance of the Court.

If the disposer has been frustrated in his attempt to carry out his fraudulent or illegal purpose he is entitled to the relief. C Rajani Kanta Das Gupta v. Abani Kanta Das Gupta, A. I. R. 1926 Cal. 850 33

——— **s. 53, proviso**—*Simple money-decree against judgment-debtor—Mortgage of property by judgment-debtor—Mortgagee unaware of execution proceedings—Intent to defeat creditors—Deed, validity of.*

Where a judgment-debtor executes a mortgage of his property on a date prior to the service of notice under O. XXI, r. 54, C. P. C. on him, with a view to defeat the creditor who has obtained a simple money-decree against him, but the mortgagee has no notice of the execution proceedings, the mortgage-deed cannot be declared void under s. 53 of the Transfer of Property Act. O Ram Charan v. Ragho Singh, A. I. R. 1926 Oudh 469 420

——— **s. 53**, *scope of.*

Documents which are voidable under s. 53, Transfer of Property Act, are good in law so long as the option

to avoid them is not exercised by the creditors who are defrauded. A HARI CHAND RAI *v.* MOTI RAM, 24 A. L. J. 495 **429**

———— **ss. 53, 118**—*Hindu Law—Partition, whether transfer—Distinction between transfer and exchange*—Mala fide *partition in fraud of father's unsecured debt—Decree—Son's share, whether liable to be attached.*

A partition cannot be considered a transfer in so far as it does not in effect change the rights of the parties; what it does do is to effect a change in the mode of enjoyment.

Partition in certain aspects approximates to exchange as defined in s. 118 of the Transfer of Property Act, but even so the distinction emerges that in exchange two persons owing two specific properties transfer or convey their respective ownership, one to the other.

A fraudulent partition cannot, however, be regarded as entirely divorced from the principles of s. 53 of the Transfer of Property Act.

Ordinarily property taken by a Hindu son in partition cannot be seized in execution of a decree in respect of an unsecured personal debt of the father, but it is liable for the father's debt if it be shown that the partition was made with a view to defraud or defeat creditors. N CHHOTELAL *v.* LAKHMICHAND **282**

———— **s. 55.**

The provisions of s. 55 of the Transfer of Property Act apply not only to completed sales but also to agreements of sales. M KATHA MUTHU PILLAI *v.* SUBRAMANIA CHETTIAR, 50 M. L. J. 228; (1926) M. W. N. 271; A. I. R. 1926 Mad. 569 **561**

———— **s. 55 (2)**—*Covenant for actual possession, whether implied.*

Where there is no express contract in terms in a sale-deed, a provision that the vendee shall be put into possession of the property sold cannot be said to be implied in it by virtue of s. 55, cl. (2), Transfer of Property Act. M MUTHUSAMI IYER *v.* DHARMA RAJA, (1926) M. W. N. 209; A. I. R. 1926 Mad. 495 **302**

———— **ss. 56, 81**—*Mortgage of several properties—Mining leases granted by mortgagor in respect of some properties—Mortgage-decree—Order of sale—Marshalling.*

Some out of several mortgaged properties were leased out by the mortgagors on mining leases under which the mortgagors were entitled to recover rent and royalties from the lessees. The mortgagee subsequently obtained a decree on foot of his mortgage and in execution of the decree the mortgagors obtained an order that the properties which had been leased out should first be sold in satisfaction of the decree inasmuch as it was expected that the sale of those properties would satisfy the decree completely. The lessees contended that the properties other than those leased to them should first be sold in execution of the decree:

Held, (1) that inasmuch as the mortgagors had a valuable interest, *viz.*, the right to receive rent and royalties, in the properties leased, the principle of s. 56 of the Transfer of Property Act was not applicable to the case;

(2) that the lessees having taken with full notice of the mortgage the principle of marshalling of securities laid down in s. 81 of the Transfer of Property Act was not applicable to the case;

(3) that the order directing that the leased properties should be sold first was perfectly proper in the circumstances of the case. C LOW & CO. *v.* HAZARI MULL BABU, 30 C. W. N. 183; A. I. R. 1926 Cal. 525 **786**

———— **s. 58**—*Construction of document—Sale of property with right to re-purchase—Sale or security for money.*

A person executed a sale of certain properties to another for Rs. 3,500 and on the same day obtained a counter-agreement from the vendee providing that at the end of any *fasli* before three years from date, the vendor might re-purchase the property conveyed on paying the total sale price. The property sold was worth very much more than Rs. 3,500. The vendor was to bear the expenses of the deed of re-conveyance and was also to pay interest on a sum of money payable to a third person to whom the property had been usufructuarily mortgaged and whose mortgage had two years more still to run. There was no defeasance clause on the grantor or vendor failing to pay by the fixed date. There was a power in the vendee to recover the sum named as the price of re-purchase. Moreover the price payable by the grantor on the re-purchase was not fixed but was subject to an account for the cost of a well and for repairs. The two deeds were executed within two hours of each other. They were registered together and the stamp papers bore consecutive numbers:

Held, that the documents really and substantially formed a single transaction and the conveyance was not intended as an absolute sale but only as a security for the money. M MUHAMMAD YAKUB SAHIB *v.* MAHABOO BIBI, 23 L. W. 151 **756**

———— **s. 58**—*Mortgage by conditional sale—Suit to recover money due—Limitation, commencement of—Option given to mortgagee—Waiver.*

Per *Kanhaiya Lal, J.*—The essential characteristic of a mortgage by conditional sale is that on the breach of the condition of re-payment the contract executes itself and the transaction is closed and becomes one of absolute sale to be enforced in a particular manner.

A mortgage-deed provided that if interest for any six months remained unpaid, the mortgagee shall have power either to bring a suit in respect of the entire mortgage-money and interest without waiting for the expiry of the stipulated period or to wait for the payment of the principal and interest and compound interest till the expiry of the term fixed. In a suit to recover the amount of the mortgage-money:

Held, that despite the authority given to the mortgagee by the mortgage-deed, the operation of the clause which gave an option to the mortgagee for his own benefit could not be waived so as to prevent or postpone the starting of limitation against him and that limitation began to run from the date when interest for a period of six months became due and remained unpaid. A SHEORAM SINGH *v.* BABU SINGH, 24 A. L. J. 295; 48 A. 302 **849**

———— **s. 59.** *See* REGISTRATION ACT, 1908, s. 17 (1) (*b*) **567**

———— **s. 59**—*Equitable mortgage—Deposit of title-deeds—Mortgage-deed, whether document of title.*

A mortgage-deed executed by the owner of a property in favour of a third person cannot be deemed to be a title-deed within the meaning of s. 59, Transfer of Property Act, though it may be evidence of the fact that the mortgagor dealt with the property as his.

An equitable mortgage by deposit of title-deeds is created by the borrower depositing with the lender

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title-deeds, the gist of the transaction being the intention that it should be held as security

A document evidencing an equitable mortgage by deposit of title-deeds is compulsorily registrable. **M** NAGESWARA IYER *v.* ALAGU SRINIVASA IYENGAR, 23 L. W. 675; A. I. R. 1926 Mad. 743 **427**

——— **s. 69**—*Mortgage—Sale, power of, irregular exercise of—Mortgagee, right of, to recover balance of mortgage-money—Notice, whether necessary.*

Where in a mortgage-deed the amount due for principal is not re-payable at any particular time nor is anything stated as to when it is to be re-paid, there can be no default in payment of the principal sum due within the meaning of s. 69 of the Transfer of Property Act until there is a demand made for the money.

When a mortgagee demands payment of the mortgage-money, he should be in a position to give back the mortgaged property and allow the mortgagor to redeem. Where he has wrongfully disabled himself from doing so, for instance, by having sold away the mortgaged property under an irregular exercise of his power of sale, he cannot sue the mortgagor for the balance of the mortgage-money.

A mortgagee has a right to make use of his remedies against the mortgagor for obtaining payment of his money; but as soon as the mortgage-money has been fully paid he is bound to deliver over the mortgaged property to the mortgagor. If he has made it impossible for himself to restore the property mortgaged, he cannot proceed against the mortgagor to recover the amount of the mortgage-money.

Per *Krishnan, J., Obiter*:—In cases falling under s. 69 of the Transfer of Property Act, if interest amounting to at least Rs. 500, is in arrears and unpaid for three months the mortgagee, if he has got a power of sale under the mortgage, can exercise the power without notice to the mortgagor. **M** PURASAWALKAM HINDU JANOPAKARA SASWATHA NIDHI LTD. *v.* KUDDUS SAHIB, 23 L. W. 476 **860**

——— **s. 76 (e)**—*Mortgagee's duty to mortgagor—Suit for redemption—Mortgagee setting up occupancy rights—Estoppel.*

A mortgagee is precluded from doing anything which might put a hinderance to the redemption of the property. Therefore, in a suit for redemption a mortgagee cannot be allowed to set up occupancy rights even if his mortgagee rights have passed to third parties under an auction-sale. **A** GAURI *v.* MANGLA, L. R. 7 A. 171 Rev. **442**

——— **s. 81.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 56 **786**

——— **s. 82**—*"Contract to contrary," meaning of—Contract between mortgagor and mortgagee not providing manner of liability of different properties—Effect—Subsequent purchasers, right of—Vendee's right to avail of contract between his vendor and another vendee.*

The expression "a contract to the contrary" in s. 82, Transfer of Property Act, means a contract between the mortgagor and mortgagee. Therefore, in the absence of any contract between a mortgagor and his mortgagee that the several properties mortgaged are liable in any other manner than that contemplated by the section, neither of the purchasers of the properties subsequent to the mortgage can as against the mortgagee set up a case that the properties are not rateably liable to contribute to mortgagee's debt.

A vendee cannot avail himself of a personal covenant between his vendor and another vendee. **A** CHARAN SINGH *v.* GANESHI LAL, 24 A. L. J. 401; A. I. R. 1926 All. 352 **1048**

——— **s. 108 (c)**—*Lessor and lessee—Lessee's duty to surrender possession.*

A lessee whose possession has been disturbed only temporarily and who gets back into possession before the term of the lease comes to an end, is duty bound at the termination of the lease to surrender peaceably the premises leased to him. **L** JAMITA MAL-SANT RAM *v.* GOKAL CHAND, A. I. R. 1926 Lah. 371 **121**

——— **ss. 111 (h), 113**—*Rent, receipt of, after notice to quit—Waiver of notice.*

Where rent is accepted after the notice to quit, whether before or after a suit has been filed, the landlord thereby shows an intention to treat the lease as subsisting and there is a waiver of the notice to quit. **C** MANICKLAL DEY CHAUDHURI *v.* KADAMBINI DASSI, 43 C. L. J. 272; A. I. R. 1926 Cal. 763 **156**

——— **ss. 111, 117**—*Agricultural leases—Relief against forfeiture for breach of covenant.*

Agricultural leases are exempt from the operation of s. 111, Transfer of Property Act. Therefore, a Court can in a proper case exercise its equitable power of relieving against forfeiture for breach of covenant. **B** MHALAPPA VENKATESH SHETTI *v.* JANARDAN GOVIND MAHALE, 28 Bom. L. R. 527; A. I. R. 1926 Bom. 304; 50 B. 450 **1054**

——— **s. 115.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 53 **282**

——— **s. 116**—*Landlord and tenant—Sub-lessee from tenant, liability of, as lessee—Landlord's assent, what amounts to.*

Where a sub-lessee from a lessee is sought by the landlord to be rendered liable as a tenant by virtue of s. 116, Transfer of Property Act, it is the lessor and not the lessee that must have done some act, recovered rent or otherwise given assent to the sub-lessee remaining in possession as a tenant.

Where a landlord served the sub-lessee with a notice to vacate the premises or he would be charged Rs. 75 per month along with the costs of the case, it cannot be said that the landlord consented to the sub-lessee remaining in possession as his tenant in direct privity with him. **M** KUPPUSWAMI PILLAI *v.* MUHAMMAD KASIM, (1926) M. W. N. 236; A. I. R. 1926 Mad. 566 **308**

——— **s. 122.** *See* MUHAMMADAN LAW—GIFT **7**

——— **s. 123**—*Oral gift of right of residence—Interest of donee, whether saleable—Acknowledgment in writing of gift, whether gift deed.*

A gift cannot be created by a document signed by the person intended to be benefited by an oral gift in favour of the owner of the property acknowledging gift.

Where an oral gift is made as to the right of residence in a house unaccompanied by any powers of alienation, the donee cannot be said to have any saleable interest in the house which, on his insolvency, can be put to sale by the Receiver. **B** GIRJAPRASAD CHINUBHAI *v.* PARSHOTTAM VITHALRAI VYAS, 28 Bom. L. R. 421; A. I. R. 1926 Bom. 261 **609**

Trust—*Breach of trust—Participation in division of trust funds—Liability to refund trust moneys.*

Defendant No. 1 was an employee of the plaintiffs and was entrusted by the latter with the cashing of a cheque for a large amount of money. He cashed the cheque and made away with the proceeds with

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the help of defendant No. 2, his brother. The proceeds were subsequently divided between the different defendants who were members of a joint Hindu family. Defendants Nos. 1 and 2 were tried for the offence of criminal breach of trust and were convicted. Plaintiffs subsequently brought a suit to recover from all the defendants the amount of money which had been embezzled by defendant No. 1 with the help of defendant No. 2:

Held, that defendant No. 1 having committed a breach of trust in which defendant No. 2 was an abetter and that the remaining defendants having afterwards been parties to a mis-application of the trust property in breach of the trust with notice of the trust, they were all liable to replace the trust moneys and that the plaintiffs were entitled to a decree. B KISHENPRASAD & Co *v.* RAJARAM RAMHARAKH, 27 Bom. L. R. 1159; A. I. R. 1926 Bom. 13 **770**

——— Inam—*Non-performance of services—De facto trustee, powers of.*

A trust shall not fail for want of a lawful trustee and where a person is doing something unlawful or something to the detriment of the trust, even a *de facto* trustee is entitled to maintain a suit against him for the benefit of the trust or institution.

But where certain lands were granted as *Sarva Dambala inam* to certain dancing girls long before the Permanent Settlement for the purpose of rendering service, it is not competent to a *de facto* trustee to call upon the service-holders to perform the services, and in default of performance to dismiss them and appoint other persons in their places. M TADANKI BRAHMAYYA *v.* PUVVALA MADHAVAN, 50 M. L. J. 282; A. I. R. 1926 Mad. 496 **489**

——— *Scheme settled by Court, alteration of—Scheme, direction in—Mode of enforcement.*

A scheme once settled by a Court cannot be altered except by the Court and this would preclude suits between parties to establish a private right, which, if established, would interfere with the charitable scheme settled by the Court. A direction in a scheme of this nature may be enforced in execution application by persons interested. N RAMU *v.* PUNA, 9 N. L. J. 45; A. I. R. 1926 Nag. 326 **326**

——— *Trusteeship, transfer of—Adverse possession.*

A transfer of trusteeship of a temple is invalid.

But such a transferee of trusteeship can prescribe for a lawful title by adverse possession of the office for more than 12 years. M TADANKI BRAHMAYYA *v.* PUVVALA MADHAVAN, 50 M. L. J. 282; A. I. R. 1926 Mad. 496 **489**

Trusts Act (II of 1882), s. 90—*"Properly incurred," meaning of.*

The words "properly incurred" in s. 90 of the Trusts Act mean "reasonably and suitably incurred". N WAMANRAO *v.* SHRAWAN **941**

U. P. Court of Wards Act (III of 1899), s. 58—*Dispute between wards—Arbitrator, appointment of—Court, power of—Act, retrospective, operation of.*

The provisions of the Court of Wards Act of 1912 are applicable to an estate handed over to the Court of Wards under the Act of 1899, notwithstanding that the handing over was voluntary on the part of the ward.

Section 58 of the U. P. Court of Wards Act does not bind a Court of Wards to await an agreement between the persons it has appointed to represent the respective wards, between whom a dispute arises, as to an arbitrator to decide the dispute. It can nominate an arbitrator and require the representatives to submit the dispute to him. A SHIVA PRASAD *v* SHAMBHU PRASAD, 24 A. L J. 501; A. I. R. 1926 All. 450 **246**

U. P. Court of Wards Act—concld.

U. P. Land Revenue Act (III of 1901), s. 4—*Mortgage of sir land by co-sharer to another—Resumption of possession on redemption.*

Where a joint *sir*-holder transfers his *zemindari* rights by way of mortgage to his co-sharer, he is entitled on the redemption of his mortgage to recover possession of the *sir* land. A RAM KISHORE SINGH *v.* JAI MANGAL SINGH, L. R. 7 A. 261 Rev. **992**

U. P. Municipalities Act (II of 1916), s. 307 (b)—*Order of continuing fine when can be passed.*

It is not legal for a Magistrate to pass an order of continuing fine in a trial for an unauthorised construction. Such an order can be passed only on a separate trial if the accused fails to remove the unauthorised construction after his original trial. A MATHURA PRASAD *v.* MUNICIPAL BOARD, ETAWAH, 27 Cr. L. J. 568; L. R. 7 A. 113 Cr. **136**

Vakalatnama. *See* CR. P. C., 1898, s. 340 **714**

Vendor and Purchaser—*Sale of immoveable property—Earnest-money—Breach of contract by purchaser—Earnest-money, whether can be recovered.*

Under a contract of sale of immoveable property the earnest-money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.

Plaintiff agreed to purchase certain immoveable property from the defendant at the price of Rs. 4,76,000 and one of the conditions of the contract was that Rs. 20,000 was to be paid as earnest and the balance in two moieties, the first being payable on executing the conveyance and the last within six months thereof. Plaintiff did not pay the earnest-money as such but obtained a financial modification of the terms of the contract whereunder he paid the sum of Rs. 1,65,000 towards the sale price of Rs. 4,76,000. The plaintiff was subsequently unable to complete the contract even in its modified form and brought a suit to recover the part of the sale price paid by him:

Held, that the plaintiff having broken his contract must lose the earnest-money, *viz.*, Rs. 20,000 but must be re-paid Rs. 1,45,000 the balance of his payment to account. P. C. CHIRANJIT SINGH *v.* HAR SWARUP, A. I. R. 1926 P. C. 1; 23 L. W. 172; 3 O. W. N. 168; (1926) M. W. N. 145; 24 A. L. J. 248; 50 M. L. J. 629 **782**

——— *Sale-deed guaranteeing indemnity in case of loss—Pre-emption, loss in consequence of—Vendee's right to be recompensed.*

A guarantee clause in a sale-deed to the effect that the vendor would be liable to recompense any loss that might accrue to the vendees in connection with the sale (*agar intikal haza men mushtarian ko koi nuksan paunche to main zimmenwar hunga*) covers the risk of the vendees' title being defeated by a pre-emptor. L KALIAN SINGH *v.* FAZAL DIN **1055**

Water rights—*Riparian owners—Higher owner, whether can appropriate whole water of stream—Prescription—Easements Act (V of 1882), s. 17, applicability of.*

Water rights—concld.

For ordinary purposes such as drinking and watering cattle, a higher riparian owner is entitled to appropriate, if necessary, the whole of the water of the stream; but for extraordinary purposes, such as the irrigation of his fields, he is entitled only to take so much as will not reasonably diminish the volume of water in the stream.

It is open, however, to a higher riparian owner to establish that he has been in possession from time immemorial of the right to appropriate the whole of the water of the stream for extraordinary purposes.

Section 17 of the Easements Act is intended to apply to rights in the nature of *profits a prendre* which do not include a right to water. **Pat** JUGAL SARKAR *v.* RAJ MANGAL PRASAD, A. I. R. 1926 Pat. 187; 7 P. L. T. 547 929

Will. *See* CONSTRUCTION OF DOCUMENT 967

——— *Draft Will as evidence of oral Will.*

A draft Will may be accepted as evidence of an oral, one where the facts show that the testator had expressed his final intention as to the property. **O** GUR PRASAD *v.* SITLA DEI, 13 O. L. J. 152; A. I. R. 1926 Oudh 424 796

Will—concld.

——— *Executor—Appointment of member of firm, effect of.*

Where a member of a firm is appointed an executor under a Will the appointment only applies to a person who was a member of the firm at the date of the Will and also at the date of the testator's death. **C** *In the matter of* GEORGE NASH, 29 C. W. N. 373; A. I. R. 1925 Cal. 606 994

——— *Testimentary devise, essentials of.*

A deed to be a testamentary devise must contain language from which can be inferred an intention to make a devise. **O** BRIJ RAJ CHANDRA *v.* SUBHADAR KUAR, 3 O. W. N. 321; A. I. R. 1926 Oudh 324 294

Witnesses. *See* PRACTICE. 21

WORDS AND PHRASES.

'Sikh and Singh distinguished'. *See* C. P. C., 1908, s. 92 695

Wilful neglect, meaning of. *See* RAILWAYS ACT, 1890, s. 72 173